INTRODUCTION

1. At the heart of the application brought by the Respondents (collectively "**NU**")[1] in the High Court lies the failure of the Provincial Respondents ("**Province**")[2] and the City of Cape Town ("the **City**") to redress spatial apartheid in central Cape Town.

2. NU's application was prompted by Province's sale of the Tafelberg Properties in Sea Point, pursuant to Province's Cape Town Central City Regeneration Programme ("the **Regeneration Programme**").[3] The Properties had come to symbolise a broader campaign for affordable or social housing close to Cape Town's Central Business District ("**CBD**").

3. The first section of these heads of argument deals with the Appellants' grounds of appeal in respect of their failure to redress spatial apartheid in central Cape Town. The two sections which follow consider Province's appeal in respect of legislation pertaining to disposal of immovable property.[4] The final section deals with restructuring zones in Cape Town under the Social Housing Act,[5] including whether Sea Point falls within a restructuring zone.

THE FAILURE TO REDRESS SPATIAL APARTHEID

Introduction

4. We begin this section by considering the failure of the Appellants' to take into account the nature of: (i) this litigation; and (ii) the constitutional rights at stake, after which

[1] The First to Sixth Respondents under SCA case number 522/2021.
[2] The First to Fourth Appellants under SCA case number 522/2021.
[3] Annexure JG 42, Vol.11, pp. 1819 - 1858. The Tafelberg Properties comprise two erven. They are referred to interchangeably as the Tafelberg Properties, the Tafelberg Property and the Tafelberg site. The judicial reviews of Province's decisions in respect of the sale of the Tafelberg Properties to the Phyllis Jowell Jewish Day School ("the **School**") became moot after the High Court Judgment was handed down ("the **Judgment**"). Province has not made any fresh decisions in respect of the future use and/or disposal of the Tafelberg Properties.
[4] The Government Immovable Asset Management Act 19 of 2007 ("**GIAMA**") and the Western Cape Land Administration Act 6 of 1998 ("the **WCLAA**").
[5] Act 16 of 2008 ("the **SHA**").

we outline the context against which the proceedings were launched. We then address in turn the main submissions advanced by Province and the City and the question of an appropriate remedy.

The nature of the litigation

5. In attempting to mount a case that they have complied with their constitutional and statutory obligations, the submissions advanced by both Province and the City disregard entirely the legal framework within which the inquiry is to be conducted. This framework is dealt with by Gamble J in the Judgment,[6] which sets out: (i) the purpose for which socio-economic rights were entrenched in the Constitution;[7] (ii) the obligation on the State to formulate and implement reasonable programmes designed to achieve the progressive realisation of socio-economic rights;[8] and (iii) the role of the Courts in ensuring that the legislative and other measures taken by the State to realise socio-economic rights are reasonable.[9] Gamble J then considered the principles established in *Mazibuko*,[10] in terms of which socio-economic rights enable citizens to hold government to account for the manner in which it seeks to achieve the rights.[11]

6. In terms of those principles, the purpose of litigation dealing with positive socio-economic rights obligations is to hold government to account and foster *"a form of participatory democracy"* in accordance with the founding constitutional values of responsiveness, accountability and openness.[12] By these means, one of the key goals of the entrenchment of socio-economic rights – ensuring that government is responsive and accountable to its citizens, both through the ballot box and litigation

[6] Samela J concurred in the Judgment.
[7] Judgment, Vol. 20: p.3658: para 60.
[8] Judgment, 20: 3659: 61.
[9] Judgment, 20: 3660: 62.
[10] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) ("***Mazibuko***").
[11] Judgment, 20: 3660: 63, *Mazibuko* para 59.
[12] *Mazibuko*, paras 160 - 161, read with Judgment: 20: 3660-3661: 65 - 68.

– *"will be served when a government respondent takes steps in response to litigation to ensure that the measures it adopts are reasonable"*.[13]

7. The role of a court in determining a reasonableness challenge: (i) starts with determining the extent of the positive obligation imposed by the socio-economic right under consideration;[14] and (ii) is restrained and focused, but it must *"require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation"* [emphasis added].[15]

8. Furthermore, when faced with a challenge to the reasonableness of its socio-economic rights policies, a government agency is required to: (i) show that the policy it has selected is reasonable; (ii) disclose what has been done to formulate its policy; and (iii) show that the policy is being reconsidered in accordance with the obligation to progressively realise the right.[16]

9. The principles set out above are of decisive importance for this appeal for two reasons. First, the key constitutional values implicated in this form of litigation are responsiveness, accountability and openness. NU explicitly relied upon the *Mazibuko* principles in their founding papers,[17] and there could have been no doubt that they were exercising their right to hold government to account. It is within this context that the Appellants' reliance on the principle of the separation of powers, and their claims that the judicial function is not suited to inquiries of this kind,[18] stand to be evaluated. *TAC* makes it clear that, when faced with a matter of this nature, a court is obliged to evaluate and determine the reasonableness of the measures taken by the State.

[13] *Mazibuko*, para 96.
[14] *Mazibuko*, paras 46 – 49.
[15] *Minister of Health and others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) ("***TAC***"), para 38.
[16] *Mazibuko*, paras 161 – 162. In our response to Province's case below, we deal with government's obligations, in litigation of this nature, to act transparently and to provide access to information.
[17] Supplementary Founding Affidavit ("**SFA**"), 4: 692: 18.
[18] See, for example, Province heads, paras 3, 23, and 27 - 28; City heads, para 25.

Second, this is not – as assumed by the Appellants – conventional Bill of Rights litigation, in terms of which the applicant is required to demonstrate the infringement of a constitutional right. *Mazibuko* tells us that it is the government agency concerned which bears the burden of proving the reasonableness of its policies (and the steps taken to implement them).[19]

The nature of the right

10. In their notice of motion NU sought an order declaring that Province and the City had failed to comply with *"their obligations, in terms of sections 25(5), 26(1) and 26(2) of the Constitution, and the legislation enacted to give effect to these rights, to redress spatial apartheid in central Cape Town"*.[20] In *Thubakgale*,[21] Majiedt J (in a judgment concurred in by three other justices):[22] (i) emphasised that in determining the content and scope of socio-economic rights, consideration must be given to their primary purpose *"which is to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid"*;[23] (ii) held that ss 25 and 26 of the Constitution *"function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today"*;[24] (iii) found that in the context of South Africa's highly segregated urban areas and scarce resources, spatial justice must be considered when determining what constitutes *"adequate housing"*;[25]

[19] *Mazibuko*, paras 161 – 162. The conclusion that the government agency bears the burden of proof also follows from the fact that in most, if not all, cases the party bringing the challenge would not have access to the information necessary to show that the conduct was unreasonable.
[20] Notice of Motion, 1: 2: 2. The claim was based on a special cluster of legal relationships between Province, the City, and the residents of Cape Town, rooted in ss 25(5) and 26 of the Constitution and the legislative provisions enacted to give effect to these rights (Judgment, 20: 3662: 69; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 24–25).
[21] *Thubakgale v Ekhurhuleni Metropolitan Municipality* [2021] JOL 5183 (CC) ("***Thubakgale***").
[22] The other judgments did not consider the issue.
[23] *Thubakgale*, para 107.
[24] *Thubakgale*, para 107.
[25] *Thubakgale*, para 111. This is in the context of the right of access to *"adequate housing"* entrenched in s 26(1) of the Constitution.

and (iv) explicitly endorsed Gamble J's finding – in this case - that the Constitution imposes an obligation on the State to redress spatial apartheid.[26]

11. Majiedt J also referred to the importance of having regard to international law (such as the International Covenant on Economic, Social and Cultural Rights)[27] in interpreting socio-economic rights.[28] In this regard, at the 49th session of the United Nations Human Rights Council, on 31 March 2022, the Council adopted a resolution on adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination ("the **UN resolution**").[29] The UN resolution follows (and welcomes) the recent report of the Special Rapporteur[30] on discrimination, spatial segregation, and the right to adequate housing ("the **Special Rapporteur's report**"),[31] which noted that:

> *"12. Spatial segregation goes hand in hand with a violation of one or several of the elements of housing as a human right, as defined by the Committee on Economic, Social and Cultural Rights in its General Comment No. 4. These are namely legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy. The Special Rapporteur wishes to point to the aspect of*

[26] *Thubakgale*, paras 108 - 109. Majiedt J quoted, and approved, Gamble J's description, in para 75 of the Judgment, of the obligation to address spatial apartheid.
[27] Ratified by South Africa on 12 January 2015.
[28] *Thubakgale*, para 111. At para 112, Majiedt J quoted the Committee on Economic, Social and Cultural Rights' General Comment 4 on the importance of location as one of several defining features of the right to adequate housing.
[29] See the United Nations Human Rights Council's press release at the following link: <https://www.ohchr.org/en/press-releases/2022/04/human-rights-council-concludes-forty-ninth-regular-session-after-adopting-35> and the Council's list of resolutions at the following link: <https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session49/res-dec-stat>. A copy of the resolution is available at the United Nations documents systems page <G2229311.pdf (un.org)https://documents-dds-ny.un.org/doc/UNDOC/LTD/G22/293/11/pdf/G2229311.pdf?OpenElement>. In the resolution the Human Rights Council urged States to *"take urgent measures to address inadequate housing, to promote the integration of all to counter social exclusion and marginalization"* and encouraged them to *"adopt effective legal, policy and institutional measures that address racism beyond a summation of individualized acts that promote housing choice and economic opportunity and achieve diverse, inclusive, integrated and representative communities"*.
[30] On adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context.
[31] A/HRC/49/48, published on 4 March 2022. A copy of the Special Rapporteur's Report is available at the following link: <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2F2022-03%2FA_HRC_49_48_AdvanceUneditedVersion.docx&wdOrigin=BROWSELINK>. .

> *location in particular as key to understanding spatial segregation as a violation of the right to adequate housing, due to its inherent physical or geographic character. When housing is located in segregated neighbourhoods, it usually lacks infrastructure, basic services and connectivity, to schools and employment opportunities, and is subject to precarious or hazardous conditions. Core elements of the right to adequate housing are therefore violated, often simultaneously. The Committee has as well made a number of references to spatial and residential segregation in its concluding observations[32] when commenting on the right to adequate housing."* [emphasis added]

12. Certain observations in the Special Rapporteur's report are particularly relevant to this appeal, namely: (i) spatial segregation, like discrimination, may be *"direct"* or *"indirect"* (the latter being the result of poorly-conceived or implemented policies, as opposed to intentional segregation);[33] (ii) social or state subsidised housing is often located in peripheral or under-resourced urban areas, perpetuating segregation;[34] and (iii) the lack of appropriate policies directing the allocation of land for the construction of affordable housing exacerbates the problem.[35]

13. The judgment of Majiedt J, together with the international law principles reflected in the UN resolution and the Special Rapporteur's report, confirms the High Court's finding – which was based on a detailed analysis of the relevant authorities – that the Constitution (and the legislation flowing from it) obliges both Province and the City to address the legacy of spatial apartheid.[36] This defeats the argument that the obligation to deal with spatial injustice only arose when SPLUMA[37] came into effect in 2015[38] and renders the Appellants' claim that they are under no obligation to

[32] E/C.12/DNK/CO/6, E/C.12/MUS/CO/5,E/C.12/MEX/CO/5-6,E/C.12/SWE/CO/6, E/C.12/CHL/CO/4.
[33] Special Rapporteur's report, para 21.
[34] Special Rapporteur's report, para 42.
[35] Special Rapporteur's report, para 43. Paragraph 61 of the report refers to, and quotes from, the Judgment.
[36] Judgment, 4: 3674: 94.
[37] The Spatial Planning and Land Use Management Act 16 of 2013.
[38] City's heads, paras 26 and 24. The content of constitutional rights do not evolve over time, but are fixed at the date the Constitution came into effect (*Ferreira v Levin No and Others; Vryenhoek and Others v Powell and Others* 1996 (1) SA 984 (CC) paras 26 – 27). It would be an error to interpret constitutional provisions through the prism of national legislation (*Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC) para 56).

redress spatial apartheid in central Cape Town untenable.[39] For this argument to succeed the Appellants would have to show that they can reasonably comply with their obligations to redress spatial injustice, without dealing with the legacy of spatial apartheid in the heart of Cape Town – the centre of the city.[40] Furthermore, as the High Court pointed out: (i) the Appellants' argument misses the point - the question is whether the government institutions have taken reasonable measures to realise the right in question;[41] (ii) State policy must take into account all different economic levels in our society;[42] and (iii) having regard to the CBD being the economic hub of Cape Town, where a vast number of working class residents in the requisite salary band for affordable housing are employed (and other relevant contextual considerations);[43] the High Court came to the conclusion that neither the City, nor Province, had complied with their obligations.

14. The Appellants' denial of any obligation to redress spatial apartheid in central Cape Town is expedient and inappropriate, particularly in litigation in which they are required to account openly and frankly for their conduct.[44] This obligation is explicitly

[39] See the arguments advanced in Province's heads at paras 10, 34 and 41 and in the City's heads at paras 36 and 39.2. These arguments overlook that both Appellants were subject to legislation and policies, dating back to the mid-1990's, requiring them to redress spatial injustice (see items 1 - 4 of NU's chronology).
[40] We shall address the Appellants' criticisms of the definition of *"central Cape Town"* in greater detail below.
[41] Judgment, 20: 3824: 473.
[42] Judgment, 20: 3825: 474.
[43] Judgment, 20: 3827 - 8:479. The requisite salary bands are considered further below.
[44] *Cf Mazibuko*, para 94 and see further paras 71, 161 - 164. In any event, organs of state should act as "*role models of propriety"* in litigation (*Madibeng Local Municipality v PIC Ltd* 2016 (6) SA 56 (SCA) para 30).

acknowledged by the City[45] and (implicitly) by Province[46] in their answering papers.

15. The argument that the High Court failed to source the obligation to provide affordable housing in specific legislative provisions[47] overlooks the High Court's analysis of the Housing Act ("**HA**")[48] (which identified the statutory obligation to promote racial, social, economic and physical integration in urban areas) and the SHA[49] (which spells out the obligation to promote the social, physical and economic integration of housing development in existing urban and inner-city areas). Furthermore, the legislation cannot be read as if divorced from its constitutional context, which requires programmes directed at realising socio-economic rights to be balanced and flexible and not to exclude a significant sector of society.[50]

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[45] The City's evidence is that: (i) spatial apartheid is still prevalent, affects the poorest and most vulnerable residents of the city the most, and the City has a role to play in redressing this (Mbandazayo, 13:2237 – 8: 45); (ii) facilitating access to housing for poor residents close to where they work and amenities is critical for the transformation of the city and must be pursued, not just in central Cape Town (Mbandazayo, 13:2238:47); and (iii) the City's housing delivery approach has progressively been reconceptualised *"within the context of a focused and accessible Urban Inner Core"* (Mbandazayo, 13: 2264: 128). The obligation to redress spatial segregation in the urban core of the city is confirmed in the City's policy documents, notably its 2017/18 Built Environment Performance Plan ("**BEPP**") in which it states that the availability and development of affordable rental accommodation in central areas of the city "*must play a key role in the future development of the city*" and that no site that meets the criteria for providing affordable housing should be excluded from being realised as an opportunity to reverse the legacy of apartheid planning and provide affordable housing to lower income families (Annexure LM 2, 13: 2399 - 2400). The principle is re-iterated in the City's September 2017 *"Woodstock, Salt River and Inner-City Precinct Affordable Housing Prospectus"*, where it stated its commitment to *"leverage City-owned assets such as land and property to achieve spatial transformation to create an inclusive urban fabric"* and to enable *"more integrated communities through creating new affordable housing opportunities in the city"* (Annexure JG 40, 10: 1781).

[46] Similarly, Province's evidence is that: it has always accepted that it has an obligation to address spatial imbalances (Gooch, 8: 1391: 748); and while acknowledging that spatial apartheid is nowhere near to being addressed in Cape Town, states that this is an objective to be realised progressively over time (Gooch, 7: 1155: 210 - 211). The March 2017 change in policy (see Judgment, 20: 3829: 483, 3831: 488), in terms of which Province committed itself to the provision of affordable housing at the Helen Bowden and Woodstock Hospital sites in central Cape Town, effectively concedes the obligation which is denied in its legal submissions, as if there was no obligation to provide affordable housing in central Cape Town, Province's conduct in devoting scarce and valuable resources to this purpose would be irrational.

[47] Province's heads para 12, City's heads para 28 (where it is contended that SPLUMA is the only legislation that deals with apartheid spatial planning - this Act is considered in Judgment, 20: 3667 - 70: 81 - 83).

[48] Act 107 of 1998; Judgment, 20: 3665: 77.

[49] Judgment, 20: 3666 - 3667: 79 - 80.

[50] Judgment, 20: 3659 - 3660: 61.

16. Whether or not the City and Province are discharging their obligations with regard to the provision of affordable housing in other areas, cannot excuse their failure to do so in central Cape Town, particularly given the latter's economic and social importance to both Cape Town and the region.

The context

17. Whether the measures taken by government to realise socio-economic rights are reasonable will be determined by context.[51] The Judgment sets out a number of important contextual considerations, including: (i) the fact that the CBD is the economic hub of Cape Town where a vast number of working class residents who qualify for affordable housing are employed; (ii) Cape Town is recognised as one of the most spatially divided cities in the world; and (iii) central Cape Town is less diverse today than it was 50 years ago under apartheid.[52]

18. But the single most important – and damning – aspect of the context is the complete failure to deliver affordable housing in central Cape Town: the stark reality is that neither Province nor the City can claim to have completed a single affordable or social housing programme in central Cape Town in the 24-year period between the end of apartheid and the finalisation of their answering affidavits in 2018.[53]

19. Four further contextual factors bear emphasising. First, the policies of the apartheid government systematically deprived people of access to urban land and residential accommodation in formerly white areas of Cape Town.[54] Furthermore, from the late 1990's, the approach to urban regeneration spearheaded by the City, Province,

[51] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) ("***Grootboom***") para 43.
[52] Judgment, 20: 3827 - 3828: 479.
[53] Province in its answering affidavit relies primarily on projects *"in the pipeline"*, while the best the City can do is point to housing located some distance from – and not normally associated with - the centre of the city, in Brooklyn and Maitland. The evidence in the Appellants' answering affidavits concerning the provision of affordable housing in central Cape Town is analysed in NU's Replying Affidavit ("**RA**"), 15: 2750: 88 - 2754: 99.
[54] Mbandazayo, 13: 2229: 12.

and the Cape Town Partnership has forced lower income households out of the centre of the city and has not provided new housing opportunities for those wanting to live closer to the CBD.[55]

20. Second, it is common cause that government cannot afford to buy land for housing at market related prices in and around the CBD. The Judgment refers to the evidence of NU's expert witness, Dr Odendaal, that the *"single greatest contemporary driver of spatial injustice in the city is the price of well-located land and housing"*. This means that State-owned land is an essential requirement for addressing spatial injustice in central Cape Town.[56] Such land is extremely scarce and *"will only become more so in the future"*.[57]

21. Third, Province owns a very substantial portfolio of properties, which if used appropriately could have a significant impact on addressing spatial segregation in Cape Town.[58] However, under the Regeneration Programme, Province effectively followed a policy (from about 2012/2013 until March 2017)[59] that affordable housing should be developed on the urban periphery rather than in, or in close proximity to, the inner city.[60] In terms of this policy Province sought simply to maximise the financial returns from the disposal of its well-located properties.

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[55] It has also resulted in a developed inner-city where residential accommodation is only affordable to households in the top 20 per cent of South African income earners McCarthy, 4: 591: 30.
[56] Judgment, 20: 3653: 42. See further the letter of Province's head of Department of Human Settlements ("**DHS**"), quoted at Judgment, 20: 3690: 141 - 3693: 143, concerning the limited opportunities for people in the R 1 500 – R 7 500 income bracket to live close to the city centre.
[57] Judgment, 20: 3653: 42.
[58] Parnell, 4: 644: 23.
[59] Judgment, 20: 3818: 456 - 3819: 457.
[60] Judgment, 20: 3697 - 3698: 157 and 3698: 159 - 3699: 161. NU's founding affidavit records that: (i) MEC (for Transport and Public Works) Carlisle stated on 17 April 2014 that there was neither the intention nor desire on the part of the provincial government to relocate poor people into Cape Town's city centre or surrounds and *"there cannot be RDP in the City"* (Founding Affidavit ("**FA**"), 1: 42: 78); and (ii) his successor, MEC Grant, on 11 June 2014 placed on record that the Regeneration Programme was "*set up to extract maximum value from the most valuable inner-City properties"* and stated that there was a vast difference between developing housing in the CBD as opposed to the edges of the metro, as the financial modelling for affordable housing is simply impossible to apply in the inner-city (FA, 1: 43 - 44: 80 - 80.3).

22. Fourth, there has been a substantial breakdown in relations between Province and the City with regard to the provision of affordable housing in central Cape Town, caused primarily by Province's decision to sell the Tafelberg Properties.[61] This means that there is no coherent, overarching strategic plan to deal with the use of State land for purposes of redressing spatial segregation in central Cape Town.[62] Professor Parnell points out that the Provincial Spatial Development Framework ("**SDF**") is intended to align the spatial and other plans and strategies of national government, provincial departments, and municipalities.[63] However, in the absence of an overarching plan dealing with the use of State land, decisions in respect thereof have pivoted largely on the provincial Regeneration strategy.[64]

23. In short, the immediate context against which NU launched their application was one in which poor residents were increasingly being forced out of the centre of the city; no affordable housing had been developed there since 1994; Province had for several years been intent on selling off State-owned land that is indispensable for redressing spatial injustice and there was no coherent, overarching strategy in place to deal with the situation.

PROVINCE'S CASE

24. We consider the following aspects of Province's submissions: (i) their acontextual nature; (ii) the subsidiarity argument; (iii) the submissions relating to budgets; and (iii)

[61] Judgment, 20: 3833: 495. See further Molapo, 14: 2629: 47 and 2630: 51 - 2633: 61.3. The breakdown was exacerbated by: (i) the failure to conclude the MOU envisaged between Province and the City concerning the implementation of the Regeneration Programme (see Gooch Annexure JG43, 11: 1862: 2.10.2); (ii) the Intergovernmental Working Group – which had been established in 2013 by the national government to fast-track the release of underutilised public land for development – becoming defunct (Molapo, 14: 2618: 16.7); and (iii) the rift between Province and the national DHS, as evidenced in the latter's application to judicially review the sale of the Tafelberg Properties.
[62] Parnell, 4: 643: 21.
[63] Parnell, 4: 640: 15.
[64] Parnell, 4: 643: 21. This evidence is not disputed. Gooch, 8: 1385: 730. The Regeneration Programme is particularly relevant as it focuses on provincial land holdings in or near central Cape Town (Annexure JG 42, 11: 1825).

the argument concerning the High Court's findings on policies.[65]

Province's analysis is acontextual

25. As Lord Steyn has noted, *"In the law context is everything"*,[66] yet Province seeks to challenge the High Court's findings on the basis of an analysis that scarcely intersects, or engages, with the core contextual features of the case summarised above.

26. Province has put forward an enormous volume, and range, of evidence in response to NU's reasonableness challenge and objects to having to report to the High Court in terms of the supervisory interdict on the grounds that it has *"already filed comprehensive answering affidavits"*.[67] Yet these affidavits do not squarely deal with the failure to deliver affordable housing in the centre of Cape Town; the breakdown in relations between Province and the City (as well as the national DHS); its *de facto* policy of *"No RDP in the city"* and extracting maximum value from the sale of its centrally located properties; or the subsequent abandonment of this position.[68]

27. *Mazibuko* states that a socio-economic rights challenge requires the State to explain and give reasons for its actions. In doing so, the government must provide access to the information it has considered, as well as the processes followed, in determining the content and implementation of its policies: if the process followed by government is flawed – or the information gathered is inadequate or incomplete – appropriate relief may be sought.[69] Province's whole response to the reasonableness challenge

[65] Certain of these arguments are also raised by the City, but in the interests of convenience are dealt with in this section, while Province's criticism of the definition of central Cape Town will be addressed below, in response to the City's submissions.
[66] *R v Secretary of State for the Home Department, ex parte Daly* [2001] 3 All ER 433 para 28, cited in *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another* 2002 (4) SA 768 (CC) para 63.
[67] Province heads, para 21.
[68] Which took place in March 2017 (Judgment, 20: 3829: 483).
[69] *Mazibuko*, para 71. Government agencies are also required to explain why their policies are reasonable; how these policies were formulated; their investigation and research; the alternatives

is coloured by its failure to account openly and transparently for its conduct in terms of the Regeneration Programme and it subsequent change of course in March 2017.

Subsidiarity

28. Province's reliance on the principle of subsidiarity[70] exemplifies the difficulties it faces as a result of its failure to appreciate the nature of the duty to account in terms of the *Mazibuko* principles. The subsidiarity argument: (i) does not take into consideration that the primary right relied upon by NU, namely, to call upon government to account for the steps it has taken to advance socio-economic rights, has not been enacted in legislation; (ii) overlooks that the duty to account only applies to socio-economic rights, so unlike conventional constitutional litigation, it is the constitutional right which is the primary focus and the legislation enacted to give effect to the right is secondary;[71] and (iii) fails to explain how subsidiarity can apply where government is required to account in respect of a cluster of rights rooted in ss 25(5) and 26 of the Constitution (and the ancillary legislation).[72]

The budgetary arguments

29. One of Province's principal objections to the Judgment is that it – so it argues - directs how its housing budget should be allocated, something which lies *"in the heartland of executive-government function"* and is inconsistent with the separation

considered; the reasons they selected a specific policy; and whether that policy was reconsidered in light of the broader obligation to progressively realise the right concerned (*Mazibuko,* paras 161 - 162).

[70] Province's heads, paras 10 - 12. Subsidiarity entails that where legislation has been enacted to give effect to a right in the Bill of Rights, a litigant who seeks to enforce that right must rely on the legislation, or challenge the legislation as being inconsistent with the Constitution, rather than invoking the Constitution directly (*Mazibuko*, para 73, read with *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) ("***My Vote Counts***") paras 53 - 54).

[71] *Cf My Vote Counts*, paras 53 - 54.

[72] There is no single Act which *"covers the field"*, particularly in relation to ss 25(5), but also with regard to ss 26(1) and (2). In these circumstances, it is not feasible to mount a challenge to the legislation as being inconsistent with the Bill of Rights.

of powers.[73] In relying on the "*bogeyman of separation of powers concerns"*,[74] Province loses sight of: (i) the nature of this litigation, which obliged the High Court to evaluate and determine the reasonableness of its conduct;[75] and (ii) the availability of resources being an important factor in the reasonableness inquiry.[76]

30. The proper approach is set out in *TAC*[77] which states that: (i) a court's primary duty is to the Constitution and the law; (ii) when State policy is challenged as being inconsistent with the Constitution, a court must consider *"whether in formulating and implementing such policy the State has given effect to its constitutional obligations"*; (iii) if it holds that the State has failed in this regard, *"it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself;"* and (iv) there is no merit in the argument that a distinction should be drawn between declaratory and mandatory orders against government, as even simple declaratory orders against government *"can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so."*[78]

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[73] Province heads, paras 2 - 3 and 29. The City puts forward a similar argument (at para 25 of its heads).
[74] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) ("***Mwelase***") para 51.
[75] *TAC*, para 14 (which has been considered above in the section entitled "*The nature of the litigation"*).
[76] *City of Johannesburg MM v Blue Moonlight Properties* 2012 (2) SA 104 (CC) ("***Blue Moonlight***") para 88.
[77] *TAC***,** *para* 99. *TAC* should be read together with the First Certification judgment, *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) which states (at para 77): *"It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications… In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers"*.
[78] Some court orders have far-reaching budgetary implications, for example, *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) ("***Khosa***"), paras 58 - 62.

31. The High Court was required to determine whether the City and Province complied with their obligations on the basis of the facts, as they stood at the time that NU launched this application in May 2017.[79] The evidence establishes that at that time: (i) both of them had long histories of implementing policies that exacerbated the legacy of spatial injustice in Cape Town;[80] and (ii) neither of them had implemented any meaningful measures to redress the problem. It follows that the approach adopted in *Blue Moonlight* - that the determination of the reasonableness of measures cannot be restricted by budgetary decisions based on a mistaken understanding of constitutional (or statutory) obligations – is applicable.[81]

32. Furthermore, neither Province nor the City has sought to defend the claim on the grounds that they have insufficient funds to provide affordable housing in central Cape Town.[82] Both Appellants place considerable emphasis on the wide range of rights that they are obliged to realise and that the advancement of spatial integration is but one element of the State's obligations with regard to housing rights. There are at least three answers to this argument. First, it is a question of priorities.[83] The fact that the government has wide-ranging responsibilities and numerous demands on its resources[84] does not exempt it from its obligation to take

[79] *Mazibuko* para 39; *Grootboom* para 69; *TAC* paras 90, 92, and 116.
[80] As a result of misconceiving or overlooking their obligations in this regard.
[81] *Blue Moonlight*, para 74.
[82] See *Blue Moonlight,* para 71.
[83] Province argues (Province heads, para 48) that it is required to prioritise the homeless, implying that those who qualify for social housing are relatively privileged. This cannot be the case. Government programmes must be balanced and flexible, catering for all groups in need of access to housing. NU's challenge was directed at the failure to provide affordable housing and was not limited to social housing as the model for delivering affordable housing. The City defines *"affordable housing"* as housing for people with a household income of R3501 – R18000 per month per household, including social, GAP and inclusionary housing, as well as residential units valued at less than R 500 000 (Annexure JG 40, 10: 1783). Social housing projects are intended to make rental accommodation accessible for low-income households. At the time when the NU application was launched, Social Housing Institutions had to accommodate families earning between R1500 and R15000 per month (depending on the development) (Mbandazayo, 13: 2249: 86; Molapo, 14: 2615: 13). The First to Fourth Respondents are good examples of people in need of affordable housing in the city. Their circumstances are set out in the Judgment (20: 3639: 7 - 3640: 9): they are not wealthy people.
[84] Both Province and the City rely on *Commando v Woodstock Hub (Pty) Ltd* [2021] 4 All SA 408 (WC), with Province contending that the Court *"determined"* that the City spends too much on social housing

reasonable measures to redress spatial apartheid in central Cape Town. Government's budgets will always be limited, and resources will be allocated only to those projects that are perceived as being sufficiently important.[85] Second, it is not good enough for the State to say that it has not budgeted for something, if it should have planned and budgeted for it in the fulfilment of its obligations.[86] Third, while it is correct that the State faces huge demands in relation to access to education, land, health care and other socio-economic rights, it is obliged to take reasonable measures, within available resources, to progressively realise of each of these rights. This might be a difficult task, but it is, nonetheless an obligation imposed on the State by the Constitution.[87]

The High Court's findings on policies

33. Province argues that the High Court found that it had failed to adopt suitable policies to give effect to social housing, when: (i) this was not part of NU's challenge; and (ii) it is not appropriate or competent for the Court to direct it on the issues on which it should be adopting policy.[88]

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and too little on, for example, emergency housing (Province heads, para 4). There was no such determination. The City relies on this case to argue that the Judgment ignored other housing demands in the greater Cape Town area (City heads, paras 19 - 20). Both arguments are misplaced and hone in on one aspect of the *Commando* judgment without regard to the factual matrix and the orders granted, including a declaratory order that the City's emergency housing programme and its implementation, in relation to persons who may be rendered homeless by their eviction in the inner city and surrounds, is unconstitutional and a mandatory interdict directing the City to provide *inter-alia* emergency accommodation in Woodstock, Salt River or the Inner-City Precinct (as defined in the 28 September 2017 Affordable Housing Prospectus for the Woodstock, Salt River and Inner-City Precinct), in a location as near as possible to where the applicants are currently residing in Woodstock (paras 169.1 - 169.2). The Court's reference to social housing at para 158 of the judgment, seized upon by Province and the City, must be read in the context of the Court's findings of unreasonableness in the light of specific undertakings given by the City in respect of evictees who had lived their entire lives in areas such as Woodstock, and providing them with decent temporary housing nearby (paras 44 - 49, 56, 59 - 62, 161 and 162).

[85] RA, 15: 2800: 245.2.

[86] *Blue Moonlight* para 74.

[87] *TAC*, para 94.

[88] Province heads, paras 14 and 15.4 – 5. The City advances a similar argument at paras 9.3 and 22 of its heads.

34. These arguments disregard the case made out in NU's founding papers. The founding affidavit: (i) relies on *Grootboom* and its findings relevant to Province and City's obligations, in terms of ss 25(5) and 26 of the Constitution, to redress spatial apartheid, including the requirement that legislation alone is insufficient and must be supported by policies and programmes which are reasonable both in their conception and implementation;[89] (ii) states explicitly that a significant reason for the failure to implement the social housing programme in Cape Town's inner city and surrounds is because of how government in the Western Cape "*has conceived and implemented its urban regeneration objective"* [emphasis added].[90]

35. While NU's case was directed primarily at the failure of Province and the City to implement appropriate programmes and policies, rather than the policies themselves,[91] it is not correct to assert that the case was limited to a failure of implementation. The claim that the High Court's findings are at variance with the case made out by NU is inconsistent with the latter's founding papers.

36. The complaint that it is not competent for the High Court to issue directions on the issues on which government should be adopting policy: (i) fails to place that part of the order dealing with policies in its proper context; and (ii) again overlooks the nature of these proceedings. First, when paragraph five of the High Court order[92] is read in context, it is clear that its requirement with regard to reporting on social housing policies is one aspect of the broader requirement to set out the steps to be

[89] FA, 1: 72: 142 - 73: 143.2.
[90] FA, 1: 75: 144.3. These passages should be read together with the SFA, in which the Appellants were specifically referred to the *Mazibuko* principles (SFA, 5: 692: 18) and Ms. Adonisi stated (SFA, 5: 692 - 693: 19) that: "*Once the City and Province have accounted to this Court in their answering affidavits for the manner in which they have formulated and implemented their policies directed at redressing spatial apartheid . . ., the applicants will revisit the question of what relief it is appropriate to seek against them"* [emphasis added].
[91] FA, 1: 33: 57.
[92] Judgment, 20: 3856.

taken in complying with the obligations declared by the Court.[93]

37. Second, in relation to the nature of the proceedings, *Mazibuko* states that while ordinarily it is inappropriate for a court to determine precisely what the achievement of a socio-economic right entails[94] or to seek to draft policies in this regard, in *Grootboom* government was required to revise its policy to provide for those in greatest need and in *TAC*, it was directed to remove anomalous policy restrictions.[95] The High Court order does not seek to prescribe the content of the policies to be followed in complying with the obligations declared by the Court, but only to be assured that there are clear policies in place. This is consistent with the approach followed in *Grootboom* and *TAC*.

THE CITY'S SUBMISSIONS

38. The two primary planks of the City's attack on the Judgment are that: (i) NU failed to make out a case that the City had acted unconstitutionally; and (ii) the City is under no obligation to develop affordable housing within the *"contrived geographic boundaries of [NU's] "central Cape Town"*. These issues will be considered in turn.

No case against the City

39. We have pointed out above that the City – not NU - bears the onus to demonstrate the reasonableness of the measures it has adopted, and that it has explicitly acknowledged its obligation to redress spatial apartheid in and near the inner-city.

40. NU's supplementary founding affidavit sets out admissions made by Councillor Brett Heron, at the relevant time the mayoral committee member for Transport and Urban Development in the City and (then) Mayor De Lille concerning the steps

[93] This issue, together with the reasoning underpinning the order, will be considered in greater detail below in the section on *Remedy*.
[94] *Mazibuko*, para 61.
[95] *Mazibuko*, para 65.

taken by the City to address spatial apartheid.[96] The substance of this evidence was not disputed by the City in its answering affidavits and no attempt was made to distance the City from what was said in, or otherwise explain, the statements, made by officials who were, at the relevant time, high ranking City representatives (although the City contends that the statements did not constitute admissions that it had failed to comply with its constitutional obligation to redress spatial apartheid).[97]

41. The High Court's findings are, in any event, justified on the City's own evidence. Mr Mbandazayo states in his affidavit that: the City's housing delivery strategy was initially focused on delivering as many housing opportunities as possible;[98] this led to the development of housing programmes on the periphery of Cape Town where land is cheaper;[99] with the result that subsidised housing, including social housing, is not provided in areas like the CBD or central Cape Town.[100] One of the unintended consequences of the City's approach was the further entrenchment of the spatial patterns prevalent under apartheid.[101]

42. There are two further, particularly telling, admissions made by the City. First, its acknowledgement that, in terms of its legislative mandate, it had taken steps to

[96] Councillor Herron stated that: (i) although the City had for a long time spoken about the spatial legacy of apartheid and made commitments to addressing it, the commitments had "*fallen short*", as a result of the pursuit of a high number of low-cost housing opportunities (SFA, 5: 686: 10.1 and 688: 11.2); (ii) a "*180 degree change*" had taken place in the City's approach to affordable housing, which stemmed from its failure to address the spatial legacy of apartheid in the implementation of housing policies (which actually perpetuated exclusion) and that the City was *"starting to consider the location of what we're providing"* (SFA, 5: 688: 11.1.); (iii) the City had adopted a package of plans that would "*begin to reverse the tragic spatial impacts of apartheid*" (SFA, 5: 686: 10.2); (iv) he was unable to explain why it had taken the City so long to provide well-located affordable housing (SFA, 5: 689: 11.6); and (v) the process (which the City had just begun) of releasing land for this purpose had not been difficult, and the focus had just been *"on providing high numbers on the outskirts"* (SFA, 5: 689: 11.6). The then Mayor, Ms Patricia De Lille, stated, on 13 September 2017, that the City had *"turned a corner"* in its approach to affordable housing and reversing the legacy of apartheid spatial planning (SFA, 5: 687:10.5).
[97] Mbandazayo, 13: 2223: 4.10 - 4.11.
[98] Mbandazayo, 13: 2221: 4.2.
[99] Mbandazayo, 13: 2222: 4.3.
[100] Mbandazayo,13: 2223: 4.10.
[101] Mbandazayo,13: 2223: 4.7.

source land for housing, but *"much more can be done"* to provide access to State-owned land in a number of areas.[102] The City is obliged, in terms of ss 9(1)(c) of the HA to *"identify and designate land for housing development"* and ss 5(c)(i) of the SHA *"to provide access … to land and buildings for social housing development"*. The obligations of the national and provincial governments, in terms of this legislation, do not encompass the identification and designation of land for affordable housing or providing access to land and buildings for social housing. It follows that the failure to discharge these obligations with regard to land and buildings in and near the CBD rests squarely on the City.[103] Second, the City concedes in its 30 May 2017 10 Point Turnaround Action Plan[104] - formulated to address the problem that human settlement opportunities have historically been provided on Cape Town's urban periphery – that the forward planning functions required for a consistent pipeline of land for human settlement projects and such projects themselves, *"does not exist"*[105] and it *"is in the process of developing an inner cities human settlement strategy"*.[106]

43. A further consideration is that the City did not account to the Court with regard to how much centrally located land (which could be made available for affordable housing) it has - despite making much of Province owning considerably more well-located land – or why it has been unable to develop affordable housing on this land.[107]

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[102] Mbandazayo, 13: 2241: 57.
[103] As has been pointed out above, the shortage of land for affordable housing in central Cape Town lies at the heart of this case.
[104] This is reflected in the BEPP. The complaint that this Court erred in finding that the City had admitted that it had no policy in place to redress spatial injustice in central Cape Town (City heads, para 22) is without merit, given that the relevant date for determining whether the City had complied with its obligations was when this application was launched on 5 May 2017 and the admission in its BEPP that it was still developing such a policy.
[105] Annexure LM 2, 13: 2322 (lines 18 – 20).
[106] Annexure LM 2, 13: 2322 (lines 33 – 34).
[107] This is particularly pertinent in light of Councillor Herron's evidence that the process of releasing centrally located City land for housing had not been difficult (SFA, 5: 689: 11.6).

44. Given the City's failure to deliver affordable housing in and near the inner-city in the democratic era, its pursuit of policies that have exacerbated spatial injustice and the acknowledged deficiencies in its programmes (particularly with regard to identifying and providing access to suitable land), it has little cause for complaint with regard to the findings made against it by the High Court.

Central Cape Town

45. Both the City and Province argue that they are under no obligation to provide housing in any specific area and, more particularly, the area defined by NU as *"central Cape Town"*. We shall start by addressing the argument that *"central Cape Town"* is an artificial construct, developed by NU, which cannot form the basis for government's constitutional obligations.

46. In answering the *"artificial construct"* argument, we have to begin, once again, with the context – which the Appellants' submissions disregard entirely. The context against which these proceedings were launched in May 2017 was that: (i) no affordable housing had been developed in or near the inner-city since 1994; (ii) Province had, in terms of its Central City Regeneration Programme, embarked on a programme of selling off its prime, centrally located properties; (iii) in May 2016 NU temporarily interdicted[108] the sale of the Tafelberg Properties and in May 2017, these proceedings were launched, challenging the reasonableness of the City and Province's affordable housing policies and reviewing the sale of the Tafelberg Properties. In short, it was the Regeneration Programme which triggered the application.

47. NU's founding affidavit clearly sets out that the Regeneration Programme is the policy in terms of which Province sought to sell the Tafelberg Properties and other

[108] FA, 1: 48: 93.

properties it owns in and around central Cape Town.[109] In support of the reasonableness challenge, the founding affidavit states that none of the developments in terms of the Social Housing Programme in Cape Town since 1994 had been *"undertaken in the inner-city and only the City's proposed Woodstock development … is near the inner-city"*.[110]

48. Despite the Regeneration Programme being the key policy at the heart of this matter, on reviewing the Rule 53 record, it became apparent that the term *"central Cape Town"* was not defined in any documents in the record, nor were there any documents which defined the *"Central City"* area contemplated by the Regeneration Programme.[111] As there would undoubtedly have been objection to the vagueness of a challenge to the failure to provide for affordable housing *"in or near the inner-city"*, it became necessary for NU to define the term *"central Cape Town"*.

49. Dr Odendaal's definition[112] of *"central Cape Town"* was accepted by the High Court on the grounds that there was no basis to reject the opinion of NU's experts, notwithstanding Mr Molapo's view that the area might include Maitland.[113] Although the City objected to Dr Odendaal's definition of central Cape Town, their witnesses did not lay claim to any urban or spatial planning expertise on which to ground their

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[109] FA, 1: 29: 49. The aim of the Regeneration Programme is to: *"unlock the latent value of the Provincial property portfolio, and encourage synergistic well-coordinated development public and private properties in the selected central city precincts"* [emphasis added] (FA, 1:30:51); Annexure JG 42, 11:1831.
[110] FA, 1: 75: 144.2. This allegation is supported in the expert evidence of Mr Malcolm McCarthy, 4: 589: 22, 590 - 592: 28 - 31.
[111] Odendaal, 6: 1003: 12.
[112] In defining central Cape Town, Dr Odendaal's starting point was the CBD itself, which is the city's dominant economic node. Spatial planning characteristics were then applied for purposes of considering which surrounding suburbs also fall within "*central Cape Town*". Those characteristics are: (i) physical and relational proximity to the CBD; (ii) historical urban development; (iii) presence of diversified economic activity and mixture of land uses; as well as access to employment opportunities, services; amenities and transport; and (iv) dense urban development in the context of building form, not population (Odendaal, 6: 1003: 14).
[113] Judgment, 20: 3841: 518.

objections to Dr Odendaal's views.

50. In relation to the broader argument that there can be no right to housing in a particular area, *Grootboom* makes it clear that a state housing programme that excludes a significant segment of society cannot be said to be reasonable. One cannot overlook the economic significance of the central city, which Province describes as not just Cape Town's main economic hub but also its strategic seat of government, a regional tourism gateway and a centre for creativity and innovation supported by four major universities.[114] The critical importance of the city centre is also acknowledged by the City which in the BEPP records that the CBD, into which 200 000 people commute every working day, remains by far the most significant concentration of business and employment in the City and the region and is one of the few business locations in southern Africa which has the qualities required to compete successfully at a global level and is an economic engine which helps drive employment across the City.[115]

51. The argument that the absence of housing opportunities in any designated geographic area does not in itself amount to an infringement of constitutional rights and that no one has a right to land or housing in any particular area ignores this context. For the Appellants to succeed with this argument, they would have to show that a housing programme which makes no provision for affordable housing in central Cape Town is reasonable. Given the economic and social importance of the area, such an argument is, we submit, untenable. The stark reality is that the legacy of spatial apartheid cannot be transformed without addressing the exclusion of people living in poverty and families with lower incomes from central Cape Town.

[114] Annexure JG 42, 11: 1825 (lines 19 – 25).
[115] Annexure LM 2, 13: 2349 (lines 11 – 17).

REMEDY

Introduction

52. Given that state-owned land is indispensable in addressing spatial injustice in central Cape Town, the scarcity (and diminishing nature) of this resource and the impasse that has developed between Province and the other levels of government, the key to an effective remedy lies in developing a co-ordinated approach to the use of State land in the centre of the city. This was recognised in the Judgment.

53. The High Court found that: (i) Province's policies with regard to the use of available land are haphazard, reactive and ultimately irrational;[116] (ii) Province did not comply with its obligation to account openly and transparently to the Court concerning its policies (and, in particular, the abandonment of its previous land use policy);[117] (iii) given the ease with which policies could be side-stepped, it wanted to be assured that Province had clear policies with regard to the use of State land for affordable housing and that it would adhere to those policies;[118] (iv) for 25 years the City had been providing social housing, but this had been focused on the periphery: while the lack of reasonably priced land had been its achilles heel, there were instances where its land could be used for affordable housing and it did not take much to achieve this;[119] (v) following pressure from activist organisations the City radically changed its affordable housing policy in 2017, but following the departure of the architects of the City's new policy, the Court wished to be assured that it acted in accordance with the new policy;[120] and (vi) taken together with the need for extensive consultations between the different levels of government, the only feasible way to achieve a constitutionally compliant, integrated and consolidated

[116] Judgment, 20: 3828: 481.
[117] Judgment, 20: 3831: 488.
[118] Judgment, 20: 3832: 491.
[119] Judgment, 20: 3833: 495 - 6.
[120] Judgment, 20: 3833 - 3834: 497 - 8.

social housing policy, is through a structural interdict coupled with a *mandamus*: in this way the City and the Province will be required to co-operate in their planning decisions (and for the Province to conduct necessary consultations with national government departments).[121]

54. In this section we: (i) consider the relevant remedial principles; (ii) answer the criticism that the High Court's *mandamus* is too vague; (iii) deal with the criteria for a structural interdict; (iv) address the Appellants' criticisms of the supervisory order; (v) consider the appropriateness of a structural interdict; and (vi) conclude that such an order provides the only effective remedy.

Remedial principles

55. The following remedial principles are applicable. First, in constitutional matters courts have **wide remedial powers**. Sections 38 and 172(1) of the Constitution confer the power to grant "*appropriate*" and "*just and equitable*" relief. In *Mhlope* it was stated that "*whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem.*"[122]

56. Second, to be *"appropriate"* and *"just and equitable"*, relief must be **effective**. In *Fose*, Ackermann J held that "*an appropriate remedy must mean an effective remedy*".[123] As he pointed out: "*without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.*"[124]

[121] Judgment, 20: 3832: 492 - 3 and 3834: 498.
[122] *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) at para 132. See further: Judgment, 20: 3805: 426, with reference to the injunction to *"do practical justice"*.
[123] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69.
[124] Ibid.

57. Third, Courts should strive to forge a remedies which place *"substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute"*.[125] In this regard, the High Court[126] relied on the *Modderklip* case,[127] where it was held that if a constitutional breach is established, the Court is mandated to grant appropriate relief and is not confined to the relief which the claimant originally sought or the manner in which it was presented or argued.[128]

58. The Appellants' objections to the High Court's remedy focus on the structural interdict and the *"vagueness"* of the *mandamus*. We shall first address the latter issue.

The mandamus

59. It is contended that the *mandamus* is impermissibly vague.[129] This disregards the rationale for the relief sought – namely that NU did not seek a detailed, intrusive mandatory interdict as it is not appropriate for a court to prescribe to the Appellants how they should discharge their obligations - the objective of the relief sought was to ensure that effective measures were taken without undue delay.[130] Further, it is institutionally inappropriate for a court to prescribe precisely what the achievement

[125] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* 2010 (2) SA 415 (CC) para 97, quoted at Judgment, 20: 3838: 512.
[126] At Judgment, 20: 3840: 516.
[127] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) para 18.
[128] See further *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) paras 210-211, where the majority of the Court held that the *'power [in s 172(1)(b)] to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution.'*
[129] Province heads, para 17.
[130] See Judgment, 20: 3810: 435.

of a socio-economic right entails.[131] No doubt if a detailed *mandamus* had been granted, the complaint would have been raised that it is too prescriptive.

60. The vagueness argument also overlooks what was stated in *Joint Liaison Committee*,[132] namely that: (i) there is no reason why a court order must be totally precise; (ii) courts *"frequently give orders that are very general indeed"*; and (iii) in *Metrorail*[133] the Court made an order requiring that *"reasonable measures"* be taken to provide for the safety of rail commuters. Further, if in any doubt about the extent of their obligations, the Appellants can look to the Judgment for guidance.[134]

The criteria for a supervisory order

61. The Appellants argue *inter- alia* that a structural interdict is inappropriate as there is a high threshold for such an order.[135] However, this relief can no longer be regarded as unusual or exceptional. It is routinely granted, in cases like this, where: (i) curing the constitutional defect is complex; (ii) will take some time to achieve; and (iii) the ordinary enforcement mechanism of contempt will be ineffective.[136]

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[131] *Mazibuko*, para 61.
[132] *Kwazulu-Natal Joint Liaison Committee v MEC for Education* 2013 (4) SA 262 (CC) para 74.
[133] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC). The *mandamus* is consistent with orders granted in similar circumstances, such as *City of Cape Town v Rudolph and Others* 2004 (5) SA 39 (C) and *District Six Committee and Others v Minister of Rural Development and Land Reform and Others* 2019 (5) SA 164 (LCC).
[134] This was pointed out by the High Court: Judgment, 20: 3832: 493.
[135] City heads, para 64, Province heads, para 44.
[136] Just some examples of cases in which supervisory orders have been granted are: *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* 2005 (5) SA 315 (CC) ("***Sibiya***"); *Nyathi v Member of the Executive Council for the Department of Health Gauteng and Another* [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 (CC) ("***Nyathi***"); *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* 2009 (4) SA 222 (CC) ("***DPP Transvaal***"); *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC) ("***Pheko***"); *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3)* 2016 (10) BCLR 1308 (CC); *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* ("***Black Sash***") 2017 (3) SA 335 (CC). In addition, the Constitutional Court has approved the appointment of panels of experts (*Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others (No 2)* ("***All Pay***"); 2014 (4) SA 179 (CC)) and a special master (in *Mwelase*) to assist the Court monitor the implementation of orders.

62. There are three clear criteria that are generally relied on to justify supervision: a vulnerable class of persons, a complex problem, and doubt about the State's ability to rectify the wrong unsupervised. First, almost invariably, the cases in which courts have granted supervisory relief concern **vulnerable groups of people** – prisoners (*Sibiya*), refugees,[137] victims of state negligence (*Nyathi*), children (*DPP Transvaal*), homeless people (*Pheko*), social grant beneficiaries (*Black Sash*) and labour tenants (*Mwelase*). A court's obligation to ensure that its orders are implemented is heightened when those who will suffer are the vulnerable and the marginalised.[138]

63. Second, the most important criterion for employing a supervisory remedy is the **complexity of the problem**. Invariably, the instances where supervisory relief has been imposed concern situations where there is no easy or immediate solution to cure the unconstitutionality, and full compliance will take time. They concern the need to revisit and change existing practices, and then design and implement new, constitutionally-compliant practices. In these circumstances a simple declarator or interdict is unlikely to be sufficient. In order to ensure that the illegality is rectified as promptly as possible, the courts retain supervision. The reason for this is explained in *Meadow Glen*.[139] Confronted with a claim that an administrator was in contempt of court for non-compliance with one of a string of interdicts granted to solve a complex housing problem, this Court highlighted the limits of ordinary enforcement: "*Contempt of court is a blunt instrument to deal with these issues and*

[137] *Kiliko & Others v Minister of Home Affairs & Others* 2007 (4) BCLR 416 (C) (provision of services to refugees); *South African Human Rights Commission and Others v Minister of Home Affairs and Others* [2014] ZAGPJHC 198; 2014 (11) BCLR 1352 (GJ).
[138] *Mwelase* at para 49.
[139] *Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* [2014] ZASCA 209; [2015] 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA).

courts should look to orders that secure on-going oversight of the implementation of the order."[140]

64. Third, courts often employ supervisory remedies where there has been repeated non-compliance with legal obligations, a refusal to act on recommendations, or some other reason to believe that, without supervision, **the respondents may not fully and promptly comply with the court's order**. The reasons may vary. It could range from intransigence, to apathy, to incapacity. But where the evidence demonstrates that government may not perform its obligations "*diligently and without delay*", supervision is used to spur the state into swifter compliance.

65. Finally, it is important to stress that supervisory relief is **not intended to punish** or undermine the State. Rather it recognises that "*courts and government are not at odds about fulfilling the aspirations of the Constitution.*"[141] Instead, the judiciary and the executive share a "*common goal*" and are "*engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.*"[142] Supervisory relief is not justified if its only purpose is to chide the state for past infractions. It is justified where it will further the realisation of constitutional promises. It is "*directed to systemic functioning – rather than to any individuals' attitudes or defaults*".[143]

The Appellants' criticisms of the structural interdict

66. The Appellants criticise the High Court's order on the grounds that it: (i) conflates the obligations of the City and Province;[144] and (ii) does not include the national government.[145] A careful reading of the Judgment shows that the former complaint

[140] Ibid at para 35.
[141] *Mwelase* at para 46.
[142] Ibid.
[143] *Mwelase* at para 70.
[144] Province heads, para 35; City heads, para 35.
[145] Province heads, para 36; City heads, paras 65.2 - 68.

is without merit – the obligations of Province and the City are dealt with independently[146] and the grounds upon which the Court found that each level of government had failed to comply with their obligations differed markedly.[147] The High Court concluded that requiring Province and City to file a joint report setting out the steps they will take to comply with their obligations will serve the important purpose of requiring both parties to co-operate in formulating a joint programme.[148]

67. There are two strands to the criticism of the failure to include the national government in the structural interdict: (i) it is implied that all national departments which own suitable land should have been subject to supervision;[149] and (ii) the order should have included the national Minister of Human Settlements.[150]

68. The suggestion that all national departments which own centrally located land which could be used for affordable housing should have been included in the order is untenable: such land is owned by a range of departments and organs of state,[151] the full extent of which could not reasonably have been known to NU at the outset of the proceedings and accordingly their joinder was not feasible.[152]

69. The national Minister of Human Settlements has not been required to account to the Court in terms of the supervisory order, as she has not failed to comply with her obligations to redress spatial injustice. NU's reasonableness challenge did not extend to the legislative, fiscal or national policy framework for affordable housing. This was prudent, as there is no evidence showing that the national department

[146] Judgment, 20: 3810: 438 - 3821: 466, read with 3788: 385 - 3791: 388.
[147] Judgment, 20: 3826 - 3832: 476 - 493 (dealing primarily with the Province) and 3832 - 3832: 494 - 498 (in relation to the City).
[148] Judgment, 20: 3834: 498 and 3832: 492 - 493.
[149] City heads, para 68.
[150] Province heads, para 36, City heads, paras 65.2 - 66.
[151] Including Transnet, the Department of Defence and the Department of Public Works: Judgment, 20: 3816: 453 -3818: 455.
[152] The joinder of all these organs of state, putting in issue the extent to which their under-utilised, centrally located, land should be made available for affordable housing, would have resulted in the scope of these (already extensive) proceedings growing like Topsy.

has failed to discharge its obligations under s 3 of the SHA, or s 3 of the HA - or otherwise in terms of ss 25(5) and 26 of the Constitution – which require it to put in place the legislative, regulatory, financial and national policy framework necessary for affordable housing. By way of contrast, it is the City which should have performed the critical functions of identifying and designating land for housing development and providing access to land and buildings for social housing – which lie at the heart of this case – and the grounds upon which the High Court found against Province are clear, forthright and (we submit) unassailable.

Conclusion: the only effective remedy

70. *Mazibuko* held that the progressive realisation of socio-economic rights imposes a duty on the different levels of government to continually review their policies in order to ensure that the achievement of the rights is progressively realised.[153] The evidence in this case reflects an abject failure on the part of Province and the City to comply with this duty. Councillor Herron's evidence[154] shows that for many years the City's statements about addressing the legacy of spatial apartheid were little more than empty rhetoric. The City candidly admits that one of the consequences of its policies until 2017 was the entrenchment of apartheid era spatial patterns.[155] Furthermore, there is a dearth of evidence in Province's answering papers dealing with its policies or the implementation of measures to redress spatial injustice in Cape Town prior to 2010, and the High Court justifiably found that, since that time, its policies in terms of the Regeneration Programme entrenched apartheid spatial planning.[156] Province concedes that spatial injustice in Cape Town is not close to being addressed, but defends its track-record on the grounds that spatial justice is

[153] *Mazibuko*, para 67.
[154] SFA, 5: 686: 10.1 and 688: 11.2.
[155] Mbandazayo, 13: 2223: 4.7.
[156] Judgment, 20: 3811: 441 and 3827: 478.

an objective to be realised progressively over time.[157] This argument disregards: (i) the need for State-owned land for affordable housing; (ii) that the longer it delays, the less land will be available for this purpose; and (iii) the impact of any affordable housing programme will be diminished accordingly.

71. Far from seeing the rights in issue being progressively realised, they have, until now, been progressively eroded. The situation has been compounded by the scarcity of well-located, state-owned land and the breakdown in relations between Province and the other levels of government.

72. The inquiry required to determine an *"appropriate"* remedy for the purposes of s 38 of the Constitution is determined by the *"specific facts and exigencies of a particular case"*.[158] In *Mzalisi NO v EO*[159] this Court held that the granting of a structural interdict entails the exercise of a true discretion, which can only be set aside on appeal if it is shown that: (i) the discretion was not exercised judicially; or (ii) was influenced by wrong principles or a misdirection on the facts; or (iii) the court reached a decision which could not reasonably have been made if it had properly directed itself to all the relevant facts and principles.

73. The relevant High Court findings have been summarised at the beginning of this section and we submit that there is no justifiable basis for contending that the Court was influenced by wrong principles, that it misdirected itself on the facts, or that there are other grounds for setting aside the supervisory order.

74. In this case, an effective remedy must contain three elements. First, it should ensure that a comprehensive audit is conducted to establish the full extent of State-owned land (which could be made available for affordable housing) in central Cape

[157] Gooch, 7: 1155: 210 - 211.
[158] *The Residents of Industry House and Others v The Minister of Police and Others* 2022 (1) BCLR 46 (CC) at para 113.
[159] 2020 (3) SA 83 (SCA) at para 14.

Town. Second, the City and Province must formulate a co-ordinated programme – rather than working in silos - to determine how much of this land should be used for affordable housing and what can be released for other purposes. Third, a timetable should be drawn-up (taking into account that it might take some time to develop housing on all of the designated land) and implemented.

75. A supervisory order, such as that granted by the High Court, in conjunction with a *mandamus*, makes provision for all three of the above elements and, we submit, on the *"specific facts"* of this case constitutes the only effective remedy.

THE INTERPRETATION AND APPLICATION OF GIAMA

76. NU contends that both GIAMA, enacted by Parliament, and the WCLAA govern disposals of Province's land. Province's appeal in respect of GIAMA is primarily premised upon the argument that GIAMA is framework national legislation for the management of assets within the national and provincial spheres of government and that it is solely the WCLAA, and not GIAMA, that regulates the acquisition and disposal by Province of immovable property.

77. The arguments are made without regard to the approach to statutory interpretation under the Constitution, which was applied by the High Court,[160] the relevant grounds of review relied upon by NU, including the factual context pertaining to GIAMA, and the High Court's reasoning and findings in respect of GIAMA.[161]

78. Province's approach appears to be underpinned by (i) not wanting to be constrained by the social-economic and service delivery considerations in GIAMA when decisions are made to dispose of property and, hence, being free to make

[160] Judgment, 20: 3677 - 3679: 105 - 110.
[161] Judgment 20: 3745 - 747: 278 - 280 (the application of GIAMA), 3747 - 3752: 281 - 298 (was the Tafelberg Property surplus), 3753 - 3755: 299 - 308 (what of allocation to another user) and 3755 - 3757: 309 - 315 (is the Cabinet decision in March 2017 not to resile from the agreement reviewable). The factual context appears from items 13 – 16, 18, 20 - 22, 24 – 35 and 38 of the NU chronology.

decisions driven by commercial considerations and (ii) its failure to comply with the C-AMP and U-AMP requirements of GIAMA.

The relevant provisions of GIAMA and the High Court's findings

79. GIAMA is national legislation that applies to all organs of state. For purposes of GIAMA, the provincial Department of Transport and Public Works is the custodian of immovable property vesting in Province.[162]

80. A custodian may dispose of a surplus immovable asset by the allocation of that immovable asset to another user, [163] or subject to the State Land Disposal Act,[164] and any provincial land administration law, by the sale, lease exchange, or donation of that immovable asset or the surrender of a lease.[165] The WCLAA is a "*Provincial land administration law*" for purposes of GIAMA.[166]

81. GIAMA stipulates a number of principles of immovable asset management.[167] It also, read together with the Guidelines for User and Custodian Immovable Asset Management in National and Provincial Government,[168] prescribes in detail the requirements for both user and custodian immovable asset management plans (respectively, "*U-AMPs*" and "*C-AMPs*"). A U-AMP is the principal immovable asset strategic planning instrument which guides and informs all immovable asset management decisions and binds the user in the exercise of its executive authority.[169] A user's accounting officer must prepare a U-AMP in relation to

[162] Definition of "*custodian*", read with ss 4(1)(c) of GIAMA.
[163] According to s 1 of GIAMA, a "*user*" means a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy.
[164] 48 of 1961.
[165] GIAMA, ss 13(3).
[166] Definition of "*provincial land administration law*" read with the Schedule, section 1(i).
[167] GIAMA, s 5.
[168] Published on 20 October 2008.
[169] GIAMA, s 10.

immovable assets which the user uses or intends to use,[170] and ensure that the U-AMP meets the objects of GIAMA and adheres to the principles in s 5 of GIAMA and applicable standards and regulations. These requirements also apply to C-AMPs.[171] A custodian must prepare a C-AMP in relation to all the immovable assets which are in its custody.[172] The C-AMP must consist of at least the aspects specified in s 7, which include a disposal strategy and management plan.[173]

82. The High Court Judgment summarised the relevant provisions.[174] Once an immovable asset becomes *"surplus"*, it is surrendered to the custodian, who becomes its caretaker and is required to manage it in accordance with its C-AMP. A custodian may dispose of surplus immovable assets, either to another user or, alternatively, to a private entity. Before a disposal to a private entity can take place, a two stage decision-making process must be undertaken. Firstly, the user of the asset must decide that the asset is *"surplus"*, that is, it does not support its service delivery objectives at an efficient level and cannot be upgraded to that level.[175] This decision must be made in terms of the U-AMP, which is the principal immovable asset strategic planning instrument and is binding on the user. GIAMA states explicitly that users must conduct immovable asset management in a manner consistent with the Act and their U-AMPs.[176] Secondly, the custodian must then decide, in terms of its management plan (and particularly the disposal strategy) in its C-AMP, whether the surplus asset can be allocated to another user or jointly to

[170] GIAMA, ss 6(1)(b).
[171] GIAMA, ss 6(2).
[172] GIAMA, ss 6(1)(a).
[173] GIAMA, ss 7(f).
[174] Judgment, 20: 3686: 125 - 127. In *Rinaldo Investments (Pty) Ltd v Minister of Public Works and Others* (D2213)/2019) [2021] ZAKZDHC 16; [2010] 2 ALL SA 541 (KZD) (9 March 2021) (*"**Rinaldo**"*) at para 84, the Court referred to these paragraphs as an explanation of the significance of an asset becoming *"surplus"*.
[175] GIAMA, ss 5(1)(a).
[176] GIAMA, ss 10(1)(a), (b) and 11.

different users,[177] particularly in relation to government's social development initiatives and socio-economic objectives (including land reform).[178]

83. In dealing with the reviews, the High Court's point of departure in respect of Province's failure to comply with its obligations under GIAMA was the reliance in the Minute[179] on the provisions of GIAMA as constituting the legal foundation for Province's decision to dispose of the property.[180] Province had purported to apply the principles in s 5 of GIAMA and had concluded that the property was not required for any government purpose and could thus be disposed of by private sale.[181] There was no mention in the Minute of U-AMPs and C-AMPs.

84. The High Court found that (i) before a decision to dispose could be taken, ss 5(1)(a) of GIAMA required the user to decide that the property did not support the users' service delivery objectives at an efficient level and that the property could not be upgraded to that level of efficiency, (ii) the existence of a U-AMP was a necessary tool which the users were duty bound to utilise in coming to an informed decision under ss 5(1)(a) of GIAMA,(iii) the rendering of an asset as surplus would have to be informed by an immovable asset surrender plan which is a required component of a U-AMP, (iv) once an asset is surrendered to the custodian, the custodian must take stock of the position in terms of the C-AMP before determining that the property is surplus, and (v) it follows from the application of ss 13(3) of GIAMA that the Tafelberg site could only be sold on the open market if it was surplus in terms of GIAMA.

[177] GIAMA, ss 13(3)(a) and 5(1)(f).
[178] GIAMA, ss 13(3)(b) and 5(1)(f)).
[179] Annexure JG 107, 12: 1985 - 1998 (i.e. the minute of the Cabinet meeting held on 11 November 2011 resolving to dispose of the Tafelberg Properties to the School).
[180]Judgment, 20: 3745: 278. The relevant portion of the Minute is reflected in paragraph 279 of the Judgment.
[181] Judgment, 20: 3747: 280.

The framework and internal management argument

85. Province contends that GIAMA is principally intended to create a system for the *management* of assets within the national and provincial spheres of government and that the powers to *dispose* of immovable property are conferred by the Constitution and by *other* governing legislation (not GIAMA).[182]

Section 104 (4) of the Constitution and the provincial acts

86. Province relies on ss 104(4) of the Constitution, arguing that *"since the acquisition and disposal of immovable property is reasonably necessary for, or incidental to, the effective exercise of their constitutional powers and obligations"* the power to dispose of provincially owned assets vests in the provincial sphere of government and one would not expect to find it being governed by national legislation (unless such legislation took the form of framework legislation which does not encroach on the functional or institutional integrity of the provincial sphere).[183] It further contends that it is to the provincial acts, such as the WCLAA, and to the Constitution, that reference must be had in determining whether an acquisition or disposal was lawful.

87. Section 104(4) of the Constitution must be read with ss 104(1)(b)(i). The provincial legislature has the power to pass legislation for its province with regard to any matter within a functional area listed in Schedule 4. That Schedule lists functional areas of concurrent national and provincial legislative competence in Part A.[184] In terms of ss 104(4), provincial legislation with regard to a matter that is reasonably

[182] Province heads, para 68.
[183] Province heads, para 70.
[184] Part B of Schedule 4 lists local government matters to the extent set out in section 155(6)(a) and (7) of the Constitution. Schedule 5 Part A lists functional areas of exclusive provincial legislative competence.

necessary for, or incidental to, the effective exercise of a power concerning any Schedule 4 matter, is legislation with regard to a matter listed in Schedule 4.

88. In terms of s 44(1)(a)(ii) of the Constitution "*the national vested authority as vested in Parliament - confers on the National Assembly the power – to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection 44(2), a matter within a functional area listed in Schedule 5*."[185]

89. The preamble to the WCLAA makes it clear that it was enacted because it was reasonably necessary for, or incidental to, the exercise of (other) powers concerning matters listed in Schedule 4. The disposal of state land is accordingly a matter which falls within Parliament's legislative domain in respect of which national legislation enjoys precedence.[186] To the extent that *"land*", *"state land"* and/or management of immovable assets may not be regarded as falling within matters reasonably incidental to or reasonably necessary for the effective exercise of a power concerning any matter listed in Schedule 4, and are not listed in Schedule 5, the implication of s 44(1)(a)(ii) of the Constitution is that legislative competence over functional areas or matters not enumerated in either Schedule 4 or 5 are *"residual matters outside the scope of the functional areas in Schedules 4 and 5 are the preserve of the national legislature"*.[187] They would then fall under Parliament's plenary legislative powers.

[185] In terms of ss 44(3) legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes, legislation with regard to a matter listed in Schedule 4.
[186] *Premier Limpopo Province v Speaker of the Limpopo Provincial Government and Others* 2011 (6) SA 396 (CC) at paras 20 – 24.
[187] See V Bronstein "Conflicts" in S Woolman, & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, RS5, January 2013) Chapter 16 at 9.

90. The WCLAA itself provides that *"Unless otherwise expressly provided for in any other law, the Premier may acquire immovable property,"*[188] "[u]*nless otherwise expressly provided for in any other law, the Premier may dispose of provincial state land on such conditions as are deemed fit…"*,[189] and the Premier must co-ordinate the provincial government's actions regarding the administration of provincial state land with the national and local sphere of government.[190]

91. The effect of Province's argument is that (on its version) GIAMA is constitutionally invalid. However, in the absence of a direct frontal challenge to the constitutionality of GIAMA, Province is not entitled to any relief that effectively flows from the unconstitutionality of GIAMA that has not been declared by a Court.[191]

92. Furthermore, the powers allocated by the Constitution to the three spheres of government are not contained in hermetically sealed compartments and sometimes overlap. Laws within each sphere can serve different purposes for the level of government charged with responsibility for administering them. When this happens, each sphere is exercising powers within its own area of legislative competence. In terms of the *"Macsand principle"* such laws must be read, as far as possible, in consonance with each other, allowing each statute to be interpreted in a manner that serves its underlying purpose. It is within this context that s 41 of the Constitution obliges theses spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.[192]

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[188] WCLAA, ss 2(1).
[189] WCLAA, ss 3(1).
[190] WCLAA, ss 4(1).
[191] *Public Protector v Commissioner for the South African Revenue Service and Others* (CCT 63/20) [2020] ZACC 28; 2021 (5) BCLR 522 (CC) at paras 25 - 27.
[192] *Macsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at paras 43 and 47, read together with *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC) at para 106.

Applying the *Macsand* principle, Province has to comply with the requirements of both GIAMA and the WCLAA in order to lawfully dispose of property.[193]

93. In any event, on Province's argument that the provincial legislation should enjoy precedence, it would have to establish that a conflict exists between national legislation (GIAMA) and provincial legislation (the WCLAA). Section 146 of the Constitution (which deals with conflicts between national and provincial legislation failing within a functional areas listed in Schedule 4) states the following: "*146(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met… (b) the national legislation deals with a matter that, to be dealt with effectively requires uniformity across the nation, and the national legislation provides that uniformity by establishing –(i) norms and standards; (ii) frameworks; or (iii) national policies."*

94. The implication of s 146 of the Constitution is that national legislation prevails if the substantive requirements of at least one of the override clauses are met.[194] It is difficult to reconcile how the provincial legislation, the WCLAA, would enjoy legislative competence when national legislation, GIAMA, specifically sets out to "provide for a uniform framework for the management of an immovable asset that is held or used by a national or provincial department"[195] as contemplated by ss 146(2) of the Constitution regarding uniform, framework legislation.

[193] This principle is reinforced by the strong statutory presumption that laws must be read together, unless there is a clear conflict, in which case the later enactment will take precedence: *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para 67.
[194] J Klaaren "Federalism" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) Constitutional Law of South Africa (1st Edition, OS, 1996) 5-12.
[195] GIAMA, preamble and ss 3(a).

The argument that GIAMA is framework legislation aimed to standardise immovable asset management at department level and within government and is not empowering legislation in respect of state land disposal

95. GIAMA's preamble makes it clear that its purpose is to provide for a uniform framework for the management of immovable assets in national and provincial departments, to ensure the co-ordination of the use of immovable assets with service delivery objectives and *"to provide for issuing of guidelines and minimum standards in respect of immovable asset management by a national or provincial department"*.[196] The language used throughout GIAMA consistently reflects the distinction between binding requirements, invariably introduced by the peremptory *"must"*,[197] in contradistinction to discretionary or non-binding functions which are introduced by the word *"may"*. A number of provisions state explicitly that they are imposing peremptory requirements.[198]

96. Province's arguments in respect of GIAMA only regulating *internal* management mechanisms is not sustainable. First, it must be borne in mind that Province itself interpreted certain of the provisions of GIAMA as being applicable to whether it was lawfully entitled to dispose of the Tafelberg properties to a private party. Second, the principles in ss 5(1)(a) – (e) are not specified to only apply to a custodian. Third, when read with the definitions of *"acquire"* and *"disposal"* in GIAMA (both of which expressly refer to and include those definitions in the relevant provincial land administration laws), as well as *"best value for money"*, those principles patently do not only apply in an *"inward, government management only"* manner. Section 13(3)

[196] GIAMA, preamble.
[197] See, for example, ss 4(4), 5(1)(a),(b), (c),(d),(e),(f), 6(1)(a),(b), 6(2) and contrast with ss 19(1)(a), (c) and 19(2).
[198] See ss 10(b) (a U-AMP *"binds the user in the exercise of its executive authority"*), 11 (a user *"must give effect to"* its U-AMP) and 16 of GIAMA (*"A standard issued by the Minister in terms of this Act is compulsory"*).

of GIAMA[199] must be read with ss 5 and 4(2), and GIAMA must be read together with the WCLAA.

97. Under the scheme of GIAMA, in terms of ss 4(2) a custodian (i.e. the national or provincial department, as the case may be), is itself empowered to acquire or dispose of an immovable asset.[200] Under the WCLAA, the power of disposal is vested in the Premier, acting together with the other members of Provincial Cabinet.

98. Province contends that the obligations in terms of ss 5(1)(f) and 13(3)(a) of GIAMA are duties conferred on the custodian and not on the Cabinet. Section 13(3)(b) of GIAMA requires a custodian to dispose of a surplus immovable asset in terms of its provincial land administration legislation. Section 3 of the WCLAA authorises the Premier (defined as the Premier acting together with the other members of the Provincial Cabinet) to *"dispose of provincial state land on such conditions as are deemed fit"*.

99. The processes and requirements are not unrelated. GIAMA mandates the department to dispose of *"surplus"* immovable assets to another user *or "by the sale … of that immovable asset or the surrender of a lease"*, subject to a decision by Cabinet in terms of the WCLAA to dispose of land.[201]

100. In terms of the *Macsand* principle, there must be compliance with the requirements of both GIAMA and the WCLAA, meaning that the Cabinet could only dispose of the Tafelberg site if the custodian had satisfied its GIAMA requirements.[202]

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[199] Which refers to a custodian disposing of surplus assets *"subject to … any provincial land administration law"*.
[200] In the case of a provincial department which is a custodian, it may, subject to the relevant provincial land administration law, acquire, manage, and dispose of an immovable asset (see ss 4(2)(ii)).
[201] This includes the sale, exchange, donation or letting of provincial state land.
[202] The effect of *Rinaldo* is that both GIAMA and the relevant disposal legislation regulate the basis upon which State immovable property should be disposed of. See *Rinaldo* paras 51 and 68.

The interpretation of those responsible for administering GIAMA and reliance on incremental implementation in respect of U-AMPs and C-AMPs

101. Province contends that U-AMPs and C-AMPs are not required for the disposal of immovable properties and relies on the manner in which GIAMA has been *"consistently interpreted"* by provincial and national departments since its enactment.[203] This contention is reminiscent of the argument which received short shrift in *Mwelase*,[204] to the effect that the department concerned *"knew better than the legislature"*. It is also inconsistent with the language used throughout GIAMA, which clearly distinguishes between binding and non-binding requirements. The provisions in respect of U-AMPs and C-AMPs are unambiguous in articulating peremptory requirements.[205]

102. GIAMA was assented to by Parliament on 22 November 2007. The national Department of Public Works adopted the C-AMP Guidelines which are dated 20 October 2008.[206] The date of commencement of the majority of the provisions of GIAMA was 30 April 2009, to provide a period of grace to enable government departments to prepare and plan for its commencement.[207] The date of commencement of several of its provisions (including ss 6, 10, 11, 12, 13 and 14) was 30 April 2009 for any custodian or user which is a national department and 1 April 2010 for any custodian or user which is a provincial department. Section 15 of GIAMA provides that the Minister of Public Works may exempt any organ of state

[203] Province heads, para 92. The claim that GIAMA has been interpreted in a consistent way and uniformly read by national and provincial departments as not precluding the state from disposing of immovable assets owned by it (Gooch, 8: 1310: 450) is contradicted by the Western Cape Provincial Department of Health which in 2014/2015 produced its fourth U-AMP (RA, 15: 2864: 345.4, Annexure TA 58, 6: 961 - 976).
[204] *Mwelase*, at para 20.
[205] Ss 6(1)(a) and s 7 in respect of C-AMP's, and 6(1)(b), 8, 10(1)(b) and 11 in respect of U-AMPs.
[206] SFA, 5: 712: 80; Annexure TA 57, 6: 915 - 960.
[207] RA, 15: 2863: 345.2

from any provision of GIAMA for a specified period, while s 22 empowers the same Minister to suspend any requirement of GIAMA for a transitional period to facilitate the implementation of the Act. The suggestion by Province that the failure to comply with its provisions may be condoned by the GIAMA implementation technical committee or the national and provincial treasury is untenable[208] – GIAMA itself sets out the course that must be followed to deal with any transitional issues or difficulties in implementing the Act.

103. Province suggests that the High Court's finding that there was no C-AMP in place at the time of the disposals, and that the disposal was therefore in breach of the mandatory provisions of GIAMA is far-reaching, for it means that neither the national government, nor any provincial government is entitled to dispose of any immovable property owned by it and that *"on the undisputed evidence, this is an uncertain number of years into the future"*.[209]

104. Province had a C-AMP in place when the decision not to resile from the sale of the Tafelberg Properties was taken by Cabinet, but the C-AMP did not include the Tafelberg Properties, nor had DTPW adopted a C-AMP specific to the Tafelberg site.[210] As the High Court found, Province does not say why the Tafelberg Properties were not included in the C-AMP (other than that they had *"simply not yet been included"* in the C-AMP).[211] Province has failed to explain why it did not prioritise including the Tafelberg Properties in a C-AMP, particularly in the light of the Regeneration Programme embarked upon in 2010.

105. Province has not indicated when it expects to have a complete C-AMP in place, nor has it explained why there is no completed C-AMP in place in the Western Province

[208] RA, 15: 2862: 345.2.
[209] Province heads, para 65.
[210] Judgment, 20: 3756: 310; Gooch, 8: 1314: 454
[211] Judgment, 20: 3756: 312; Gooch, 8: 1446: 983.

(other than a general reliance on incremental implementation by national and provincial governments) or why it has not sought to rely on ss 15 and 22 of GIAMA. Furthermore, the Court's findings in respect of U-AMPs and C-AMPs would not place the validity of disposals since GIAMA came into effect in 2007 in issue. Each disposal would remain valid unless judicially reviewed and set aside.

The proper interpretation of GIAMA

106. Province has fundamentally misunderstood the provisions of GIAMA, which must be read together, in the light of the objects of GIAMA and the obligations imposed on State property owners in terms of ss 25(4) to (9) of the Constitution.

107. It is only if an immovable asset is surplus and surrendered to the custodian by the user that the custodian may dispose of it. If Province's belief that it is entitled to dispose of any immovable asset, including those that are not *"surplus"*, is correct, it would be able to pick and choose whether it needed to comply with the careful system of safeguards put in place by GIAMA when disposing of provincial state land.[212] Such an interpretation would defeat the purpose of GIAMA.

108. A purposive and contextual interpretation of GIAMA, read together with s 4 of the WCLAA, demonstrates that it is mandatory for the DTPW to conduct a rigorous inquiry into whether an immovable asset can be used by another department or level of government for social development purposes, before it can be sold to a private party simply in order to raise revenue. If the inquiry shows that the asset can be usefully employed within government for social development purposes, and particularly land reform, then it should not be disposed of to a private entity, alternatively, such a disposal should take place only in the most exceptional circumstances, subject to stringent justification and in order to meet a compelling

[212] Judgment, 20: 3752: 296.

social need. This interpretation: (i) renders GIAMA compliant with ss 25(5) of the Constitution; (ii) best promotes the purport and objects of the Bill of Rights, particularly the *"compelling constitutional priority"* of land reform and the need to redress the unequal distribution of land; (iii) advances the objects of both GIAMA and the WCLAA; and (iv) is generous to the beneficiaries of socio-economic rights.

THE UNCONSTITUTIONALITY OF THE WCLAA REGULATIONS

109. The High Court declared Regulation 4(6) and the proviso in Regulation 4(1) of the WCLAA Regulations to be unconstitutional and invalid ("*the Regulations*").[213] Even though the reviews became moot and are not before this Court, it is important to have regard to the factual context underpinning this relief sought by NU.[214] By the time that notices of disposal were published in terms of the notice and comment procedure in the WCLAA,[215] a tender process had been conducted, Cabinet had decided to sell the Tafelberg Properties to the School, and Province and the School had already signed the agreement of sale, subject to Province being able to resile from the sale after the public participation process.

110. The basis for the High Court's declaration of constitutional invalidity was the following: (i) the purpose of the public participation process provided for in ss 3(2) – (4) of the WCLAA is to further the constitutional concept of participatory democracy and to ensure that members of the community have a meaningful opportunity to participate in decisions concerning the disposal of provincial state land;[216] (ii) having regard to the constitutional imperative to redress historical injustices in relation to access to land, effective public participation in the process

[213] Judgment, 20: 3857: 10 - 11. In consequence, the High Court held the disposal of the Tafelberg Properties to be unlawful.
[214] See items 13 – 16, 18, 20 - 22, 24 – 35 and 38 of the NU chronology.
[215] S 3(2).
[216] Judgment, 20: 3728 - 3730: 240 - 243.

of disposing of state land is crucial;[217] (iii) the word "*proposed*" means "*put forward for consideration or action*": the Legislature's use of the phrase *"proposed disposal"* in ss 3(2) of the WCLAA signifies an intention to conclude a written contract of sale and that it contemplated that the public would be afforded the opportunity to comment before a decision was finally taken;[218] and (iv) the procedure followed with regard to the Tafelberg property, in which the contract of sale had been concluded before the public was able to comment, did not allow for a fair opportunity to make representations: a fair procedure would allow for objections at an early stage of the process, providing a clean slate for the evaluation of competing views.[219]

There is an inconsistency between the Regulations and the WCLAA rendering the Regulations unconstitutional

111. Province contends that the purpose of the WCLAA is to give effect to the constitutional powers of the Western Cape Government under section 104 of the Constitution to dispose of its immovable property and, at the same time, to elicit the views of the public without compromising the ability of the WCG to secure the most advantageous deal as possible.[220] Province asserts baldly that the High Court incorrectly found that the constitutional context of the WCLAA is an obligation on the WCG to address to address the historical injustices perpetuated through the deprivation of the majority of our citizens of access to land.[221]

112. While s 104 of the Constitution is the source of Province's power to enact the WCLAA, Province's approach embodies the blinkered disregard for context in

[217] Judgment, 20: 3742: 265.
[218] Judgment, 20: 3734 - 3735: 247 - 250, read together with 3741: 264.
[219] Judgment, 20: 3736 - 3738: 251 - 257.
[220] Province heads, para 56.
[221] Province heads, para 56 and footnote 69.

interpretation that the High Court cautioned against,[222] in that it overlooks the Constitutional Court's finding that land reform is a *"compelling constitutional priority"*;[223] that this priority permeates the entire property clause;[224] and is explicitly referred to in the WCLAA.[225] The High Court conclusion that context is the touchstone for contemporary statutory interpretation[226] is unassailable and the imperative for land-reform is an integral part of the context to the WCLAA.

113. Province contends further that there is no inconsistency between ss 3(2) of the WCLAA and the Regulations. The interpretation of a *"proposed disposal"* contended for by Province is *"an agreement to dispose which is subject to a resolutive condition pertaining to public participation"*. This is a far cry from the ordinary meaning of the words. While the pendulum has swung away from literal interpretation towards purposive construction, Courts should still be cautious about departing from the literal meaning of words in a statute and do so only where the purpose – established having regard to the context and mischief the provision seeks to address – reflects a contrary intention.[227]

114. The object of the public participation process provided for in ss 3(2) to (4) of the WCLAA is to ensure that members of the public have a meaningful opportunity to participate in decisions concerning the disposal of land. The High Court emphasised the need for meaningful opportunities for public participation, given that Province's decision to sell the Tafelberg Properties was effectively within the local sphere of government[228] and found that the procedure provided for in the

[222] Judgment, 20: 3678 - 3679: 109 - 110.
[223] *Kwalindile Community v King Sabata Dalinyebo Municipality and Others; Zimbane Community v King Sabata Dalinyebo Municipality and Others* 2013 (6) SA 193 (CC) at para 39.
[224] Judgment, 20: 3680: 112.
[225] Ss 4(2) requires Province to co-ordinate its actions regarding the administration of provincial state land with other spheres of government with a view towards *"realising the nation's commitment to land reform…"*.
[226] Judgment, 20: 3678: 109 - 110.
[227] *Airports Company SA v Imperial Group* 2020 (4) SA 17 (SCA) paras 69 – 72.
[228] Judgment, 20: 3728 - 3729: 241 - 242, relying on the *dicta* of Goosen J in *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP).

Regulations is irreconcilable with a meaningful public participation process.[229] Province, however, advocates an interpretation of the words *"proposed disposal"* that is destructive of the purpose of the public participation process.

115. Province relies on ss 14(2) of the Municipal Finance Management Act[230] which authorises a municipality to dispose of a capital asset without - according to the Province - a separate notice and comment requirement.[231] However, ss 14(2) of the MFMA must be read together with the Municipal Asset Transfer Regulations[232] (the "**MATR**") which provide for a meaningful public participation process at the outset of a disposal process in respect of a high value property, before a council decides in-principle that the property may be disposed of.[233] The tender process then only takes place after the council has granted in-principle approval.[234]

116. Province also places heavy emphasis on the commercial benefits the Regulations provide to it.[235] There is no factual basis for Province's assertion that the purpose of the WCLAA includes eliciting the views of the public without compromising the ability of the WCG to secure the most advantageous deal possible.[236] It suggests that it is sufficient for the public to participate after the offer has been made because the public will be afforded an opportunity to *"comment on an actual transaction."* This ignores a critical aspect of the public participation process, namely, the capacity to influence the decision whether or not to dispose of the land in question in the first place. Province's approach allows commercial considerations to cloud

[229] Judgment, 20: 3736 - 3741: 251 - 265.
[230] 56 of 2003 ("**MFMA**").
[231] Province heads, para 63.
[232] Published under section 168 of the MFMA GN R878 in *GG* 31346 of 22 August 2008.
[233] Regulations 5(1), 5(3) and 6 of the MATR.
[234] Regulations 12(1) and 12(4) of the MATR.
[235] Province heads, para 57.
[236] Province heads, para 56.

constitutional considerations,[237] which should be the primary focus, given the constitutional objectives summarised above.

117. It follows that the Regulations: (i) serve to defeat the objects of the public participation process: (ii) are *ultra vires*; and; (iii) beyond the powers of ss 3(2) of the WCLAA.[238]

The Regulations are inconsistent with s 33 of the Constitution and s 4 of the Promotion of Administration Justice Act 3 of 2000

118. Turning to the challenge on the basis of the Regulations being in conflict with the right to procedural fairness in ss 33(1) of the Constitution and s 4 of PAJA, Province relies in their heads of argument on the section not applying at all because, they contend, a decision by Province to conclude a written contract for the disposal of land which is subject to a resolutive condition pertaining to public participation does not constitute administrative action.[239] In deciding the reviews, the court *a quo* correctly held, on the authority of *Grey's Marine,*[240] *Military Veterans*,[241] and *Bullock*[242] that the decisions of Cabinet to sell and not to resile from the sale constituted administrative action.[243]

[237] The Regulations are inconsistent with the requirement of meaningful public participation in respect of the decision whether or not the land should be disposed of to a private party in the first place, or whether it can be used in relation to governmental social development initiatives or socio-economic objectives, as provided for in GIAMA.
[238] *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paras 49 - 50.
[239] Province heads, para 62.
[240] *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA).
[241] *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC).
[242] *Bullock NO v Provincial Government of North West Province* 2004 (5) SA 262 (SCA).
[243] Judgment, 20: 3726: 233 - 234; 20: 3740: 262. See also *Rinaldo* at para 51.

119. The High Court correctly dismissed Province's alternative argument, finding that the impugned regulations are inconsistent with the architecture of s 4 of PAJA, which contemplates a public participation process before a decision is made.[244]

120. Province's reliance on ss 4(1)(d) of PAJA which authorises a procedure that is fair but different does not avail it. The Court found that the impugned provisions were procedurally unfair in that they do not afford interested parties a right to be heard before a decision to dispose of state land is made.[245] In short, there is no basis to the High Court order declaring that Regulation 4(6), and the proviso in Regulation 4(1) of the WCLAA Regulations are unconstitutional and invalid.

RESTRUCTURING ZONES IN CAPE TOWN

121. The High Court granted a declaratory order 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 Provisional Restructuring Zone Regulations.[246]

122. Province argues that the notice, published by the national DHS in the *Gazette,* is only provisional, and was merely published "*for public information*". It does not deal with the High Court*'s* findings that their arguments in that regard were unsustainable[247] and refers to the plain meaning of "*provisional*".[248]

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[244] Judgment, 20: 3740 - 3741: 262 - 264. The Judgment notes that counsel for Province could advance no compelling argument to justify the unusual order of the procedure in the Regulations.
[245] Judgment, 20: 3742: 267.
[246] General Notice 848 in Government *Gazette* 34788 of 2 December 2011, Annexure JG 33, 10: 1685 - 1687 ("**the notice**"). The notice listed a number of Restructuring Zones ("**RZs**") in six provinces, including the Western Cape, in respect of which five RZs were listed, all in respect of the City of Cape Town. A subsequent correction notice of 15 December 2011 substituted the list of the areas in the City of Cape of Cape Town with a list of 10 areas, which comprised the five areas listed in the notice and an additional five areas; Annexure JG 34, 10: 1688.
[247] Judgment, 20: 3771: 343.
[248] Province heads, p 35 footnote 108.

123. The High Court had regard to the uncontroverted evidence of Mr Molapo of the City in respect of the process of identification of the restructuring zones (RZs) in 2011 in terms of the SHA.[249] A municipality identifies a restructuring zone, with the concurrence of the provincial government, which then submits the identified restructuring zones for designation by the Minister.[250] Mr Molapo prepared a report to the City's then Executive Mayor for purposes of the identification of the RZs.[251] That report was also annexed to Province's motivation to the Minister for declaration of the RZs in the City.[252]

124. Mr Molapo's evidence included that: (i) it was not contemplated by the City that these RZs would only be gazetted as "provisional RZs";[253] (ii) the RZs in the 2011 notice relate to RZs in all the major metropolitan areas;[254] and (iii) at all material times the City and other role-players, including the provincial DHS, regarded the notice as having legal efficacy and funding was accessed from the Social Housing Regulatory Authority ("**SHRA**") pursuant thereto.[255] The City understood that the initial five RZs identified by the City were provisional only to the extent that further RZs could be added in due course, which it then did, by adding five further areas, all 10 of which were then designated in the notice (as corrected).

125. Province also makes the contradictory argument that a designation made by the Minister's department, and not the Minister (there being no evidence of a delegation) is unconstitutional and unlawful for want of lawful authority. The

[249] Judgment, 20: 3763 - 3767: 333 - 41. This evidence in respect of the restructuring zones is at Molapo 14: 2620 - 2627: 22 - 41.
[250] Definition of "*restructuring zone*" in s 1; ss 5(d)(i), 3(1)(f) and 4(1)(e).
[251] Judgment, 20: 3763: 334; Annexure PM 2, 14: 2650 - 2659.
[252] Judgment, 20: 3771: 343; Annexure JG 32, 10:1665 - 1684.
[253] Judgment, 20: 3767: 341; Molapo, 14: 2625: 35.
[254] Judgment, 20: 3767: 341; Molapo, 14: 2625: 35.
[255] Judgment, 20: 3771: 341; Molapo: 14: 2627: 41.

evidence placed before the High Court was that the City, Province, the national DHS and the SHRA all regarded the notice as valid.

126. In accordance with the *Oudekraal* rule[256] the notice stands and is binding unless it is reviewed and set aside in terms of PAJA, alternatively, on the basis of the principle of legality.[257] If Province wished to rely on the notice being invalid for want of lawful authority, it was obliged to bring judicial review proceedings to set the notice aside.[258] There was no such counter-application in these proceedings.[259] As the Constitutional Court stated in *Kirland*, there is no reason to exempt government from this due process and, on the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights.[260]

127. In interpreting the notice, the High Court correctly and permissibly had regard to the context relevant to the designation of the notice, the conduct of the City and Province in respect of the process for designation of a RZ under the SHA, and the evidence that the notice has been interpreted in a consistent way by the parties who administer the SHA for a substantial period of time, including by providing funding for approved social housing projects in designated RZs.[261] Mr Molapo's

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[256] *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) para 26.
[257] In *Department of Transport v Tasima (Pty) Ltd.* 2017 (2) SA 622 (CC) para 146 (per Khampepe J), the majority of the Constitutional Court stated the principle as follows: "*Our Constitution confers on the courts the role of the arbiter of legality. Therefore, until a court is appropriately approached and an unlawful exercise of public power is adjudicated upon, it has binding effect merely because of its factual existence*. In *Magnificent Mile Trading 30 (Pty) Lyd v Celliers NO* 2020 (4) SA 375 (CC) para 45 the majority described this principle as applying to any situation where for whatever reason an extant administrative act is being disregarded without first being set aside.
[258]*MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) para 82. If the review were to be brought in the public interest by Province (being an organ of state) in respect of the publication of the notice by another organ of state, PAJA would apply (*Compcare Wellness Medical Scheme v Registrar of Medical Schemes and Others* 2021 (1) SA 15 (SCA) at para 20). If not, the principle of legality would apply.
[259] If Province had sought to review the notice, it would have been made clear whether or not it had been promulgated in terms of delegated authority. In the absence of such review proceedings, Province has no grounds upon which it can complain about the absence of evidence with regard to any delegated authority.
[260] As above.
[261] *Commissioner for the South African Revenue Service v Bosch and Another* 2015 (2) SA 174 (SCA) para 17.

evidence includes examples of social housing projects which have taken place with the assistance of funding under the SHA.[262] It bears emphasising that, on Province's version, there are no designated RZs in the City of Cape Town.

128. With regard to the meaning of "*surrounds*", and whether Sea Point falls within the relevant RZ, Province relies in its heads of argument on ss 3(1)(f) of the SHA requiring that RZs be *"specifically provided for in a municipality's integrated development plan"*, and that on no basis can it be said that Sea Point has been specifically provided in a RZ. This argument has not been raised before. Province has quoted only a portion of the provision,[263] without reference to the other relevant provisions of the SHA,[264] and has interpreted its meaning incorrectly. The purpose of the provision is that the RZ must be specifically provided for in a municipality's integrated development plan (our emphasis). It does not mean that a particular suburb must specifically be listed as falling within a RZ for that suburb or geographical area to fall within a RZ.

129. Province argues further that Salt River, Woodstock and Observatory are not examples of the surrounds, but are the surrounds intended by the notice, and that if those three suburbs were used for illustrative purposes only, then it is not apparent why the Department should have used three contiguous areas for the illustration. These arguments ignore Mr Molapo's direct evidence in respect of the City's use of the phraseology *"and surrounds"* when the City identified the RZs for designation, being to ensure that no areas surrounding an economic hub, for example the CBD, would be specifically excluded, that the reference to those three

[262] Judgment, 20: 3767: 341; Molapo, 14: 2625: 31.
[263] That provision falls under the section of the SHA dealing with the roles and responsibilities of national government.
[264] "*Restructuring zone*" is defined as meaning a geographic area which has been (a) identified by the municipality, with the concurrence of the provincial government, for purposes of social housing; and (b) designated by the Minister in the *Gazette* for approved projects. Section 5 of the SHA deals with roles and responsibilities of municipalities and the relevant provision is that a municipality must to the extent permitted under the MFMA, initiate and motivate the identification of restructuring zones (ss 5(d)(i)).

suburbs was intended to be illustrative rather than dispositive, that though one of the pipeline projects at the time was in the Bo-Kaap area, there was no need for the City to seek Bo-Kaap's inclusion because it had already been included in this RZ,[265] and that the notice must be afforded a generous interpretation so as to give it meaning which will advance the constitutional right to housing.[266]

CONCLUSION

130. In the circumstances, both Province and the City's appeals fall to be dismissed with costs, including the costs of two counsel.

P HATHORN SC

C DE VILLIERS

25 April 2022

[265] I.e. 'Cape Town CBD and surrounds (Salt River, Woodstock and Observatory)'; Judgment, 20: 3767: 341.
[266] Judgment, 20: 3772: 345.