IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA Case Nos: 522/2021 and 523/2021

WCHC Case Nos: 7908/2017 and12327/2017

In the matter between:

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

and

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

and in the matter between:

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

CITY OF CAPE TOWN	Third Appellant
and	
MINISTER OF HUMAN SETTLEMENTS	First Respondent
NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	Second Respondent
SOCIAL HOUSING REGULATORY AUTHORITY	Third Respondent

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INTRODUCTION

1 This matter arose from the unlawful and unconstitutional decision of the Western Cape Provincial Government to dispose of the Tafelberg Property to the Phyllis Jowell Jewish Day School ("**the School**").

2 The sale was challenged (and ancillary relief sought) in two separate applications before the High Court, which were consolidated. These were the "**RTC application**" under case number 7908/2017 and the "**National Minister's application**" under case 12327/2017.

3 On 31 August 2020, the High Court (per Gamble and Samela JJ) handed down judgment in both matters. In the RTC application, the court made the following order ("**the RTC order**"):

> "1. It is declared that the fourth and sixth respondents have the following obligations in terms of the Constitution of the Republic, 1996:
>
> (i) under s25(1) the said respondents are obliged to take reasonable and other measures, within their available resources, to foster conditions which enable citizens to gain access to land on an equitable basis;
>
> (ii) under s26(2) the said respondents are obliged to take reasonable legislative and other measures, within their available resources, to achieve the progressive realisation of the right of citizens to have access to adequate housing as contemplated in s26(1) of the Constitution.
>
> 2. It is declared that the fourth and sixth respondents have failed to comply with their respective obligations under the legislation enacted to give effect to the said rights, namely, the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008, and have accordingly breached their respective obligations under the Constitution.
>
> 3. It is declared that in so failing to comply with their obligations as aforesaid, the fourth and sixth respondents have failed to take adequate steps to

redress spatial apartheid in central Cape Town (the boundaries of which were in 2017 as depicted on the map annexed hereto marked "A");

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

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

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

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

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

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

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

9. It is declared that Sea Point falls within the restructuring zone 'CBD and surrounds (Salt River, Woodstock and Observatory)' as contemplated in sub-regulation 6.1 of the Provisional Restructuring Zone Regulations

published under General Notice 848 in Government Gazette 34788 of 2 December 2011.

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

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

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

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

4 In the National Minister's application, the court made the following order ("**the National Minister order**"):

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

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

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

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

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

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

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

5 Both the City of Cape Town[1] and the Western Cape Government[2] sought leave to appeal against the above orders (or aspects thereof).

6 After the applications for leave to appeal were filed, significant factual developments occurred. The School informed the Province that it no longer intended to pursue its rights under the contract of sale. The Province then announced that the School's decision would result in the mutual termination of the sale agreement and the return of the property to its property portfolio.[3] This rendered the High Court's orders relating to the sale of the Tafelberg property

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[1] The Fourth Respondent in case number 12327/2017.

[2] We refer to the Minister for Transport and Public Works: Western Cape, the Provincial Government of the Western Cape and the Minister of Human Settlements: Western Cape collectively as "**the Western Cape Government**" or "**the Province**".

[3] High Court's judgment on leave to appeal, vol 21, p 3882, para 4.

moot. As a consequence, the High Court denied leave to appeal against those orders.[4] Leave to appeal was granted as follows:

6.1 In the RTC application, leave was granted against paragraphs 1 – 6 and 10 – 12 of the RTC order.

6.1.1 Paragraphs 1 – 6 hold that the City, Province and Minister of Human Settlements ("**the State respondents**") bear constitutional and statutory obligations to address spatial apartheid in South Africa; hold that the State respondents have failed to comply with these obligations; and put in place a structural interdict requiring the State respondents to report back to the High Court on the steps that they have taken (and plan to take) to comply with the above obligations.

6.1.2 Paragraphs 10 – 12 declare various regulations under the Western Cape Land Administration Act ("**WCLA**") unconstitutional and invalid; declare that the disposal of the Tafelberg property in accordance with the regulations are invalid; and deal with the issue of costs.

6.2 In the National Minister's application, leave was granted against paragraphs 5 and 6 of the National Minister's order. These paragraphs repeat the order of invalidity regarding the regulations under the WCLA and deal with the question of costs.

[4] High Court's judgment on leave to appeal, vol 21, p 3909 - 3910, para 60.

7 Subsequently, this Court granted leave to appeal on additional issues. These included leave to appeal against paragraph 9 of the RTC order.[5] Paragraph 9 contains a declaration that Sea Point falls within the restructuring zone '*CBD and surrounds (Salt River, Woodstock and Observatory)*'.

8 Given the number of parties participating in this appeal, we are alive to the need to avoid undue repetition. For this reason, and given the limited role played by the SHRA, these heads of argument seek to concisely to focus on the following issues in turn:

8.1 First, the role of the SHRA;

8.2 Second, the obligations resting on the Province; and

8.3 Third, the Tafelberg property falls within a restructuring zone.

THE ROLE OF THE SHRA

9 The Social Housing Regulatory Authority ("**SHRA**") was the third applicant in the National Minister's application. It was the ninth respondent in the RTC application, which it did not oppose.

10 The SHRA contended before the High Court that the decision to dispose of the Tafelberg Property was unlawful and unconstitutional and should be set aside.

11 In doing so, the SHRA made submissions regarding the nature of the State Respondents' statutory and constitutional obligations to redress spatial injustice and the fact that the Tafelberg property fell into a restructuring zone.

5 Order of the Supreme Court of Appeal granting leave to appeal, vol 12, p 3922 – 3923.

11.1 These submissions were predominantly directed towards the relief in paragraphs 2 – 4 of the National Minister's order (which are not challenged in this appeal).

11.2 However, SHRA's submissions remain relevant to paragraphs 1 – 3 and 9 of the RTC order, which are under appeal.

12 SHRA was established in terms of section 7 of the Social Housing Act 16 of 2008 ("**Social Housing Act**"). It is the administrative body responsible for the implementation of the Housing Code's social housing programme.[6] Its mandate is amongst others "to promote an enabling environment for the growth and development of the social housing sector" and "to assist, where requested, in the process of the designation of restructuring zones".[7]

13 Thus, SHRA is an active participant and role-player in ensuring that the right of access to housing is achieved.

14 As an organ of state with the above mandate, SHRA participates in these proceedings in order to assist this Court. Although its written submissions are narrowly focused, SHRA will be available (in oral argument) to address any further aspects of this appeal that this Court may direct.

[6] Section 7(1) of the Social Housing Act establishes the SHRA as the administrative body responsible for the efficient functioning of the social housing market by regulating all social housing institutions and obtaining public funds for the delivery of social housing. The SHRA is thus the government agency responsible for the implementation of the social housing programme, which is defined in section 1 of the Act as being the "national housing programme for social housing, instituted by the Minister in terms of section 3 (4) (g) of the Housing Act, 1997."

[7] Section 11(1) of the Social Housing Act.

THE LEGAL OBLIGATIONS RESTING ON THE PROVINCE

15 Central to this appeal is the question of whether the State respondents (particularly the Province) bear a duty to redress spatial injustice.

16 The answer is 'yes'. The Province's obligation has two sources:

16.1 First, a constitutional obligation grounded in section 26 of the Constitution; and

16.2 Second, a statutory obligation flowing from the Social Housing Act and the Housing Act.

Constitutional obligation to redress spatial injustice

17 The Province's obligation to redress spatial injustice flows from section 26 of the Constitution. This section gives effect to the right of access to adequate housing. It provides that:

> "(1) Everyone has the right to have access to adequate housing.
>
> (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
>
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

18 The courts have explained the nature of the State's obligations and individuals' rights under section 26. In this regard, they have held that:

18.1 For a person to have access to adequate housing there must be land, basic services, and a dwelling.[8] Access to land for the purpose of housing is therefore included in the right of access to adequate housing.

18.2 Section 26(2) imposes a positive obligation on the State. It requires, inter alia, that the State devise a comprehensive and workable plan to meet its obligations in terms of the subsection.[9] This plan is set out in the National Housing Code.

18.3 Section 26(2) requires that the State take "reasonable legislative and other measures" to progressively realise the right. To determine whether a measure is reasonable, the Court in *Grootboom* held that it-

> "will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review."[10]

19 Recently, four judges of the Constitutional Court endorsed the High Court's view that the Constitution imposes an obligation on the State to redress spatial apartheid.[11] Majiedt J (with three judges concurring) held as follows:

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[8] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 35 ("*Grootboom*").

[9] *Grootboom* at para 36

[10] *Grootboom* at para 43.

[11] *Thubakgale v Ekurhuleni Metropolitan Municipality* 2021 JDR 3200 (CC).

20 when a court determines the content and scope of socio-economic rights, it must consider their primary purpose, which is "to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid."[12] The right of access to housing is such a right, and its purpose is both remedial and transformative.[13]

20.1 The same principle applies to the land rights that are implicit in section 25.[14]

20.2 Together, these rights (s 25 and 26) "function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today. They would ring hollow – and could not achieve their central aims – if actions to fulfil housing and land rights did not include a consideration of spatial apartheid." [15]

20.3 Majiedt J endorsed the High Court's view that "the Constitution clearly imposes an obligation on the state to address spatial apartheid. This finding was based on the right of access to housing and the right to have access to land on an equitable basis."[16] Majiedt quoted and endorsed the following paragraph of the High Court judgment, in describing the nature of the duty imposed upon the state:

> "I believe that the approach mandated by the Constitutional Court in the cases referred to takes account of these obligations, viz. that all levels of state are to provide affordable housing in locations proximal to socio-

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[12] *Thubakgale* at para 107.

[13] *Thubakgale* at para 107.

[14] *Thubakgale* at para 107.

[15] *Thubakgale* at para 107.

[16] *Thubakgale* at para 108 - 109.

economic goods, services and opportunities, as expeditiously as possible, through the design and implementation of policies and programmes that not only provide better housing to the poor and marginalised, but also challenge and overcome spatial and socio-economic inequality and exclusion."[17]

20.4 He emphasised the comprehensive nature of the right to adequate housing:

> "For present purposes, the permanent accommodation to be provided by the Municipality must be more than "four walls". It must include ensuring continued access to schools, jobs, social networks and other resources which the applicants in this case enjoy where they currently stay, and which they will lose if displaced. This interpretation is in line with spatial justice and the right to the city, and therefore also in line with the remedial and transformative purposes of socio-economic rights and the Constitution more broadly."[18]

20.5 Majiedt J also stressed that when interpreting socio-economic rights, courts must also have regard to international law. This includes the International Covenant on Economic, Social and Cultural Rights ("**CESCR**"), to which South Africa is a party.[19] The CESCR has emphasised that the right to adequate housing must be interpreted within the context of "the indivisibility of human rights, and so the right must be understood in relation to the rights to human dignity and non-discrimination." In the context of South Africa's highly segregated urban areas and scarce resources, Majiedt J observed, it should also mean that "spatial justice must be considered in determining what constitutes 'adequate housing'."[20]

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[17] *Thubakgale* at para 108.

[18] *Thubakgale* at para 110.

[19] South Africa signed the CESCR in 1994 and ratified it in 2015.

[20] *Thubakgale* at para 111.

20.6 Majiedt J pointed to General Comment No. 4, where the CESCR has explained that "adequacy" is one of the main components of the right to housing. Adequate housing has several core elements such as accessibility, affordability and location. In respect of location, the CESCR stated that:

> "Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households."[21]

21 We submit that the above reasoning is manifestly correct. The right to adequate housing in section 26 of the Constitution (read with section 25) imposes a duty upon the state to redress spatial apartheid.

Statutory obligations to redress spatial apartheid

22 The State respondents also bear statutory obligations to redress spatial apartheid. These derive from the following:

22.1 The Housing Act contains the general principles that are applicable to housing development.[22] These include giving priority to the needs of the poor, and the promotion of "the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and

[21] *Thubakgale* at para 112.

[22] The Housing Act defines defines "housing development" as: "*the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities .. .*"

prevention of slums and slum conditions".[23] These general principles are binding on all spheres of government.[24]

22.2 Part 1 of the Housing Code deals with the context in which National Housing Policy (which is prescribed by section 4 of the Housing Act) applies.[25] Clause 2 of Part A in that section records that:

> "The Code defines the aim of the Social Housing Programme as being to redress the "inequities of the Apartheid induced spatial frameworks of our cities and towns by promoting integration across income and population group divides. There is a need to provide especially poor households with convenient access to employment opportunities and the full range of urban amenities". (emphasis added)

22.3 Part 3 of the National Housing Code governs Social Housing and gives effect to the Social Housing Programme. It also sets out the Social Housing Policy.

22.3.1 The Social Housing Policy restructuring objective is threefold - it must address spatial inequality, economic inequality and social inequality in housing.

22.3.2 With regard to spatial redress, the Social Housing Policy aims to locate social housing "in specific, defined localities (mostly urban) which have been identified as areas of opportunity (largely economic) where the poor have limited or inadequate

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[23] Section 2 of the Housing Act.

[24] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) at para 200.

[25] Section 4(1) of the Housing Act enjoins the Minister to publish the National Housing Code, which must contain the national housing policy. The Housing Code was adopted by Cabinet in September 2004. Section 4(6) of the Code stipulates that it is binding on the provincial and local spheres of government.

access to accommodation, and where the provision of social housing can contribute to redressing this situation."

22.4 The Spatial Land Use Management Act, 16 of 2013 ("**SPLUMA**") also imposes obligations to the redress of spatial injustice on the state.

22.4.1 One of SPLUMA's goals is to provide for the inclusive, developmental, equitable and efficient spatial planning at the different spheres of government.[26] SPLUMA also aims to "provide a framework for policies, principles, norms and standards for spatial development planning and land use management; to address past spatial and regulatory imbalances."

22.4.2 SPLUMA mandates that spatial planning policies address racial inequality; segregation; and unsustainable settlement patterns. Its purpose is to compel the state to put in place spatial planning and land use management policies and legislation to realise the constitutional imperatives of, among others, the right of access to adequate housing and the sustainable development of land to encourage social, economic and environmental integration.

22.4.3 Redressing spatial injustice through the use of social housing is an integral component of the right of access to adequate housing. Equitable spatial planning lies at the core of

[26] See the preamble to SPLUMA.

redressing spatial injustice. For this reason, it is prescribed by SPLUMA as a land use management tool.

23 Read together, the above provisions impose an obligation upon the state to redress spatial injustice.

THE TAFELBERG PROPERTY FALLS INTO A RESTRUCTURING ZONE

24 The High Court declared that the Tafelberg property fell within the Restructuring Zone of "CBD and surrounds (salt River, Woodstock and Observatory)",[27] as contemplated in sub-regulation 6.1 of the Provisional Restructuring Zone Regulations.[28]

25 This is one of the orders that is the subject of this appeal. We submit that the High Court's order was correctly made.

26 That restructuring zone was published in General Notice 848 in the Government Gazette 34788 ("**the Notice**").[29] The Notice listed restructuring zones in six provinces, including the Western Cape. The zones listed for Cape Town were:

26.1 "CBD and surrounds (Salt River, Woodstock and Observatory)";

26.2 "Southern near – Claremont, Kennilworth and Rondebosch";

26.3 "Southern Central – Wakelake – Steenberg";

26.4 "Northern Near – Milnerton";

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27 Paragraph 9 of the RTC order, quoted above.

28 Published under General Notice 848 in Government Gazette 34788 of 2 December 2011.

29 Annexure JG33, vol 10, p 1685 – 1687.

26.5 "Northern Central – Belville, Bothasig, Goodwoods and surrounds".

27 A subsequent Correction Notice was published on 15 December 2011,[30] which (amongst other things) added the following five restructuring zones in Cape Town:

27.1 "South Eastern - Somerset West, Strand, Gordons Bay";

27.2 "Southern - Strandfontein, Mitchell's Plain, Mandalay and surrounds";

27.3 "Eastern - Brackernfell, Durbanville, Kraaifontein, Kuils River";

27.4 "Cape Flats - Athlone and surrounds (Pinelands to Ottery)";

27.5 "Far South - Fish Hoek, Simonstown".

28 The Tafelberg property fell within the restructuring zone "CBD and surrounds (Salt River, Woodstock and Observatory)".

29 This is so both at the level of a textual, contextual and purposive interpretation.

30 The relevant restructuring zone for the City of Cape Town is listed in the gazette as "CBD and surrounds (Salt River, Woodstock and Observatory)".

30.1 Sea Point is situated approximately 5 km from the CBD. On an ordinary reading, it would fall within the meaning of "surrounds".

30.2 The only question then is whether the references to Woodstock, Observatory and Salt River exclude Sea Point. They do not. They are merely examples of areas falling within the meaning of "*surrounds*".

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[30] Annexure JG34, vol 10, p 1688.

30.3 The restructuring zones that specify a particular limited area appear to indicate this using a dash (" – "). It appears that brackets are used in the Notices to provide examples, rather than specific areas.

31 In any event, the Notices must be interpreted in a common-sense, generous and purposive manner.

31.1 The purpose of restructuring zones is to facilitate social housing, not to inhibit it. The Social Housing Policy aims to locate social housing "in specific, defined localities (mostly urban) which have been identified as areas of opportunity (largely economic) where the poor have limited or inadequate access to accommodation, and where the provision of social housing can contribute to redressing this situation."

31.2 It is clear that the purpose of the Social Housing Policy is to house poor people and communities in areas of economic activity. Sea Point is an area of economic opportunities that is located close to the CBD. Against this backdrop, the restructuring zone of "CBD and surrounds (Salt River, Woodstock and Observatory)" must be generously interpreted to include Sea Point.

31.3 The above interpretation is consistent with one of the primary objectives of the Social Housing Policy and applicable legislation (including the Social Housing Act and SPLUMA),[31] which is to redress spatial injustice.

[31] SPLUMA aims to "*provide a framework for policies, principles, norms and standards for spatial development planning and land use management; to address past spatial and regulatory imbalances*."

31.4 In addition, the High Court correctly observed that the Notice is drafted in a sloppy and imprecise manner. It should not be read in a restrictive or formalistic way.

32 In coming to its conclusion that the Tafelberg property falls within a restructuring zone, the High Court correctly applied this generous, purposive and common-sense approach to interpretation.[32]

33 The Province appeals against the declaratory order in respect of the restructuring zone (i.e. paragraph 9 of the RTC order) on a number of grounds. These grounds are wrong in fact and law. They include the following:

33.1 First, the Province asserts that the declaratory order usurps the role of the Minister, who is authorised in terms of s 3(1)(f) of the Social Housing Act to designate restructuring zones. The Province maintains that it is for the Minister, not the court, to designate the restructuring zones, as the court had neither the authority nor the expertise to do so.[33] This argument misconstrues the nature of the declaratory order:

33.1.1 The declaratory order does not seek to designate new restructuring zones. It simply interprets the existing designation made by the Minister.

33.1.2 The interpretation of documents such as the Notices falls within the High Court's power and expertise.

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[32] High Court judgment, para 318 – 347. See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

[33] Provinces Heads of Argument, para 97.

33.2 Second, the Province points out that the Notice states the Department of Human Settlements "hereby publishes for public information the following provisional restructuring zones…". The Province argues that the zones are "provisional" in nature and cannot be relied upon.[34] This argument misconceives the text of the Notice:

33.2.1 "Provisional" is not used to mean "not yet operative" or "draft". Rather, it denotes that the restructuring zones are operational (i.e. they have come into effect) but may be changed or supplemented at a later stage.

33.2.2 This interpretation is confirmed by the fact that no notice was later published declaring that the restructuring zones were final. All of the concerned parties operated on the understanding that the zones declared were operational and were to be relied upon.

33.3 Third, the Province argues that the Notices declaring the restructuring zone were invalid because they were published by the Department of Human Settlements rather than the Minister herself. In particular, the Province contends that s 3(1)(f) of the Social Housing Act "requires a designation of a restructuring zone to be made by the Minister, with the result that a designation by her department cannot have legal effect. (There was no evidence of a delegation.) The Court did not address

[34] Provinces Heads of Argument, para 99.

this argument at all. The notice is unconstitutional and invalid for want of lawful authority."[35]

33.4 This argument is unsustainable. The notices state that they are published by the 'Department of Human Settlements'. The Minister is the political head of the Department. Therefore, it is clear that the Minister has caused the notice to be published. It is overly-formalistic to require that the notices specifically state that they are published by "the Minister".

33.5 <u>Fourth</u>, the Province argues that the High Court erred in having regard to the evidence when interpreting the Notices.[36] It contends that this is inconsistent with the rules of interpretation.

33.5.1 This is wrong in law. The courts have held that the words of a statute or regulation must be interpreted in their context. This may include the surrounding factual context.[37]

33.5.2 The role of evidence in assisting in contextual interpretation has recently been reaffirmed by the Constitutional Court, albeit in the context of contractual interpretation.[38]

33.6 <u>Fifth</u>, the Province argues that the Notices do not specifically mention Sea Point. This, it contends, is inconsistent with section 3(1)(f) of the

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[35] Provinces Heads of Argument, para 100.

[36] Provinces Heads of Argument, para 101.

[37] See *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para 20.

[38] *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) at paras 66-68

Social Housing Act, which states that restructuring zones must be "specifically provided for in a municipality's integrated development plan" (Province's emphasis).[39]

33.6.1 This misconstrues the meaning of the words "specifically provided for".

33.6.2 They simply mean that each municipality must identify the restructuring zones in their IDPs. It does not mean that each area falling within a restructuring zone must be expressly named.

33.6.3 This interpretation is borne out by the wording of the Notices themselves, which refer to "surrounds" in various instances without specifying which areas fall into the surrounds. See, for example, the reference in the Correction Notice to "Southern - Strandfontein, Mitchell's Plain, Mandalay and surrounds".

34 For the reasons listed above, the Province's attacks on paragraph 9 of the RTC order must fail.

CONCLUSION

35 The above arguments support the conclusion that the appeals should be dismissed with costs.

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[39] Province's Heads of Argument, para 104.

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3 May 2022

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