IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 7908/17
Case No. 12327/17

In the matter between:

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

and

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

And in the matter between

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

THIRD APPLICANTS SUBMISSIONS IN THE APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE that the Third Applicant in Case No. 12327/2017, the Social Housing Regulatory Authority, delivers herewith submissions in the Application for Leave to Appeal.

Dated at **JOHANNESBURG** on this **10th** day of **NOVEMBER 2020**.

Sgd : Fareed Jassat

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MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	First Respondent
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MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE	Third Respondent
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THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)	Fifth Respondent
TRUSTEES OF THE NDIFUNA UKWAZI TRUST	Sixth Respondent

SOCIAL HOUSING REGULATORY AUTHORITY'S WRITTEN SUBMISSIONS IN THE APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. This matter concerns the lawfulness and constitutionality of the decision of the Western Cape Provincial Government to dispose of the Tafelberg Property to the Phyllis Jowell Jewish Day School.

2. The sale was challenged 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. The Social Housing Regulatory Authority ("SHRA"), was the third applicant in the latter application. SHRA contended that the decision to dispose of the Tafelberg Property was unlawful and unconstitutional and should be set aside.

4. On 31 August 2020, the High Court (per Gamble and Samela JJ) handed down judgment in both matters. In the National Minister's application, the court made the following 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. We shall refer to this order as "the second order".

6. Both the City of Cape Town[1] and the Western Cape Government[2] seek to appeal the second order. The Western Cape Government seeks leave to appeal the whole of the order,[3] while the City limits its appeal to paragraph 7 of the order (i.e. the order relating to costs).[4]

7. SHRA opposes the Western Cape Government's application for leave to appeal.[5]

8. SHRA's counsel are not available to attend the hearing of the applications for leave to appeal on 13 November 2020. However, we do not wish to delay the hearing of the matter on account of our lack of availability. In the circumstances, SHRA has proposed that it will file brief written submissions and that the hearing will proceed in its absence. These submissions are filed pursuant to that proposal.

TEST FOR LEAVE TO APPEAL

9. The test for leave to appeal is set out in section 17 of the Superior Courts Act 10 of 2013 ("the Act"). This section provides that leave to appeal may only be given

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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] Notice of Application for Leave to Appeal: Western Cape Government, dated 18 September 2020.

[4] Notice of Application for Leave to Appeal: City of Cape Town, dated 21 September 2020.

[5] SHRA's Notice of Opposition Against Leave to Appeal, dated 19 October 2020.

where the judges concerned are of the opinion that, *inter alia*, the appeal would have a reasonable prospect of success.

10. The courts have held that section 17(1) introduces a more stringent test than that traditionally employed before the Superior Courts Act came into force in 2013.[6] In order to obtain leave, a party must convince the court—

> *"*on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."[7] (emphasis added)

11. The Province's application for leave to appeal does not meet this threshold.

NO REASONABLE PROSPECTS OF SUCCESS

12. The Province's appeal bears no reasonable prospects of success. In this regard, SHRA aligns itself with the substantive arguments raised by the National Minister and Department of Human Settlements ("the National Minister") in their written submissions.[8] We do not intend to burden these papers by repeating those arguments here.

13. Rather, SHRA draws this court's attention to the additional considerations set out below.

RESTRUCTURING ZONE

[6] *MEC for Health, Eastern Cape v Mkhitha* (1221/15) [2016) ZASCA 176 (25 November 2016) at para 16.

[7] *S v Smith* 2012 (1) SACR 567 (SCA) 570 at para 7. See also *MEC for Health, Eastern Cape v Mkhitha* (1221/15) [2016) ZASCA 176 (25 November 2016) at para 17.

[8] First and Second Applicants' Submissions: Application For Leave to Appeal in case no 12327/2017, dated 10 November 2020.

(i) The Tafelberg property fell into a restructuring zone

14. On 22 March 2017, the provincial Cabinet took a decision not to resile from the agreement to sell the Tafelberg property to the Phyllis Jowell Jewish Day School ("the School"). One of the primary considerations underpinning this decision was Cabinet's determination that the property did not fall into a restructuring zone. As a consequence, a restructuring grant (for the purposes of providing social housing) was not available in respect of the property.

15. The Cabinet's decision was based on a material mistake of fact. This Court correctly found that Sea Point (and the Tafelberg property) did fall within a restructuring zone.

16. The Province contends that the Court erred in this finding. In particular, the Province contends that:[9]

    16.1. Sea Point did not fall within a restructuring zone;

    16.2. When Cabinet reached this conclusion, it took into account an opinion by senior counsel, something that they were entitled and duty-bound to do; and

    16.3. The risk that Sea Point did not fall into a restructuring zone was one of many factors that Cabinet took into account.

17. This argument bears no reasonable prospects of success, for the following reasons:

[9] Province's Notice of Application for Leave to Appeal, para 8.2.

18. First, this Court was correct in its finding that Sea Point falls within a restructuring zone.

18.1. This is clear from the plain meaning of the text of the Notice:

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

18.1.2. Sea Point is situated approximately 5 km from the CBD. It clearly falls within the meaning of "surrounds".

18.1.3. 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*".

18.2. Even if one accepts that the wording of the Notice is ambiguous (which is denied), the Notices must be interpreted in a common-sense, generous and purposive manner.

18.2.1. 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*." 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.

18.2.2. 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[10]), which is to redress spacial injustice.

18.2.3. In addition, this 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.

18.3. In coming to its conclusion that the Tafelberg property falls within a restructuring zone, the Court correctly applied this generous, purposive and common-sense approach to interpretation.[11]

19. Second, the risk that 'Sea Point did not fall into a restructuring zone' was not simply one of many factors that Cabinet took into account when making its decision. It was a critical factor. This is clear from the Cabinet Minutes which recorded the decision not to resile from the agreement.[12] The Minutes state that "*the Cabinet considered the following factors to be material during the deliberations on whether or not to resile from the Tafelberg sale agreement*:…" (emphasis added). The

[10] 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*."
[11] High Court judgment, para 318 – 347.
[12] Core Bundle of Documents, p 118.

factors listed include the conclusion that the Tafelberg property does not fall within a restructuring zone. Therefore, it is clear that this factual mistake materially influenced Cabinet's decision not to resile from the agreement.

20. It is irrelevant that there were other factual considerations that informed the Cabinet's decision. It is well-established in law that a single bad reason will render the entire decision reviewable. In this regard, the Court in *Patel v Witbank Town Council* held that:

> "[W]hat is the effect upon the refusal of holding that, while it has not been shown that grounds 1, 2, 4 and 5 are assailable, it has been shown that ground 3 is a bad ground for a refusal? Now it seems to me, if I am correct in holding that ground 3 put forward by the council is bad, that the result is that the whole decision goes by the board; for this is not a ground of no importance, it is a ground which substantially influenced the council in its decision . . . . This ground having substantially influenced the decision of the committee, it follows that the committee allowed its decision to be influenced by a consideration which ought not to have weighed with it."[13]

21. Therefore, the Court was correct in holding that the Province's decision not to resile from the Tafelberg sale agreement fell to be reviewed and set aside.

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[13] *Patel v Witbank Town Council* 1931 TPD 284 Tindall J said (at 290). This principle was endorsed by the court in *Westinghouse Electic v Eskom Holdings* 2016 (3) SA 1 (SCA) at paras 44-45:

> [44] It is a well-established principle that if an administrative body takes into account any reason for its decision which is bad, or irrelevant, then the whole decision, even if there are other good reasons for it, is vitiated.
>
> [45] This passage was approved by this court in *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576(SCA) para 34 where Cameron JA said: 'This dimension of rationality in decision-making predates its constitutional formulation.' Once a bad reason plays a significant role in the outcome it is not possible to say that the reasons given for it provide a rational connection to it. (The decision of this court was reversed by the Constitutional Court but this principle was not questioned: *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24; [2007] ZACC 22 (CC)).

(i) Notice declaring restructuring zone invalid

22. The Province raises a second ground for its conclusion that the Tafelberg property did not fall within a restructuring zone. It contends 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:

> "10.2. the order (and judgment) overlooks the fact that neither the 2 December 2011 notice nor the 15 December 2011 notice ('the notices') was published by the fifth respondent (as opposed to by her Department), despite the fact that section 3(1)(f) of the Social Housing Act confers the power to designate restructuring zones on the fifth respondent herself, and the notices are accordingly invalid for want of lawful authority."[14]

23. This argument is unsustainable for the following reasons:

23.1. First, 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".

23.2. Second, it is not permissible to rely on reasons that were introduced after a decision was taken.[15] The wording of Cabinet's decision against resiling

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[14] Province's Notice of Application for Leave to Appeal, para 10.2.

[15] *National Lotteries Board v South African Education and Environment Project* 2012 (4) SA 504 (SCA) at para 24 – 28:

> "[24] The high court dismissed this new ground on another basis; it was impermissible, the learned judge said, for the board to rely on new reasons for the first time in its answering affidavits….
>
> [26] In my view reliance on Fidelity Cash is misplaced. The question here is not whether there were other reasons in the record that justified the board's decision, but whether it could give reasons other than those it gave initially for refusing the application.

from the Tafelberg sale agreement makes clear that decision was based on the understanding that the Tafelberg property did not fall within one of the existing restructuring zones. The decision was not based on a concern that the existing restructuring zones had not been properly or lawfully designated by the Minister.

CONCLUSION

24. We therefore submit that the Province's application for leave to appeal should be dismissed with costs.

EMMA WEBBER

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11 November 2020

Chambers, Johannesburg

[28] … This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right."