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

CASE NOs: 7908/2017
12327/2017

In the matter between:

THOZAMA ANGELA ADONISI	First Applicant
PHUMZA NTUTELA	Second Applicant
SHARONE DANIELS	Third Applicant
SELINA LA HANE	Fourth Applicant
RECLAIM THE CITY	Fifth Applicant
TRUSTEES OF 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

MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE Second Respondent

CITY OF CAPE TOWN Fourth Respondent

THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC) Fifth Respondent

TRUSTEES OF THE NDIFUNA UKWAZI TRUST Sixth Respondent

FIRST, SECOND, SIXTH AND EIGHTH RESPONDENTS' HEADS OF ARGUMENT IN THE APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION

1. This is an application by the first, second, sixth and eighth respondents for leave to appeal to the Supreme Court of Appeal against the whole of the orders of this Court dated 31 August 2020 under case numbers 7908/2017 and 12327/2017 ('the first order' and 'the second order') and the parts of the judgment relevant to those orders, including the orders of costs. The parties are cited as in case

number 7908/2017, and we use the same abbreviations as in the application for leave to appeal.

2. The application for leave to appeal is opposed by the NU applicants, the national Minister and the ninth respondent.

3. The NU applicants and the national Minister have filed two short affidavits in which they refer to a joint statement published by the first and second respondents on 18 September 2020, after judgment was handed down, which they say renders any appeal either entirely or partially moot ('the joint statement'). The joint statement was in the following terms:

> '*The Western Cape Government can now confirm that, after reflecting on the recent judgment handed down by the Western Cape High Court, the Phyllis Jowell Jewish Day School have indicated to us that they do not intend to pursue their rights under this contract of sale any further – a decision which we believe will result in the mutual termination of the sale agreement and the return of the property to the Western Cape Government's property portfolio.*'

4. In the affidavit delivered by the national Minister on 4 November 2020 she says that:

   4.1. if the sale agreement has in fact been cancelled by agreement, then the application for leave to appeal is moot insofar as the WCG respondents seek leave to appeal against the orders pertaining to the status of the sale agreement; and

4.2. having requested from the WCG respondents confirmation that the sale agreement has in fact been terminated, and having received no formal response, the national Minister will proceed on the assumption that the agreement has been cancelled, and her opposition to the application for leave to appeal will focus on the intended appeal having no practical effect or result, falling to be dismissed on that ground alone in terms of s 16(2)(a)(i) of the Superior Courts Act 10 of 2013.

5. In the affidavit delivered by the NU applicants on 4 November 2020, they also refer to the content of the joint statement, which they describe as being an important piece of information which is not reflected in the application for leave to appeal. This information, they say, is highly relevant to whether or not aspects of the WCG respondents' application for leave to appeal ought to be dismissed in terms of s 16(2)(a)(i) of the Superior Courts Act.

6. The criticism implicit in the NU applicants' affidavit that the joint statement ought to have been referred to in the application for leave to appeal is misplaced. The approach adopted by the national Minister, namely that the application for leave to appeal should be dismissed on the basis that the sale agreement has been cancelled, is also incorrect both factually and legally.

7. As matters stood when the application for leave to appeal was delivered, the sale agreement had not been cancelled and remained in place. That is still the position now. Until the sale agreement is cancelled, the legal position which pertained when the judgment and orders were handed down continues to pertain. The joint

statement has no legal effect, and therefore has no effect on the application for leave to appeal.

8. Even if the sale agreement had been cancelled (or is cancelled before the hearing of the application for leave to appeal), very little would turn on that because:

8.1. the first order contains wide-ranging relief which extends far beyond that which pertains to the sale agreement and the impugned decisions (the relief pertaining to the sale agreement and the impugned decisions is contained in paras 7, 8 and 11 of the first order);

8.2. the second order also contains relief which extends beyond that which pertains to the sale agreement and the impugned decisions, although such relief is narrower in ambit than in the case of the first order (the relief pertaining to the sale agreement and the impugned decisions is contained in paras 2, 3 and 4 of the second order); and

8.3. even if parts of the first and second orders were to become moot (namely, those pertaining to the sale agreement and the impugned decisions), an appeal against these parts of the order would not fall within the ambit of s 16(2)(a)(i) of the Superior Courts Act because it would raise more than one discrete legal issue of public importance which will affect matters in the future, including the correct interpretation of the Government Immovable Asset Management Act 19 of 2007 ('GIAMA'), and the

interests of justice require that these issues be determined.[1]

9. The wide-ranging and entirely separate orders described in paragraphs 8.1 and 8.2 above are:

9.1. the declarator that the WCG has breached its obligations in terms of ss 25(5), 26(1) and 26(2) of the Constitution, and the Housing Act 107 of 1997 and the Social Housing Act 16 of 2008, to provide social housing in an area defined by the Court as 'central Cape Town' (paras 2 and 3 of the first order);

9.2. the direction that the WCG must comply with its constitutional and statutory obligations in paragraph 9.1 above (para 4 of the first order);

9.3. the direction that the WCG must (jointly with the City) file a comprehensive report under oath by 31 May 2021 stating what steps it has taken to comply with its constitutional and statutory obligations in paragraph 9.1 above, what future steps it will take in that regard and when such future steps will be taken (para 5 of the first order);

9.4. the declarator that Sea Point falls within the restructuring zone '*CBD and surrounds (Salt River, Woodstock and Observatory)*' as contemplated in the Western Cape Land Administration Regulations (para 9 of the first

[1] *President of the Republic of South Africa v Democratic Alliance and Others* 2020 (1) SA 428 (CC) paras 14 to 19.

order);

9.5. the declarator that regulation 4(6), and the proviso in regulation 4(1) of the Western Cape Land Administration Regulations, are unconstitutional and invalid (para 10 of the first order and para 5 of the second order); and

9.6. the declarator that the failure of the WCG to consult and engage with the national government in relation to its intention to dispose of the Tafelberg properties constituted a contravention of the WCG's obligations in terms of Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005 ('the IGRFA') (para 1 of the second order).

10. It is submitted that the application for leave to appeal in respect of each of these orders (and the parts of the judgment associated with them) complies with the requirements of s 17(1) of the Superior Courts Act.

11. Finally, although the issue of mootness does not arise for determination by this Court at all, these heads of argument proceed on the assumption that the issue is likely to arise in an appeal before the Supreme Court of Appeal should leave be granted (on the basis that the sale agreement would by then have terminated), and our focus is therefore on the aspects described in paragraph 8 above.

12. The remainder of these heads of argument are organised as follows:

12.1. The test for leave to appeal (Part A);

12.2. The grounds of appeal unrelated to the orders pertaining to the sale agreement and impugned decisions (Part B); and

12.3. The grounds of appeal which are related to the orders pertaining to the sale agreement and impugned decisions, but which do not fall within the ambit of s 16(2)(a) of the Superior Courts Act (Part C).

PART A: TEST FOR LEAVE TO APPEAL

13. Section 17(1) of the Superior Courts Act provides that:

> '*(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a) (i) the appeal would have a reasonable prospect of success; or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); …*'

14. Section 16(2)(a)(i) provides that:

> '*When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.*'

15. The effect of s 17(1)(a)(i) of the Superior Courts Act is that leave to appeal should be given if there is a reasonable prospect that another court might come

to a different conclusion. This criterion, which has over many years been adopted in relation to the question of leave to appeal,[2] has now obtained statutory force.

16. Although a question arises whether the use of the word 'would' in s 17(1)(a) of the Superior Courts Act raises the bar of the test to be applied to the merits before leave should be granted, this has not been established by the Supreme Court of Appeal or the Constitutional Court, and remains unsettled. We submit that the test remains as it has always been, but that regardless of the level of the bar, the requirement is met in the present case.[3]

17. The effect of s 17(1)(a)(ii) of the Superior Courts Act is that notwithstanding the Court's view of the prospects of success, leave to appeal should be granted where there are compelling reasons for the appeal to be heard. Although the merits remain vitally important and often decisive, if the Court is unpersuaded of the prospects of success it must still enquire into whether there is a compelling reason to entertain the appeal. A compelling reason includes an important question of law or a discrete issue of public importance that will have an effect on future disputes.[4]

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[2] *Van Heerden v Cronwright and Others* 1985 (2) SA 342 (T) at 343H.

[3] In *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 JDR 1211 (GP) para 25, a full bench of the Gauteng Division held that the use of the word 'would' in the Superior Courts Act indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. This principle has not, as far as we are aware, been taken up by the higher courts. Although Van Loggerenberg in Erasmus *Superior Court Practice* relies on the unreported case *Notshokovu v S* (157/15) [2016] ZASCA 112 (7 September 2016) for the establishment of this principle by the Supreme Court of Appeal, it is not clear that such reliance is correct.

[4] Wallis JA for the Court in *Minister of Justice and Constitutional Development and Others v Southern Africa*

18. Finally, in terms of s 17(1)(b) of the Superior Courts Act, leave to appeal may only be given where the judges concerned are of the opinion that the decision sought on appeal does not fall within the ambit of s 16(2)(a) – i.e. that the decision sought is not one which would have no practical effect or result. The Supreme Court of Appeal has established that an appeal will have a practical effect or result when it raises a discrete legal issue of public importance, the answer to which would affect matters in the future and on which the decision of the appeal court is required.[5]

19. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will come to a different conclusion as regards:

19.1. the orders in paragraph 9 above and the legal reasons underpinning them; and

19.2. the legal reasons underpinning the relief pertaining to the sale agreement and impugned decisions.

Litigation Centre and Others 2016 (3) SA 317 (SCA) paras 22 and 23; *Zuma v Democratic Alliance and Others* 2018 (1) SA 200 (SCA) para 57; *Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd* 2020 (5) SA 35 (SCA) para 2.

[5] *Van Staden NO and Others v Pro-Wiz Group (Pty) Ltd* 2019 (4) SA 532 (SCA) paras 5 to 6; *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* 2013 (3) SA 315 (SCA) para 5; *Tshwane City and Others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) paras 5 to 7; *Southern African Litigation Centre supra* paras 19 to 21; *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) paras 13 and 14; and *Mabaso v National Commissioner of Police and Another* 2020 (2) SA 375 (SCA) paras 7 to 10. The Supreme Court of Appeal has observed that there is little if any discernible difference between this approach and the one developed by the Constitutional Court in relation to mootness, namely whether or not it would be in 'the interests of justice' for the Court to consider a matter (*Qoboshiyane* para 6). For this test see *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as* Amicus Curiae*)* 2006 (1) SA 144 (CC) paras 28 to 30; and more recently *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and Another* 2020 (4) SA 409 (CC) paras 46 to 50 and the majority judgment in *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) paras 109 to 117.

20. We submit further that, quite apart from the prospects of success, each of these involves important questions of law or discrete issues of public importance that will have an effect on future disputes.

21. Lastly, the applicability of s 16(2)(a) of the Superior Courts Act does not arise at all in respect of the orders in paragraph 9 above. These will continue to have a far-reaching practical effect and result despite the cancellation of the sale agreement.

22. When it comes to the relief pertaining to the sale agreement and the impugned decisions, while the orders themselves will, if the sale agreement in cancelled, cease to have an immediate effect on the parties, an appeal would nevertheless raise discrete legal issues of public importance, the answer to which would affect matters in the future and on which the decision of the Supreme Court of Appeal is required. To this extent, an appeal against these too would fall outside the ambit of s 16(2)(a) of the Superior Courts Act.

PART B: GROUNDS OF APPEAL UNRELATED TO ORDERS PERTAINING TO THE SALE AGREEMENT AND IMPUGNED DECISIONS

B.1 An obligation to provide social housing in central Cape Town

23. Paragraphs 2 and 3 of the first order are premised on a failure by the WCG to comply with its obligations in terms of ss 25(5) and 26(2) of the Constitution, the Housing Act and the Social Housing Act arising from its failure to provide

social housing in an area defined by the NU applicants as 'central Cape Town'.[6]

24. Section 25(5) provides: '*The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*'

25. Section 26 of the Constitution provides:

> '*(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.*'

26. In accordance with s 26(2) of the Constitution, the state passed, among other legislation, the Housing Act, which came into effect on 1 April 1998, and the Social Housing Act, which came into effect on 1 September 2009.[7]

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[6] See for example the following (our emphases):

- '*... It must be stressed, therefore, that RTC's application is fundamentally based on the obligation to provide social housing in central Cape Town and its surrounds*' (judgment para 37)
- '*[The NU applicants] attack the failure of the Province and the City, over the first 25 years of democratic rule, to address the issue of spatial apartheid in central Cape Town, and to this end it seeks declaratory relief, and a structural interdict, to hold the authorities to account in respect of their alleged failure to comply with their respective constitutional and statutory obligations in that regard*' (judgment para 48)
- '*Firstly, it was argued that the housing programmes implemented by the Province and the City since the commencement of the constitutional era have not been balanced and flexible, having made no provision for a significant segment of society to progressively realise the right to housing under s26 of the Constitution. That significant segment was defined as that group of people in need of affordable housing (as opposed to RDP/BNG housing) in central Cape Town*' (judgment para 429)
- '*Mr. Hathorn SC stressed that the purpose of the supervisory relief was to ensure that the right of access to adequate housing, by persons who qualified therefor, was realised on a progressive basis in central Cape Town*' (judgment para 435).

[7] The state also passed the Spatial Planning and Land Use Management Act 16 of 2013, which came into effect on 1 July 2015. While the NU applicants originally relied on this Act in support of their case, they seem to have abandoned this, presumably because it came into force very shortly before the first impugned decision was taken. It goes without saying that this case is about social housing and not about land use planning, which is presumably a further reason that the first order (para 2) does not refer to it.

27. The Housing Act requires the balancing of competing housing interests. Thus s 2 of the Housing Act provides that:

> '*(1) National, provincial and local spheres of government must –*
>
> *(a) give priority to the needs of the poor in respect of housing development;…*[8]
>
> *(b) …*
>
> *(c) ensure that housing development –*
>
> *(i) provides as wide a choice of housing and tenure options as is reasonably possible;…*'

28. The Social Housing Act was passed in recognition of the fact that there is a dire need for affordable rental housing for low- to medium-income households which cannot access rental housing in the open market, and focuses on one aspect of housing development.

29. Neither the NU applicants nor the Court takes issue with the WCG's general performance as regards the provision of housing. The NU applicants accept, for example, that the DHS spends the whole of its budget[9] and that it consistently receives clean audits.[10]

30. Nor do the NU applicants and the Court identify specific provisions in the Social Housing Act with which the WCG has failed to comply. This too is unsurprising

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[8] Section 26 of the Constitution is in the first place concerned with the homeless. Thus in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 44 the Constitutional Court said this: '*Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right…. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*'

[9] WCG AA (NU) para 143, record 2721.

[10] WCG AA (NU) para 146, record 2723.

given:

30.1. the detailed account of the WCG's social housing pipeline contained in the main answering affidavit;[11]

30.2. the fact that by 29 June 2010, the WCG had submitted for designation by the national Minister five proposed restructuring zones, all of which are located in the Cape Metropole, including the one referred to as '*CBD and surrounds (Salt River, Woodstock and Observatory)*' (as required by s 4(1)(e) of the Social Housing Act); [12]

30.3. the submission, on 29 June 2010, by the WCG for designation by the national Minister of a further six proposed restructuring zones also located in the Cape Metropole; and

30.4. the fact that the WCG was recognised by the national government in 2013 and 2015 as the leading province for delivery of social housing (this award in recognition of excellence having ceased since then). [13]

31. Instead, what the NU applicants say and what the Court finds is that the WCG has failed in its obligation to provide social housing in 'central Cape Town'.

32. The difficulty with this finding is that there is no such obligation contained in

[11] WCG AA (NU) paras 182 to 208, record 2755-2766.
[12] WCG AA (NU) para 175, record 2749; read with annexure JG32 record 3282-3283.
[13] WCG AA (NU) para 148, record 2727.

either the Housing Act or in the Social Housing Act.[14] The NU applicants and the Court have therefore resorted to general reliance on s 26 of the Constitution.

33. Such reliance is however precisely what the principle of subsidiarity prohibits.

34. In *My Vote Counts* the Constitutional Court held as follows:[15]

> '*These considerations yield the norm that a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right…. Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role. Over the past 10 years, this Court has often affirmed this. It has done so in a range of cases. First, in cases involving social and economic rights, which the Bill of Rights obliges the state to take reasonable legislative and other measures, within its available resources, to progressively realise, the Court has emphasised the need for litigants to premise their claims on, or challenge, legislation Parliament has enacted….*'

35. The principle of subsidiarity is not raised as a technicality. It is a foundational principle based on the consideration that resort to constitutional rights and values may not be freewheeling or haphazard. The Constitution is primary, but its

[14] Indeed, the NU applicants themselves point out that the term 'central Cape Town' is not defined anywhere in the Rule 53 record and is not used in City or Provincial planning policies. The term was therefore developed by the NU applicants' expert, Dr Odendaal, who relied on '*spatial planning characteristics*' to define the area. Referring to the City and the WCG's '*constitutional and statutory obligations in terms of the Constitution, SPLUMA, LUPA and the Social Housing Act and the various applicable policies (such as spatial development frameworks) to address spatial injustice*', she expresses the opinion that the City and the WCG have not discharged their obligations to redress spatial apartheid in 'central Cape Town' (SFA (NU) paras 312 to 316, record 945 to 947).

[15] *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC) paras 53 and 54.

influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first.[16]

36. To rely directly on the Constitution where specific and detailed legislation has been passed to give effect to constitutional rights would be to undermine the legislature.

37. The freewheeling or haphazard approach adopted by the NU applicants is evident in paragraphs 2 and 3 of the first order, which draw no distinction between the WCG and the City, despite the fact that the Housing Act and the Social Housing Act place different obligations on the two spheres of government (as, of course, does the Constitution).

38. It is submitted that the failure by the Court to identify specific obligations in the Housing Act and the Social Housing Act with which the WCG respondents have failed to comply undermines the principle of subsidiarity and gives rise to a clear ground of appeal.

39. In any event, in order to declare that the WCG has failed to comply with its obligations in terms of s 26 of the Constitution the Court would need to have found that the WCG has acted unreasonably in its efforts to give effect to the housing right generally. This assessment would need to have been made in light of the full range of the WCG's delivery and other constitutional obligations, including those pertaining to health and education; the WCG's budgetary

[16] *My Vote Counts supra* para 52.

constraints; the range and extent of the housing need, including by the poorest of the poor; and the fact that the right of access to housing is one of several socio-economic rights which are to be realised progressively. This the Court did not do.

40. Finally, to the extent that the Court has relied on an alleged breach by the WCG of its obligations in terms of s 26 of the Constitution because of a perceived failure to adopt suitable policies to give effect to social housing,[17] that gives rise to a further ground of review.[18]

41. The Court says in this regard:[19]

> '*As Mr Hathorn SC pointed out, the State has discharged its legislative duty under s 26(2) by passing the Housing Act (as the primary statutory instrument) and the SHA (which targets a large and clearly defined group of working people who earn between R5000 and R15 000 per month), so as to afford that group the right to pursue access to affordable housing. The next question is whether the executive arm of state (in this case the Provincial Cabinet) has put in place suitable policies to enable the beneficiaries of the rights afforded under the SHA to assert access to those rights.*'

[17] Judgment paras 473 to 481.
[18] The Court says, among other things: '*... what the court considers when there is a challenge in respect of a socio-economic right, is the obligation imposed on the State to take reasonable legislative and other measures progressively to realise the right in question, in casu, the right afforded under s26 to adequate housing*' (judgment para 473).
[19] Judgment paras 475 to 475 (our emphasis). The Court goes on to say: '*As the evidence unequivocally establishes, the answer to that question must be a firm "No". At the time this application was launched by RTC, there was no policy put in place by the Province to enable working people to access affordable housing under the SHA, whether in central Cape Town "and surrounds" or elsewhere in the Metro.*'

42. The Court erred in framing the question in this way because:

42.1. Section 26(2) of the Constitution refers to '*reasonable legislative and other measures*' which must be taken within the state's available resources to achieve the progressive realisation of the housing right – it does not refer to the adoption of policy specifically, but to measures generally;

42.2. What these measures may be depends entirely on what is reasonably required to give effect to the housing right. Thus if, as here, there is a national Act which has as its focus the provision of social housing, and the provincial sphere of government has been giving effect to that Act through the adoption of a provincial plan in the form of a social housing pipeline, that would constitute 'other measures';

42.3. A policy to '*enable working people to access affordable housing under the SHA, whether in central Cape Town "and surrounds" or elsewhere in the Metro*' (which the Court says ought to have been adopted) would not be required where, as here, this is governed by national legislation which is being implemented by the WCG;

42.4. This was not the nature of the NU applicants' challenge, as the Court held elsewhere in the judgment:[20] '*Rather, said counsel, the challenge was in respect of the manner in which the constitutional and statutory*

[20] Para 66 (our emphasis).

obligations (as well as the policies formulated in terms of the applicable legislation) had been implemented by the Province and the City'; and

42.5. It is neither appropriate nor competent for a court to direct which issues government ought to be adopting policy on, any more than a court can direct this in regard to the adoption of legislation.[21]

43. The further suggestion that there was a policy shift in March 2017, and that this was a stratagem designed to make the sale of the Tafelberg properties more palatable to this Court,[22] is also without foundation. The social housing pipeline has been in place throughout the relevant time.

44. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will come to a different conclusion as regards paragraphs 2 and 3 of the first order and the parts of the judgment underpinning them. We submit further that these orders and aspects of the judgment raise important questions of law and discrete issues of public importance that will have an effect on future disputes, and that there is therefore a compelling reason why the appeal should be heard.

[21] In *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 47 the Constitutional Court said: '*However, courts have a duty to interpret and apply the law. On the assumption of office, each judge must swear or affirm to administer justice in accordance with the Constitution and the law. The doctrine of the separation of powers requires the legislature to make law and the courts to interpret and apply it to the best of their ability.*' In *My Vote Counts supra* paras 155 and 156 the Constitutional Court held that: (a) it is for Parliament to make legislative choices as long as they are rational and otherwise constitutionally compliant; (b) where applicants seek to prescribe to Parliament to legislate in a particular manner, they impermissibly trench on Parliament's terrain, which is proscribed by the doctrine of separation of powers.

[22] Judgment paras 483 and following.

B.2 Direction to comply with the obligation to provide social housing in central Cape Town

45. We submit that the direction in paragraph 4 of the first order, namely that the WCG must comply with its constitutional obligations in terms of ss 25(5) and 26(2) of the Constitution and its statutory obligations in terms of the Housing Act and the Social Housing Act, is impermissibly vague and has no practical effect. It assumes, incorrectly, a failure on the part of the WCG to have complied with these obligations. Insofar as the direction is intended to be limited to paragraph 3 of the first order, i.e. the redress of spatial apartheid in central Cape Town according to boundaries declared by the Court, no such obligation is to be found in the Constitution or either of those Acts. Paragraph 4 of the first order, too, falls to be set aside on appeal.[23]

B.3 Structural interdict

46. In paragraph 5 of the first order, the Court directs the City and the WCG 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* [ss 25(5) and 26(2) of the Constitution, the Housing Act and the Social Housing Act], *what future steps they will take in that regard and when such future steps will be taken*'.

[23] It is implicit in s 16(2)(a)(i) of the Superior Courts Act that such orders should not generally be made.

47. More specifically, the Court directs the City and the WCG to:

47.1. consult with '*all departments of State and organs of State necessary to discharge their duty in so reporting to the Court*'; and

47.2. include in their report '*their respective policies and the integration thereof*' as regards the provision of social housing in central Cape Town.

48. Lastly, the NU applicants are granted leave to file an affidavit responding to the reports within one month of their having been served (paragraph 6 of the first order).

49. The effect of this order appears to be that the WCG must, jointly with the City:

49.1. file a report in which it sets out all the steps it has taken to give effect to the rights in ss 25(5) and 26(2) of the Constitution, and in the Housing Act and Social Housing Act, and

49.2. prepare a policy (which has been integrated with a policy by the City) regarding the provision of social housing in central Cape Town – in other words, the WCG must develop a policy aimed at achieving social housing in central Cape Town.

50. The direction in paragraph 49.1 above is, with respect, curious in light of the fact that the WCG filed comprehensive answering affidavits in which it did precisely this. It is not apparent from the judgment what further reporting is required.

51. But the far more problematic aspect of the structural interdict is that it implies that the Court may take upon itself the role of arbiter of all housing policy and implementation in the Western Cape.

52. The order undermines the doctrine of the separation of powers in a very direct way.

53. The Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.

54. Thus:

> '*Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.*'[24]

55. Paragraph 5 of the first order effectively requires the WCG to provide social

[24] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 63.

housing in an area defined by the NU applicants' expert as 'central Cape Town' (and declared by the Court to be that area) or to make proposals in that regard, and envisages that the Court will assess, with the assistance of the NU applicants, whether or not what is proposed by the WCG is reasonable.

56. In short, the order envisages that the Court will assess myriad complex political choices, including the best use of state-owned property; the optimal allocation of resources across housing programmes; and the prioritisation of areas for social housing. In this way, the order signals an intention on the part of the Court to usurp the role of a democratically-elected government.

57. The order does this despite the fact that, quite apart from a lack of constitutional authority, the Court possesses neither the administrative nor the technical expertise required to make such assessments. The Court will have to decide, for example, whether it is better to spend the WCG's limited housing resources on 100 social housing units in central Cape Town or 400 low-cost housing units in Worcester. Such a decision falls outside its competence, in every respect.

58. The Constitutional Court has said that '*the duty of determining how public resources are to be drawn upon and reordered lies in the heartland of executive-government function and domain*'.[25] It pointed out that such decisions call for policy-laden and polycentric decision-making,[26] thereby using the language of a long line of cases of the Supreme Court of Appeal and the Constitutional Court

[25] *National Treasury supra* para 67.
[26] Para 68.

which have expressed the importance of deferring to organs of state in regard to decisions of this kind.

59. In granting this order, the Court failed entirely to engage with this principle, which was put up by the WCG in its answering affidavits.[27]

60. The structural interdict was also granted despite the fact that the NU applicants failed to demonstrate unreasonableness on the part of the WCG government in its efforts to give effect to the rights in terms of ss 25(5), 26(1) and 26(2) of the Constitution.

61. As the Constitutional Court held in *Mwelase*:[28]

> '*In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief*....'

62. The Constitutional Court affirmed many of its earlier well-established principles in stating:

62.1. It had always recognised the limitation of its judicial authority and lack

[27] The argument as regards the separation of powers and deference was also made in paras 13 to 29 of the WCG respondents' heads of argument.
[28] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) para 48.

of capacity to perform functions reserved for other arms of state.[29]

62.2. The Constitutional Court and other courts have steered clear of the determination and arrangement of budgets on the ground that this function falls exclusively within the domain of the executive. Interference by the judiciary on matters that have budgetary implications has always been limited to deciding whether plans adopted by the executive itself, without any intervention by courts in the process leading up to adoption, constituted reasonable measures envisaged in the Constitution. In this way a balance has been maintained between the judiciary and other branches of the state.[30]

62.3. '*No matter how egregious the breaches of the Constitution by the other arm are and how loud the facts of a particular case call for justice, a court may not step in and exercise powers or perform functions entrusted to other arms of the state. This is because the Constitution does not authorise the Judiciary to replace the other arms and exercise their powers or perform their functions where there is a total failure by those arms and that failure causes gross injustice on innocent third parties. It bears repeating that the role of the Judiciary is to enforce the Constitution by declaring that the other arm has breached the Constitution and ordering it to rectify the breach. In addition, the*

[29] Para 101.
[30] Para 102.

Judiciary may supervise the rectification process by the errant arm.'[31]

63. But the NU applicants have not shown, and the Court has not found, an infringement of s 26 of the Constitution in this case, let alone an egregious one.[32]

64. Furthermore, by requiring a joint report by the WCG and the City, the structural interdict impermissibly conflates the roles of the provincial and local spheres of government, which have separate and distinct constitutional and statutory duties.

65. Finally, inasmuch as the orders are intended to ensure co-ordination between the spheres of government, they are fundamentally misconceived because they omit the most important sphere, being the national sphere. The national sphere is, amongst other considerations, the source of funding for social housing.

66. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will set aside the orders in paragraphs 5 and 6 of the first order and the parts of the judgment underpinning them. We submit further that these orders

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[31] Para 108.

[32] The Constitutional Court in *Mwelase* held further (para 51, our emphases): '*the courts ... step in only when persuaded by argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programmes. In this, the courts undertake no self-appointed role, but seek only to carry out their constitutionally mandated function with appropriate restraint. In* Treatment Action Campaign*, this Court noted that, where the state has failed to give effect to its constitutional duties, the Constitution obliges the Court to say so: "In so far as that constitutes an intrusion into the domain of the [E]xecutive, that is an intrusion mandated by the Constitution itself." And in* Mohamed*, this Court noted that to "stigmatise" a court order "as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law". In the same vein, the Court warned in* Doctors for Life*, that the bogeyman of separation of powers concerns should not cause courts to shirk from this constitutional responsibility:*

> *"[W]hile the doctrine of separation of power is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty.*"'

and aspects of the judgment raise important questions of law and discrete issues of public importance that will have an effect on future disputes, and that there is therefore a compelling reason why the appeal should be heard.

B.4 Regulation 4(6) and proviso in regulation 4(1) declared unconstitutional and invalid

67. In paragraph 10 of the first order and in paragraph 5 of the second order, the Court declares that regulation 4(6) and the proviso in regulation 4(1) of the Western Cape Land Administration Regulations ('the impugned regulations') are unconstitutional and invalid.

68. In granting this order, the Court committed what are, in our submission, several material errors of law and fact.

69. First, the order is premised in part on a finding of inconsistency between the impugned regulations on the one hand and s 3(2) of the Western Cape Land Administration Act 6 of 1998 ('the WCLAA') on the other. This finding is based on an incorrect interpretation of the words 'proposed disposal' in s 3(2) of the WCLAA.

70. In this regard, the Court found incorrectly that the constitutional context of the WCLAA is an obligation on the WCG '*to address historical injustices perpetuated through the deprivation of the majority of … citizens of access to*

land',[33] when in fact the constitutional context of the WCLAA is the power conferred on the WCG in terms of s 104 of the Constitution – the power to acquire and dispose of property being necessary for a provincial government to give effect to the full range of its constitutional obligations.

71. The Court also assumed incorrectly that procedural fairness necessarily entails the granting of a hearing before a decision is taken, when that is not the case. It is not always necessary or desirable to offer a hearing before a decision is taken – for example where a decision is part of a bigger process which ultimately caters for the right to be heard.[34] In *Buffalo City Municipality*, for instance, the Supreme Court of Appeal held that the failure to afford a hearing to a landowner before serving him with a notice of expropriation having the effect of preventing him from alienating his immovable property was not unconstitutional.[35]

72. The Court also erred in finding that no useful purpose would be served by adopting the interpretation of 'proposed disposal' contended for by the WCG (namely that an agreement to dispose, which is subject to a resolutive condition pertaining to public participation, is a 'proposed disposal'), when in fact:

72.1. the interpretation contended for by the WCG allows for it to secure offers which have been found by the provincial property committee to be advantageous, by keeping offerors locked in for the duration of the public

[33] Judgment para 249.
[34] Hoexter *Administrative Law in South Africa* 2nd ed pp 383-385.
[35] *Buffalo City Municipality v Gauss and Another* 2005 (4) SA 498 (SCA).

participation process; and

72.2. the impugned regulations afford the public an opportunity to comment on an actual proposed transaction, so that meaningful comment may be made.

73. Second, the order is premised otherwise on a finding that the impugned regulations are inconsistent with s 4 of the Promotion of Administration Justice Act 3 of 2000 ('PAJA'), when in fact this section does not apply at all because:

73.1. A decision by the WCG 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' as defined in PAJA, because it has no direct, external legal effect (this was and remains part of the WCG's case);[36]

73.2. A decision as described above does not materially and adversely affect the rights of the public;[37]

73.3. Alternatively to paragraph 73.2 above, if it is found that s 4 of PAJA does apply, there is no inconsistency between the provisions of the impugned

[36] *Buffalo City Municipality supra*; *Grey's Marine Hout Bay (Pty) Ltd and Others v Minister of Public Works and Others* 2005 (6) SA 313 (SCA) para 24; *Rhino Oil and Gas Exploration SA (Pty) Ltd v Normanidien Farms (Pty) Ltd and Another* 2019 (6) SA 400 (SCA).

[37] *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA); and *Permanent Secretary, Department of Education and Welfare, Eastern Cape, and Another v Ed-U-College (PE) (Section 21) Inc* 2001 (2) SA 1 (CC), where O'Regan J for the Court found that a decision to allocate subsidies in circumstances where the amount available for distribution had been reduced by the legislature did not give rise to a right to a hearing on the part of all affected persons.

regulations and that section, because the provisions of the impugned regulations are consistent with s 4(3) of PAJA, and even if they were not, s 4(1)(d) of PAJA authorises an administrator to follow a procedure which is fair but different.

74. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will differ from the Court with respect to one or more of the issues described above and will set aside the orders in paragraph 10 of the first order and paragraph 5 of the second order. We submit further that these orders and aspects of the judgment raise important questions of law and discrete issues of public importance that will have an effect on future disputes, and that there is therefore a compelling reason why the appeal should be heard.

B.5 Sea Point falls into a restructuring zone

75. In paragraph 9 of the first order, the Court declares that Sea Point falls within the restructuring zone '*CBD and surrounds (Salt River, Woodstock and Observatory)*' as contemplated in the Western Cape Land Administration Regulations.

76. The order is appealable on one or more of the following grounds:

76.1. First, the order violates the constitutional principle of separation of powers because it usurps the role of the national Minister, who is authorised in terms of s 3(1)(f) of the Social Housing Act to designate

restructuring zones. It is not for the Court to designate restructuring zones. It has neither the expertise nor the constitutional authority to do so.

76.2. Second, the order (and judgment) does not address the fact that neither the 2 December 2011 notice nor the 15 December 2011 notice ('the notices') was published by the national Minister (as opposed to by her Department), despite the fact that s 3(1)(f) of the Social Housing Act confers the power to designate restructuring zones on the national Minister herself, and the notices are accordingly unconstitutional and invalid for want of lawful authority.

76.3. Third, the 2 December 2011 notice was replaced by the 15 December 2011 notice as far as the restructuring zones in the Metropole were concerned.

76.4. Fourth, the order is based on an impermissible approach to interpretation, with the Court relying on the evidence of a City official as to what was intended by them;[38] and finding that the way in which to clarify uncertainty in a publication in the *Government Gazette* is to ask the author what was intended.[39]

76.5. Fifth, the order is based on an incorrect interpretation of the notices. The

[38] Judgment paras 343, 344 and 349.
[39] Judgment paras 348 and 350.

Court interpreted the word '*surrounds*' by starting with the literal interpretation and applying it to a plan view of Cape Town's city centre.[40] The Court noted that one cannot access the Sea Point area '*directly from the city centre because of the geography presented by the mountain*' and concluded that while it might be argued by some that Sea Point cannot be regarded as a surrounding suburb (like Woodstock) because it is not contiguous with the central business district, Observatory is also not contiguous with the city centre.[41] The Court proceeded to say that the suburbs of Bo-Kaap, Gardens, Tamboerskloof, Oranjezicht, District Six, Vredehoek and Devils Peak (all of which nestle between the foothills of Table Mountain and the southern side of the central business district) '*undoubtedly surround the city centre*'.[42] Against this background, the Court identified the '*conundrum*' as '*what the City intended to convey by the use of the term "surrounds" in relation to the CBD, when it presented the RZ designation to the Province for approval in 2010 and what the Province intended the phrase to mean when it put up the designation to the National Minister for gazetting at the end of 2011*'.[43]

76.6. In adopting the approach that it did to the interpretation of the notices, we submit that the Court fell foul of the *dictum* of the Constitutional

[40] Judgment paras 328 and 329.
[41] Para 329.
[42] Para 330.
[43] Para 331.

Court in *Chisuse*:[44]

> '*[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary, grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity. As this Court has previously noted in* Cool Ideas*, this principle has three broad riders, namely:*
>
> > *"(a) that statutory provisions should always be interpreted purposively;*
> >
> > *(b) the relevant statutory provision must be properly contextualised; and*
> >
> > *(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."*
>
> *[48] Judges must hesitate "to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation".*'

77. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will differ from the Court with respect to one or more of the issues

[44] *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20 paras 47 and 48.

described above and will set aside the order in paragraph 9 of the first order. We submit further that this order raises important questions of law and a discrete issue of public importance that will have an effect on future disputes, and that there is therefore a compelling reason why the appeal should be heard.

B.6 An obligation on the WCG to consult and engage with national government before disposing of immovable property

78. In paragraph 1 of the second order, the Court declares that the failure of the WCG to inform the national government of its intention to dispose of the Tafelberg properties, and to consult and engage the national government in this regard, constitutes a contravention of the WCG's obligations in terms of Chapter 3 of the Constitution and the IGRFA.

79. Although the order arises from the factual context of this case, it will continue to have practical effect in all future land disposal decisions by the WCG and other provincial governments. (The Court does not explain in the judgment why the same duty of consultation with the relevant provincial government would not also apply to the national government when disposing of an immovable asset – since it logically would, the far-reaching effect of the judgment is increased.)

80. The order is appealable on several grounds.

81. First, the order assumes that every provincial government is under a legal duty to consult with the national government as regards its intention to dispose of its

immovable assets, alternatively an immovable asset that could possibly be used for housing, without identifying the source of any such duty.

82. To the extent that the Court (and the NU applicants) relied directly on s 41 of the Constitution for the source of the legal duty, this is impermissible in terms of the principle of subsidiarity.

83. To the extent that the Court relied on s 5 of the IGRFA for the source of the legal duty, it erred in doing so, because that section is limited to consultation with '*other affected organs of state*' and co-ordinated action in regard to the implementation of policy or legislation '*affecting the material interests of other governments*', whereas the disposal of property belonging to a provincial government does not affect the national government; and does not affect the material interests of the national government.

84. In any event, were s 5 of IGRFA to be applicable to the disposal of immovable property by the WCG, the requirement to inform and consult with the national Minister and her department would be at variance with the provisions regarding disposal in the WCLAA, which do not require any processes in relation to the national government beyond what is set out in s 3(3) to be followed.

85. The Court failed to address the constitutional argument that a duty as described would amount to an impermissible interference by the national sphere with an exclusive provincial executive power.

86. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will differ from the Court with respect to one or more of the issues described above and will set aside the order in paragraph 1 of the second order. We submit further that this order raises important questions of law and a discrete issue of public importance that will have an effect on future disputes, and that there is therefore a compelling reason why the appeal should be heard.

PART C: GROUNDS OF APPEAL RELATED TO RELIEF PERTAINING TO THE SALE AGREEMENT AND IMPUGNED DECISIONS

87. As we have explained in these heads of argument, if the sale agreement were to be cancelled, the orders pertaining to the sale agreement and the impugned decisions would have no effect on the parties. An appeal against these orders would however involve several discrete legal issues of public importance which will affect matters in the future and which the Supreme Court of Appeal should pronounce on.

88. These legal issues include the following:

88.1. whether or not it is a legal requirement that immovable property must be 'surplus' as that term is used in GIAMA before it may be disposed of by a provincial government (or by national government);

88.2. whether or not it is correct, as the Court found, that GIAMA is '*the over-arching legislation which gives effect to the strict controls imposed on*

the disposal of State land, while the WCLAA is the statute which prescribes the procedural mechanisms to be adhered to in the Western Cape';

88.3. whether or not s 5(1)(f) of GIAMA requires that if a custodian determines that an immovable asset *can* be used as described in the section, then it *must* be so used;

88.4. whether or not there is anything in GIAMA which makes it a condition for the valid disposal of immovable property that there must be U-AMPs and a C-AMP in place;

88.5. whether the authority of provincial governments to dispose of immovable property derives from provincial legislation or whether it derives from GIAMA;

88.6. whether or not it is a legitimate government purpose to ensure best value for money in the disposal of its immovable property; and

88.7. whether ss 5(1)(f) and 13(3)(a) of GIAMA confer duties on provincial cabinets or on the custodian.

89. We submit that there is at least a reasonable prospect that the Supreme Court of Appeal will differ from the Court with respect to one or more of the issues described above. We submit further that these are important questions of law and issues of public importance that will have an effect on future disputes, and

that there is therefore a compelling reason why the appeal should be heard. For the same reasons, an appeal on these issues would have a practical effect or result and does not fall within the ambit of s 16(2)(a) of the Superior Courts Act.

CONCLUSION

90. It is respectfully submitted that the application for leave to appeal to the Supreme Court of Appeal ought to be granted, with the costs of this application being costs in the appeal.

Eduard Fagan S.C.

Karrisha Pillay S.C.

Aymone du Toit

Maria Mokhoaetsi

10 November 2020

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2. *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* 2016 JDR 1211 (GP)
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26. Government Immovable Asset Management Act 19 of 2007 ('GIAMA')

27. Housing Act 107 of 1997

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29. Social Housing Act 16 of 2008

30. Spatial Planning and Land Use Management Act 16 of 2013

31. Western Cape Land Administration Act 6 of 1998 ('the WCLAA')

32. Western Cape Land Administration Regulations

Books

33. Hoexter *Administrative Law in South Africa* 2nd ed