IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case Nos: 522/2021 and 523/2021
WCHC Case Nos: 7908/2017 and 12327/2017

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

HEADS OF ARGUMENT

on behalf of the Western Cape Government appellants

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Introduction

1. The two applications that form the subject-matter of this appeal arose from a decision by the Western Cape Government ("the WCG") to sell two erven in Sea Point, Cape Town to a school for R135 million. Pursuant to the judgment of the Court *a quo* setting aside that decision, the sale was cancelled. The judgment and orders of the Court *a quo* however go considerably beyond only the disposal of the two erven, and leave to appeal on a number of issues was therefore granted by the Court *a quo*.[1] Leave to appeal on further issues was granted by this Honourable Court.[2]

2. Fundamentally, the Court *a quo*'s judgment reflects its view that the Department of Human Settlements in the Western Cape ("the DHS") should be allocating and spending its housing budget differently. It should spend more on social housing, in particular on social housing in "central Cape Town". Since the DHS spends the whole of its budget[3] and consistently receives clean audits,[4] the inevitable concomitant of the Court *a quo*'s view is that the DHS should spend less on other forms of housing. Moreover, since the provision

[1] Order of Court *a quo* granting leave to appeal, record 21/3876-3877.
[2] Order of Supreme Court of Appeal granting leave to appeal, record 21/3922-3923.
[3] WCG AA (NU) para 143, record 7/1109.
[4] WCG AA (NU) para 146, record 7/1111.

of social housing is more expensive than that of other forms of subsidised housing, the DHS would be able to provide housing opportunities to fewer people.[5]

3. The Court *a quo* accordingly ventured into what the Constitutional Court has termed "*the heartland of executive-government function and domain*", namely "*the ordering of public resources, over which the executive government disposes and for which it, and it alone, has the public responsibility*".[6] Jurisprudentially the reasons why the ordering of public resources is a competency of the executive government are well known: courts generally lack the expertise and the electoral legitimacy necessary for deciding how public resources should be spent.[7] Constitutionally, our courts have recognised that this limitation on what they are able to do is fundamental to the separation of powers.[8]

4. The problematic nature of what the Court *a quo* did is illustrated by the fact that in a subsequent case in the same Division, where the applicants were again supported by Ndifuna Ukwazi ("NU"), it was determined that the City of Cape Town ("the City") spends *too much* on social housing and too little on other forms of housing, such as emergency housing.[9]

5. The issues in respect of which leave to appeal has been granted, and which we shall address in turn, are:

    5.1. Whether the WCG is in breach of an obligation to provide social housing in "central Cape Town";

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5 WCG AA (NU) para 25.3, record 7/1056; para 212, record 7/1155-1156; para 220.2, record 7/1159.

6 *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) para 67.

7 *Du Plessis and others v De Klerk and another* 1996 (3) 850 (CC) para 180; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) para 46.

8 *Bato Star supra* para 48; *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* 2012 (4) SA 618 (CC) para 95; *Tshwane City and others v Nambiti Technologies (Pty) Ltd* 2016 (2) SA 494 (SCA) para 43.

9 *Commando and others v Woodstock Hub (Pty) Ltd and another* [2021] 4 All SA 408 (WCC) para 158.

5.2. Whether there should be a structural interdict against the WCG and the City in respect of housing;

5.3. Whether regulation 4(6) and the proviso in regulation 4(1) of the Western Cape Land Administration Regulations[10] ("the Regulations") are unconstitutional;

5.4. The effect of the Government Immovable Asset Management Act 19 of 2007 ("GIAMA") on the ability of the national government and provincial governments to dispose of immovable property owned by them;

5.5. Whether Sea Point falls within a restructuring zone;

5.6. Whether a provincial government is obliged to consult and engage with national government before disposing of a property belonging to the former.

6. These issues arise from the orders and the judgment in the two applications: the first brought by Ms Adonisi, NU and others and the second by the national Minister of Human Settlements ("the Minister") and others. We shall refer to the orders in the two applications as "the first order" and "the second order".

Whether there is an obligation to provide social housing in "central Cape Town"

7. Paragraphs 2 and 3 of the first order[11] 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 107 of 1997, and the Social Housing Act 16 of 2008 ("the SH Act"), in that it has not provided social housing in an area defined by the Court as "central Cape Town".[12]

10 PN 595 of 1998 (*PG* 5296 of 16 October 1998).
11 Record 20/3856.
12 See for example judgment paras 37, 429 and 435, record 20/3651-3652, 3808 and 3810.

8. The Housing Act, which came into effect on 1 April 1998, and the SH Act, which came into effect on 1 September 2009, were passed pursuant to s 26(2) of the Constitution. The Housing Act requires the balancing of competing housing interests.[13] The SH Act was passed in recognition of the fact that there is a 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 only.

9. Neither the NU respondents nor the Court *a quo* took issue with the WCG's general performance as regards the provision of housing. Nor did the NU respondents and the Court identify specific provisions in the SH Act with which the WCG has failed to comply. This is unsurprising given:

   9.1. The detailed account by the WCG of its social housing pipeline;[14]

   9.2. The fact that by 29 June 2010 the WCG had submitted for designation by the Minister five proposed restructuring zones,[15] all of which are located in the Cape Metropole, including one referred to as "*CBD and surrounds (Salt River, Woodstock and Observatory)*";[16]

   9.3. The submission, on 29 June 2010, by the WCG for designation by the Minister of a further six proposed restructuring zones also located in the Cape Metropole;[17] and

13 See s 2.
14 WCG AA (NU) paras 182 to 208, record 7/1143-1154.
15 As required by s 4(1)*(e)* of the SH Act. The designation of a restructuring zone is a prerequisite for the national government to provide grant funding for social housing.
16 WCG AA (NU) para 175, record 7/1137, read with annexure JG32, record 10/1668-1669.
17 WCG AA (NU) para 175, record 7/1137, read with annexure JG32, record 10/1668-1670

9.4. 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).[18]

10. Instead, what the NU respondents say and what the Court *a quo* found is that the WCG has failed in its obligation to provide social housing in "central Cape Town". The difficulty with this finding is that there is no such obligation contained in either the Housing Act or the SH Act.[19] The NU respondents and the Court therefore resorted to general reliance on s 26 of the Constitution.

11. Such reliance is however precisely what the principle of subsidiarity prohibits.[20] 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 influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first.[21] 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.

12. One sees the consequences of a freewheeling or haphazard approach 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 SH Act place different obligations on these two spheres of government (as, indeed, does the Constitution). Contrary to subsidiarity, the Court did

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18 WCG AA (NU) para 148, record 7/1115.

19 Indeed, the NU respondents themselves point out that the term "central Cape Town" is not defined anywhere in the rule 53 record and is not used in the City's or the WCG's planning policies. The term was therefore developed by the NU respondents' witness, Dr Nancy 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 SH Act and the various applicable policies (such as spatial development frameworks) to address spatial injustice*", she expressed the opinion that the City and the WCG have not discharged their obligations to redress spatial apartheid in "central Cape Town" (SFA (NU) paras 312-316, record 5/803-805).

20 *My Vote Counts NPC v Speaker of the National Assembly and others* 2016 (1) SA 132 (CC) paras 53 and 54.

21 Para 52. Cameron J's description of subsidiarity was confirmed by the full Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and another* 2022 JDR 0403 (CC) para 103.

not identify any specific obligations in those Acts with which the WCG has failed to comply.

13. Moreover, 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 have needed to find that the WCG had acted unreasonably in its efforts to give effect to the housing right generally. This assessment would have needed to be made with due regard to the full range of the WCG's delivery and other constitutional obligations, including those pertaining to health and education;[22] the WCG's budgetary constraints; the range and extent of the housing need, including by the poorest of the poor; the fact that the right of access to housing is one of several socio-economic rights which are to be realised progressively;[23] and the fact that there are other rights that are to be realised immediately.[24] This the Court did not do.

14. The Court *a quo* also 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.[25] Having referred to the Housing Act and the SH Act as being enactments pursuant to s 26, the Court went on to pose the question of "*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*".[26]

15. This is an incorrect framing of the question, with respect, because:

15.1. Section 26(2) of the Constitution refers to "*reasonable legislative and other measures*"

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22 The WCG's concurrent functional areas in terms of schedule 4 to the Constitution include agriculture, education, the environment, health services, housing, public transport, public works in respect of the needs of provincial government departments in the discharge of their responsibilities, tourism, trade, and welfare services.

23 Others are the right of access to healthcare services, sufficient food and water, and social security, in terms of s 27 of the Constitution.

24 Such as basic education, including adult basic education (s 29); and the right of children to basic nutrition, shelter, basic health services and social services (s 28).

25 Judgment paras 473-481, record 20/3824-3829.

26 Judgment para 475, record 20/3826.

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;

15.2. 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 statute which has as its focus the provision of social housing, and the provincial sphere of government has been giving effect to that statute through the adoption of a provincial plan in the form of a social housing pipeline, that would constitute "*other measures*";

15.3. 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)[27] would not be required where, as here, this is governed by national legislation which is being implemented by the WCG;

15.4. This was not the nature of the NU respondents' challenge, as the Court held elsewhere in the judgment;[28] and

15.5. 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.[29]

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27 Judgment para 476, record 20/3826.

28 "*Rather, said counsel, the challenge was in respect of the manner in which the constitutional and statutory obligations (as well as the policies formulated in terms of the applicable legislation) had been implemented by the Province and the City*" (para 66, record 20/3661 – our emphasis).

29 See *National Credit Regulator v Opperman and others* 2013 (2) SA 1 (CC) para 47: "*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; and (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. See too *President, RSA and another v Women's Legal*

16. 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 the Court,[30] is also without foundation. The social housing pipeline has been in place throughout the relevant time.[31]

17. 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 SH 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. In so far 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.[32]

Whether there should be a structural interdict

18. In paragraph 5 of the first order, the Court *a quo* directs that the WCG and the City "*jointly file a comprehensive report under oath, … stating what steps they have taken to comply with their constitutional and statutory obligations …, what future steps they will take in that regard and when such future steps will be taken*".[33]

19. More specifically, the Court directs the WCG and the City to include in their report "*their respective policies*" as regards the provision of social housing in central Cape Town.

Centre Trust and others 2021 (2) SA 381 (SCA) para 34, where this Court held (with reference to certain dicta of the Constitutional Court) that s 7(2) could not oblige the State to enact legislation on a specific subject, nor may a court order it to do so.

30 Judgment paras 483ff, record 20/3829ff.

31 It became apparent during argument in the application for leave to appeal that the Court *a quo* had overlooked the extensive evidence in the answering papers of the WCG's efforts and expenditure in respect of social housing.

32 Implicit in s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 is that such orders should not generally be made.

33 Record 20/3856.

20. The effect of this order is that the WCG must, jointly with the City:

20.1. 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 the SH Act, and

20.2. Prepare a policy 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".

21. The WCG has however already filed comprehensive answering affidavits in which it did precisely this. It is not apparent from the judgment what further reporting is required.

22. But the far more problematic aspect of the structural interdict is that it implies that the Court intends to take upon itself the role of arbiter of all housing policy and implementation in the Western Cape. The order therefore directly undermines the doctrine of the separation of powers.

23. The Court *a quo* will be required to do precisely what the Constitutional Court has said the judicial function does not lend itself to: factual enquiries, cost-benefit analyses, political compromises, budgetary priority decisions and the like.[34] It is not the province of courts, when judging the administration, to make their own evaluation of the public good; nor to substitute their personal assessment of the social and economic advantage of a decision.[35] A court considering the reasonableness of legislative or other measures taken by the State will not enquire into whether other more desirable or favourable measures could have been adopted, or whether public resources could have been better spent. A wide range of possible measures could be adopted by the State to meet its obligations and many of these

34 *Du Plessis supra* para 180.

35 *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) para 59.

may meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement would be met.[36]

24. 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.

25. 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.*"[37]

26. Paragraph 5 of the first order effectively requires the WCG to provide social housing in an area defined by the NU respondents' witness 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 respondents, a point to which we return below) whether or not what is proposed by the WCG is reasonable.

27. 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 undertaking this exercise, the Court would, of necessity, have to be apprised of the WCG's broader housing delivery programme, thereby making the Court the decision-maker in respect of priorities, compromises and choices made in the overall delivery of housing. In this way,

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36 *Khosa and others v Minister of Social Development and others; Mahlaule and others v Minister of Social Development and others* 2004 (6) SA 505 (CC) para 48.

37 *National Treasury supra* para 63.

the order signals an intention on the part of the Court to usurp the role of a democratically-elected government.

28. 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.[38] Such a decision falls outside its competence, in every respect.

29. 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*".[39] It pointed out that such decisions call for policy-laden and polycentric decision-making,[40] thereby using the language of a line of cases of both this Honourable Court and the Constitutional Court which have expressed the importance of deferring to organs of state in regard to decisions of this kind.[41] Courts recognise the fact that government, in its various spheres, is required to do much with little.[42]

30. Specifically in the context of housing, the way in which the budget is allocated among long-term objectives, short-term objectives, and those in desperate need is a decision to be made by government, not by the courts (subject only to the requirement that a reasonable part of the budget go to addressing desperate need).[43]

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38 Social housing is for persons who have formal employment and earn in income bands of between R1 500 and R5 500 per month, and between R5 500 and R15 000 per month: WCG AA (NU) para 172.2, record 7/1124-1125.

39 *National Treasury supra* para 67.

40 *National Treasury supra* para 68.

41 The principle was reaffirmed in *South African National Roads Agency Ltd v Cape Town City* 2017 (1) SA 468 (SCA) para 7.

42 See for instance *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) paras 11, 29 and 31; *Tshwane City supra* para 43.

43 *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC) para 66.

31. The structural interdict was also granted despite the fact that the NU respondents 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.

32. As the Constitutional Court held in *Mwelase*,[44] 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*". The Court stated:

32.1. It had always recognised the limitation of its judicial authority and lack of capacity to perform functions reserved for other arms of state.[45]

32.2. 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.[46]

32.3. "*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.*

44 *Mwelase and others v Director-General for the Department of Rural Development and Land Reform and another* 2019 (6) SA 597 (CC) para 48.
45 Para 101.
46 Para 102.

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 Judiciary may supervise the rectification process by the errant arm."[47]

33. More recently in *Mzalisi*[48] this Honourable Court held that the grant of a structural interdict entails the exercise of a true discretion and that in instances where the High Court does not say "*a single word*" as to what weighed with it to justify the grant of a structural interdict, this alone points to the fact that the High Court did not exercise its discretion judiciously. It is at variance with this approach for the Court *a quo* to have found that a structural interdict was warranted on the basis that it was "*the only feasible way to achieve this constitutional objective*" so that "*the design and implementation of a comprehensive, inclusive social housing policy in the context of the use of both state-owned and municipal land in and around central Cape Town is constitutionally compliant under the SHA, and is capable of assessment and monitoring by the courts*".[49]

34. The NU respondents have not shown, and the Court *a quo* did not find, an infringement of s 26 of the Constitution, let alone an egregious one. This is a necessary prerequisite for the grant of a structural interdict.[50]

35. 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.

36. 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,

47 Para 108; see also para 51.
48 *Mzalisi NO v Ochogwu* 2020 (3) SA 83 (SCA) paras 14 and 15.
49 Judgment para 493, record 20/3832.
50 *Mzalisi supra* para 13.

the source of funding for social housing.

37. The NU respondents are moreover granted leave to file an affidavit responding to the reports to be filed (paragraph 6 of the first order). Thus two non-governmental organisations and a number of individuals, who have no electoral legitimacy and hold no constitutional position, will be entitled to "assist" the Court in determining how the WCG and the City should best address housing issues. With respect, this cannot on any basis be permissible. Unlike the WCG and the City, the NU respondents have no proven expertise in respect of housing, and more generally in respect of how best to allocate a limited budget.

38. A structural interdict consists of five elements.[51] First, the Court declares the respects in which the violator's conduct falls short of its constitutional obligations. Second, the Court orders the violator to comply with its constitutional obligations. Third, the Court orders the violator to produce a report within a specified period of time setting out the steps it has taken. Fourth, the applicant is afforded an opportunity to respond to the report. And finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court.

39. It is specifically a remedial power to ensure effective relief for a breach of a constitutional right.[52] Indeed, the power to grant a structural interdict is derived from ss 38 and 172(1)(b) of the Constitution.[53] There is no similar remedy for the breach of a statutory obligation.

40. The NU respondents accordingly erred fundamentally in seeking a structural interdict based on an alleged failure on the part of the WCG to comply with "*the legislation enacted to*

51 *Kenton-on-Sea Ratepayers Association and others v Ndlambe Local Municipality and others* 2017 (2) SA 86 (ECG) para 98.
52 Cf *AllPay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC) para 71.
53 *Minister of Health and others v Treatment Action Campaign and others (No 2)* 2002 (5) SA 721 (CC) para 101.

give effect to" the rights in ss 25(5), 26(1) and 26(2) of the Constitution;[54] as well as in asking for orders directing the WCG to comply with their statutory obligations and to file reports stating what steps they have taken to comply with their statutory obligations.[55] Relief on that basis was not competently sought.

41. That error on the part of the NU respondents in turn leads to this difficulty: the Constitution does not impose an obligation on the State "*to redress spatial apartheid in central Cape Town*". (Nor, for that matter, does any statute impose such an obligation on the State.) None of the three constitutional provisions on which the NU respondents purport to rely contains such a provision. Section 25(5) requires of the State that it 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; s 26(1) says that everyone has the right to have access to adequate housing; and s 26(2) says that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

42. But in any event: on the facts, the WCG has complied, and continues to comply, with its obligations in terms of s 26(1) and (2) of the Constitution. Given the nature of the relief that has been sought by the NU respondents, it was necessary for the WCG to set out in considerable detail what the DHS does in respect of housing.

43. In summary, the DHS does all it can within its available resources. Again, the complaint of the NU respondents is that the weighting of social housing should be different – but that is not a matter for a court to determine.

44. Inherent in structural interdicts are the risk of infringing on the separation of powers, with

54 Prayer 2, record 4/670.
55 Prayers 3 and 4, record 4/670.

the allocation of resources being pre-eminently within the authority of democratically-elected representatives to decide;[56] the problem of the vagueness of socio-economic rights and what it means for a court to enforce them; the lack of expertise on the part of courts when it comes to decision-making on polycentric and complex questions; and the cost of structural interdicts, with extended judicial oversight and repeat court appearances.[57] Courts therefore do not readily grant structural interdicts. The Constitutional Court has described its just and equitable remedial power under s 172(1)(b) of the Constitution as "*not limitless*", and described its own remedy as one that "*must be used with caution and only in exceptional circumstances*".[58]

45. Cases where the remedy has been considered to constitute appropriate and effective relief are where there have been systemic violations of socio-economic rights, accompanied by one or more of the following:[59] government intransigence, government incompetence, and irremediable and serious (in particular life-and-death) consequences of non-compliance with an organ of state's constitutional duties.[60]

46. The relief sought by the NU respondents is therefore unprecedented. They seek a structural interdict in respect of the DHS and its functioning, in circumstances where the DHS (and the WCG generally) has violated neither s 26 nor any other provision of the Constitution, either systemically or at all; where there has been neither government intransigence nor government incompetence; and where there are in any event no life-or-

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56 In *N and others v Government of Republic of South Africa and others (No 1)* 2006 (6) SA 543 (D) para 32 the Court referred to the risk that structural interdicts "*may amount to an unwarranted interference with the authority and discretion of the executive arm of government, thereby violating the principle of the separation of powers*".

57 See Ebadolah "Using structural interdicts and the South African Human Rights Commission to achieve judicial enforcement of economic social rights in South Africa" (2008) 83 *New York University Law Review* 1565.

58 *Black Sash Trust v Minister of Social Development and others (Freedom Under Law intervening)* 2017 (3) SA 335 (CC) para 51.

59 Roach and Budlender "Mandatory relief and supervisory jurisdiction: when is it appropriate, just and equitable?" (2005) 122 *South African Law Journal* 325.

60 See for instance *City of Cape Town v Rudolph and others* 2004 (5) SA 39 (C); *Section 27 and others v Minister of Education and another* 2013 (2) SA 40 (GNP); *N supra*.

death consequences.

47. What is particularly puzzling about the NU respondents' structural-interdict claim is that it is premised on an alleged failure to allocate available resources to social housing in inner-city areas. This can be done, as the WCG acknowledges, but it would mean a reduction in the resources available for allocation to housing for those most in need. The NU respondents' concern is not that of those who are sometimes described as the poorest of the poor; it is, rather, that of those who are able to afford rental accommodation and would wish to live nearer to their place of work. It is entirely legitimate for a non-governmental organisation not to concern itself with the poorest of the poor; the same does not however apply to government.

48. Section 26 of the Constitution is in the first place concerned with the homeless.[61] Reasonable conduct of a municipality pursuant to s 26(2) includes the reasonableness of every step taken in the provision of adequate housing; every homeless person is in need of housing; and therefore every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with s 26(2).[62] It is precisely when funds are limited that the needs of the homeless are exacerbated.[63]

49. The positive duty placed on the State by s 26(1) of the Constitution "*is circumscribed by ss (2), which acts as an internal limitation on the content and ambit of ss (1)*". Accordingly, the obligation imposed on the State "*is not absolute or unqualified*": the extent of the obligation "*is defined by three key elements that have to be considered separately:* (a) *the obligation to 'take reasonable legislative and other measures';* (b) *'to achieve the progressive realisation' of the right; and* (c) *'within available*

61 *Grootboom supra* para 44.
62 *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC) para 17.
63 *Rudolph supra* at 84G.

resources"".[64]

50. Government cannot be expected to make provision for housing beyond the extent to which available resources allow.[65] In this context "*available resources*" means resources in the WCG's possession that were earmarked for realisation of the s 26 rights,[66] which would equate to the DHS's annual budget.

The constitutionality of regulation 4(6) and the proviso in regulation 4(1)

51. In paragraph 10 of the first order[67] and paragraph 5 of the second order,[68] the Court declares that regulation 4(6) and the proviso in regulation 4(1) of the Regulations ("the impugned regulations") are unconstitutional and invalid.

52. The Regulations were made by the Premier in terms of s 10 of the Western Cape Land Administration Act 6 of 1998 ("the WCLAA").

53. The effect of the Regulations read with the WCLAA is that the disposal of provincially-owned land must follow the following process: an offer; consideration of the offer by the Head of the Department for Transport and Public Works; the obtaining of an independent valuation; and where an offer exceeds R10 million, reporting by the said Head to the Provincial Property Committee, consideration and reporting by that Committee to the Cabinet, and then a decision by the Cabinet. If the Cabinet decides to accept the offer, the contract must be signed subject to the provisos in regulation 4(1) of the Regulations, and a notification process must then be undertaken.

64 *City of Johannesburg v Rand Properties (Pty) Ltd and others* 2007 (6) SA 417 (SCA) para 37. The judgment was overturned on appeal in *Occupiers of 51 Olivia Road supra*, but not the analysis of s 26.
65 *Occupiers of 51 Olivia Road supra supra* para 18.
66 *Electoral Commission v Mhlope and others* 2016 (5) SA 1 (CC) para 152.
67 Record 20/3857.
68 Record 20/3859.

54. It is of critical importance that the contract which comes into being is subject to a resolutive condition. Depending on representations which are made pursuant to the notification process, the WCG may resile from the contract with no adverse consequences to itself. The legislative scheme ensures that the WCG obtains the benefit of being able to secure an advantageous offer after an internal process of assessment. The offeror is locked in while the WCG has the opportunity to consider input from the public before making a final decision about whether or not to proceed with the disposal. This mechanism is entirely to the advantage of the WCG. It also means that the public are afforded an opportunity to comment on an actual transaction. The price and proposed use of the property are known and meaningful comment may be made. We return to this aspect below.

55. In order for the impugned regulations to be set aside on the basis of unconstitutionality, the respondents need to show (but fail to do so) not only an inconsistency between the impugned regulations and the WCLAA, but that such inconsistency renders the impugned regulations *unconstitutional* (or that the Premier exceeded his or her powers in terms of the WCLAA in making the impugned regulations). Section 10*(a)* of the WCLAA however confers a duty on the Premier to "*make regulations regarding the norms and standards, including procedures, applicable to the acquisition, exchange, disposal and letting of provincial state land*"; and s 10*(b)* provides that the Premier may "*make any other regulations considered necessary or expedient for the achievement of the purpose or objectives of this Act*". Plainly the Regulations, including the impugned regulations, fall within the one or the other of these categories.

56. The purpose of the WCLAA is to give effect to the constitutional power of the WCG to dispose of its immovable property,[69] and at the same time to elicit the views of the public

69 Under s 104 of the Constitution. The Court *a quo* incorrectly found 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*" (judgment para 249, record 20/3735).

without compromising the ability of the WCG to secure the most advantageous deal possible.

57. The procedure provided for in the impugned regulations (which is not inconsistent with anything in the WCLAA) has two clear benefits. First, when the public are notified of the proposed disposal, the terms of the proposed disposal are known, and the public may be informed of the particular disposal which is in issue. The public are given notice of what the WCG's thinking is – what it is exactly that it proposes to do. The second benefit is that the WCG may lock an advantageous offer into place without any fear of adverse repercussions to itself should it decide not to proceed based on representations by the public. There is a clear commercial rationale for this.

58. The Court's order is premised in the first place on a finding of inconsistency between the impugned regulations on the one hand and s 3(2) of 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. An agreement to dispose, which is subject to a resolutive condition pertaining to public participation, is a "*proposed disposal*". It is not an outright or completed disposal. The respondents' case for inconsistency is based on the premise that a signed contract of sale, which is subject to a resolutive condition in terms of which the WCG may, having considered representations from the public, resile from the contract with no adverse consequences to itself, constitutes a "*proposed disposal*" in terms of s 3(2) of the WCLAA, and that notice of such contract must be given before it is concluded.[70]

59. The Court also assumed, incorrectly, that procedural fairness necessarily entails the granting of a hearing before a decision is taken.[71] It is however not always necessary or

[70] See for example NU SFA para 332, record 5/816.
[71] Judgment para 257, record 20/3737-3738.

desirable to offer a hearing before a decision is taken – such as where a decision is part of a larger process that ultimately caters for the right to be heard.[72] This Honourable Court has held, for instance, 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.[73]

60. The WCG contends, on the contrary, that until notice has been given of the contract, and the WCG has considered any representations made pursuant to such notice, although there may be a valid contract in place, the WCG may at its discretion (i.e. unilaterally) bring it to an abrupt end depending on what it makes of the representations elicited from the public. Until this point in time, the disposal is still a "*proposed disposal*" in terms of s 3(2) of the WCLAA.

61. On the approach adopted by the WCG, the impugned regulations simply give expression to what the WCLAA in any event allows.

62. The order is premised in the second place 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:

    62.1. 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);[74]

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72 Hoexter and Penfold *Administrative Law in South Africa* 3rd ed pp 531-532.

73 *Buffalo City Municipality v Gauss and another* 2005 (4) SA 498 (SCA).

74 *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 Normandien Farms (Pty) Ltd and another* 2019 (6) SA 400 (SCA).

62.2. A decision as described above does not materially and adversely affect the rights of the public;[75]

62.3. *Alternatively* to the previous subparagraphs, if it is found that s 4 of PAJA does apply, there is no inconsistency between the provisions of the impugned regulations and that section, because the provisions of the impugned regulations are consistent with s 4(3) of PAJA (which presupposes the existence of a clearly defined and specific administrative action, which may be changed depending on input from the public), and even if they were not, s 4(1)*(d)* of PAJA authorises an administrator to follow a procedure which is fair but different.[76]

63. It is noteworthy in this regard that several of the other provincial Acts providing for the disposal of property by the provincial sphere do not contain any procedural requirement whatsoever.[77] Similarly s 14(2) of the Municipal Finance Management Act 56 of 2003, which authorises a municipality to transfer ownership or otherwise dispose of a capital asset, provides that the municipality may do so after the municipal council, in a meeting open to the public, has considered and decided certain aspects. There is no separate notice and comment requirement.

The effect of GIAMA

64. The Court *a quo* found that the WCG had failed to comply with its obligations under GIAMA.[78] It held, specifically, that "*there was no C-AMP in place at the time these decisions were*

75 Cf *Scalabrini Centre supra*; 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 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.

76 *Esau and others v Minister of Co-operative Governance and Traditional Affairs and others* 2021 (3) SA 593 (SCA) paras 89-94.

77 These include the Gauteng Land Administration Act 11 of 1996 and the Eastern Cape Land Disposal Act 7 of 2000. We deal with these provincial Acts further under the next heading.

78 Judgment para 278, record 20/3745. This pertains to the sale and transfer of the two erven in Sea Point: this Honourable Court gave leave to appeal this finding.

made and … the disposal was therefore effected in breach of the mandatory provisions of GIAMA".[79]

65. This is a far-reaching finding, for it means that neither the national government nor any provincial government is entitled to dispose of any immovable property owned by it until such time as it has a custodian immovable asset management plan ("C-AMP") in place. On the undisputed evidence, this is an uncertain number of years into the future.

66. The requirements of GIAMA – specifically in relation to user immovable asset management plans ("U-AMPs") and C-AMPs – are being implemented incrementally by all organs of state under the guidance of the GIAMA Implementation Technical Committee ("the GITC"),[80] which was set up in 2007 and is co-ordinated by the national Department of Public Works. This incremental implementation is taking place with the knowledge and concurrence of National Treasury and all the provincial treasuries and is not yet complete.

67. The effect of the Court's finding is severely to curtail the State's ability to raise revenue. The validity of disposals that have taken place since GIAMA came into effect in 2007 is also placed in issue. Ironically, the State is precluded *inter alia* from transferring land to homeless people, as well as to non-governmental organisations that build and provide social housing.

68. The Court *a quo* posits GIAMA as the principal empowering legislation when it comes to the disposal of land by the State, whereas GIAMA is principally intended to create a system for the *management* of assets within the national and provincial spheres of government. The powers of all three spheres of government to *dispose* of immovable property are conferred by the Constitution and by *other* governing legislation.

79 Para 312, record 20/3756-3757.
80 WCG AA (NU) paras 454.1-454.3, record 8/1315.

69. GIAMA was intended to introduce a uniform framework primarily for the management of immovable assets within the national and provincial spheres of government. In the provincial sphere, custodians are the provincial departments designated by the Premier (normally the provincial Public Works Department) which act as the overall caretakers of the provincial governments' immovable assets. User departments are the departments that use or intend to use a particular immovable asset in support of their service delivery objectives.

70. Since the acquisition and disposal of immovable property is reasonably necessary for, or is incidental to, the effective exercise of their constitutional powers and obligations,[81] the power to dispose of provincially-owned assets vests in the provincial sphere of government, and one would not expect to find it being governed by national legislation.[82]

71. Section 239 of the Interim Constitution regulated the allocation of state assets and liabilities existing on 27 April 1994 between the national and provincial governments. One of the applicable principles was that in regard to disputed assets, any disputes between a provincial government and the national government were to be referred to the Commission on Provincial Government.[83]

72. A problem arose in relation to disputed assets when the (final) Constitution came into operation and the disputes had not yet been resolved. Because the provision governing the resolution of such disputes had fallen away, it remained for provincial governments and national government to negotiate these disputes, having regard to the principles of co-

81 Section 104(4) of the Constitution.

82 Unless such legislation took the form of framework legislation which does not encroach on the functional or institutional integrity of the provincial sphere.

83 Section 239 of the Interim Constitution. See in this regard Chaskalson "Transitional Provisions on Executive Authority, Assets and Liabilities" in Woolman *et al Constitutional Law of South Africa* (2nd ed) vol 2 p 28–9.

operative government set out in chapter 3 of the Constitution.[84]

73. Shortly after the Constitution came into force, the WCG passed the Constitution of the Western Cape.[85] In terms of it, provincial legislation must provide for a register of provincial assets and the registration of assets in that register.[86] Just over two months after the Western Cape Constitution had been passed, the WCG passed the WCLAA, which commenced on 27 March 1998. It is the WCLAA that regulates the acquisition and disposal by the WCG of immovable property.[87]

74. At about the same time that the WCG passed the WCLAA, the other provinces passed similar provincial Acts aimed at governing the acquisition and disposal of provincially-owned land in each province.[88] It is therefore to the provincial Acts such as the WCLAA, and to the Constitution, that reference must be had in determining whether or not a particular acquisition or disposal by a provincial government has been lawful.

75. Several years after the enactment of the various provincial Acts governing the administration of provincial land, the Minister of Public Works introduced the Government Immovable Asset Management Bill. As appears from the Memorandum which accompanied the Bill[89] (the provisions of the Bill being identical to GIAMA in its final form), the Bill was intended *inter alia*:

75.1. To introduce measures to ensure a uniform framework for the management of

84 Chaskalson *op cit* p 28–10.

85 Act 1 of 1998, in terms of s 104(1)(a) of the Constitution.

86 Section 65.

87 The long title and the preamble give expression to this.

88 Eastern Cape Land Disposal Act 7 of 2000; Free State Land Administration Act 1 of 1998; Gauteng Land Administration Act 11 of 1996; KwaZulu-Natal Land Administration Act 3 of 2003; Mpumalanga Land Administration Act 5 of 1998; Northern Cape Land Administration Act 6 of 2002; Northern Province Land Administration Act 6 of 1999; and North West Land Administration Act 4 of 2001.

89 [B 1B-2006]. Reference is had to it on the same basis as in *Case and another v Minister of Safety and Security and others; Curtis v Minister of Safety and Security and others* 1996 (3) SA 617 (CC) para 12 and fn 18.

immovable assets that are held and used by national or provincial *departments* and their coordination with the services delivery objectives of national or provincial *departments*; and

75.2. To outline a framework of basic principles in accordance with which national and provincial government *departments* must manage the immovable assets that they use in delivering services that they are mandated to deliver.

76. It is clear from the Memorandum that GIAMA was intended to introduce a uniform framework primarily for the management of assets within the national and provincial spheres of government. In particular, the roles of "custodian" and "user" departments needed to be standardised. The new Act would make it clear that in the provincial sphere, custodians would be the provincial departments designated by the Premier (normally the provincial public works department) which would act as the overall caretakers of the provincial governments' immovable assets. User departments would be the departments that used or intended to use a particular immovable asset in support of their service delivery objectives.

77. The roles of custodian and user departments needed to be standardised, in particular so as to facilitate the budgetary process. The Public Finance Management Act 1 of 1999 governs a uniform accounting system for the management of assets that devolves accountability to user departments so that all costs relating to immovable assets are borne by user departments.[90] A uniform management framework was necessary to ensure *consistent* government-wide immovable asset management. Asset-management plans prepared in accordance with such framework could then inform the budget allocation process.

78. GIAMA was enacted on 22 November 2007. As appears from its preamble, its purpose is

90 See s 38 of the Act, and in particular s 38(1)*(d)*.

primarily to provide a uniform framework for the management of immovable assets at departmental level in the national and provincial spheres of government.

79. The importance of a uniform immovable asset management framework from a budgetary point of view is immediately apparent from the fact that GIAMA places the duty to prepare C-AMPs and U-AMPs, in accordance with prescribed standards, on the *accounting officers* of custodians and users;[91] and from the requirement that such plans must be submitted to the provincial treasury.[92]

80. It is also apparent that the scheme of the Act follows the objects described in the Memorandum.[93] GIAMA does not purport to do any more than what the Memorandum described.

81. The custodian acts as the caretaker of all provincially-owned property. The custodian must assess and respond to the property requirements of user departments[94] and must ensure that all activities that are associated with common-law ownership are executed.[95]

82. While there are very few references in GIAMA to the disposal of assets by the national and provincial spheres to the world at large – the focus being on inter-departmental functions and planning – there are some. These should not however be seized upon (as the respondents have done) without considering the language and context of the provisions, the purpose of the Act, or the relevant background.[96]

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91 Sections 6, 13 and 14.

92 Section 9.

93 The objects are in s 3; the roles and duties of custodians and users are in ss 4, 12 and 13(3); the principles of immovable asset management are in s 5; the duties of accounting officers of users and custodians are in ss 6, 9, 13(1) and (2), and 14; the minimum content of immovable asset management plans is in ss 7 and 8; the legal status of immovable asset management plans is in ss 10 and 11; administrative provisions are in ss 15 to 19 and 21; and the power of the national Minister of Public Works to make regulations is in s 20.

94 Section 13(2).

95 Section 13(1)*(d)*.

96 Cf *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] 3 All SA 647 (SCA)

83. Section 4 describes the relationship between and responsibilities of custodians and users. Section 4(2)*(b)*(ii) provides that a custodian "*may in the case of a provincial department, subject to the relevant provincial land administration law, acquire, manage and dispose of an immovable asset*".[97] This power accords with a custodian's caretaker role. Unlike a user department, the custodian may make decisions about the acquisition, management and disposal of an asset. These powers are however made subject to the relevant provincial land administration law. That is because the power to dispose of provincial assets is to be found in the applicable provincial legislation.

84. Section 5 sets out the principles of immovable asset management:

84.1. an immovable asset "*must be used efficiently and becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level*";[98]

84.2. when an immovable asset is acquired or disposed of "*best value for money must be realised*"[99] ("*best value for money*" is defined as meaning "*the optimisation of the return on investment in respect of an immovable asset in relation to functional, financial, economic and social return, wherever possible*"); and

84.3. in relation to a disposal, the custodian "*must consider whether the immovable asset concerned can be used – (i) by another user or jointly by different users; (ii) in relation to social development initiatives of government; and (iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth*".[100]

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paras 51 and 56.

97 "*[D]isposal*" is defined as meaning "*any disposal contemplated in the State Land Disposal Act, 1961 (Act 48 of 1961) or a provincial land administration law*".

98 Section 5(1)*(a)*.

99 Section 5(1)*(e)*.

100 Section 5(1)*(f)*.

85. It is clear that s 5(1)*(f)* is intended to create a mechanism *internal* to government designed to ensure that assets are not disposed of without the caretaker department (custodian) giving careful consideration to how that asset might be used internally and to achieve the objectives described in subparagraphs (ii) and (iii). But that is not to say that the custodian may make the final call as to whether or not an asset may be disposed of or for what purpose it may be disposed of. Again, that power is conferred by the applicable provincial legislation, in this case the WCLAA.

86. Section 13 contains the functions of a custodian and accounting officer of a custodian. Among these is the one in s 13(3), which permits a custodian to dispose of a surplus immovable asset.[101] As with the sections described above, the power in s 13(3) of GIAMA must be understood in the context of the Constitution and the WCLAA. A provincial government is authorised by the Constitution and the applicable provincial law to dispose of its immovable property whether or not it is "*surplus*". What GIAMA requires is that before property which has become surplus to a user is disposed of to the world at large, the custodian must consider whether or not it can be used by another user department.

87. In other words, s 13(3) is not intended to create a limitation on the power of a provincial government to dispose of its property. It is instead an elucidation of the function of the custodian. When an immovable asset no longer supports the service-delivery objectives of a user, the custodian may allocate it to another user or may dispose of it.

88. In short, GIAMA is framework legislation which aims to standardise immovable asset management at departmental level in the national and provincial spheres of government. It does not purport to confer or detract from the constitutional powers of disposal of the provincial sphere of government. Where it deals with the disposal of immovable property,

101 "*[S]urplus*" is defined in s 1 of GIAMA as meaning in relation to an immovable asset that such asset "*no longer supports the service delivery objectives of a user*".

it provides for mechanisms aimed at ensuring that disposals are made after careful consideration by the custodian and that they have the effect of achieving the best possible value for provincial governments.

89. Nothing in GIAMA makes it a condition for disposal of immovable property that there must be U-AMPs and a C-AMP in place. Indeed, as we have submitted already, the authority of provincial governments to dispose of immovable property does not derive from GIAMA at all.

90. That the existence of U-AMPs and a C-AMP is not a requirement for the valid disposal of immovable property is plain from the date of commencement of sections 6 and 13 of GIAMA, which for national departments was the same as the commencement date for GIAMA itself. If U-AMPs and a C-AMP were required in order to be able to dispose of immovable assets owned by the national government, then the effect of GIAMA would have been to place a moratorium on all such disposals until such time as U-AMPs and a C-AMP had been prepared and submitted. Plainly that was not the purpose of the legislation: the result would not be sensible.[102]

91. Had the adoption of U-AMPs and C-AMPs been a condition precedent to the exercise of power by the national and provincial spheres of government to dispose of their immovable property, one would have expected it to have been stated in unambiguous terms. In this case, it is not stated anywhere, let alone unambiguously. That being so, no question of statutory interpretation even arises.

92. Should this Honourable Court however decide that there is a question of statutory interpretation which arises, it is a relevant consideration that GIAMA has been interpreted consistently since its enactment by those responsible for its administration as not imposing

102 Cf *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

as a legal requirement for the valid disposal of land owned by the national and provincial spheres of government fully-compliant U-AMPs and C-AMPs. This tips the balance in favour of the interpretation contended for above.[103]

93. The primary reason for an incremental approach to implementation (through the GITC) is because when GIAMA came into operation a vast number of properties which vested in the State or were registered as belonging to the State were unknown, unvalued or unmanaged. Furthermore, the creation by the Constitution of autonomous spheres of government required that a process be followed to ensure the vesting of immovable properties in the correct organs of state. An accurate asset register is a prerequisite for the preparation of a comprehensive C-AMP, and it is towards this goal that the State (at national and provincial level) has been working. The process of creating an asset register is a long one, often requiring surveying, valuation, inspection and negotiation before vesting can occur.[104]

94. The GITC has conducted various meetings in which the draft U-AMPs and C-AMPs of departments have been discussed. Representatives of all the provinces and of the national government, including Treasury representatives, attend these meetings. At the meeting of 7 and 8 June 2017, where amendments to GIAMA and a review of the C-AMP Guidelines were under discussion, the national Department of Rural Development and Land Reform reported that the vesting of a total of 54 982 properties had been confirmed. The estimate at that time was that it would take another six-and-a-half years to get a further 17 332

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103 *Commissioner, South African Revenue Service v Bosch and another* 2015 (2) SA 174 (SCA) para 17. Although the Constitutional Court has sounded a cautionary note as regards this approach in a constitutional democracy (as opposed to a system of legislative supremacy), that Court accepts that it may be justified where the practice is evidence of an impartial application of the custom recognised by all concerned (as opposed to where it is unilaterally established by one of the litigating parties) (*Marshall and others NNO v Commissioner for the South African Revenue Service* 2018 (7) BCLR 830 (CC) paras 4-10). In the present case, there is no direct competition of interest between the respondents and the State (as for example in a tax context where the Commissioner has adopted a practice and applied it unilaterally to taxpayers). Here we are concerned with legislative provisions which are directed at the internal management of its affairs by the State, and the State has applied them impartially.

104 WCG AA (NU) paras 454.2-454.3, record 8/1315.

properties confirmed as vested, based on the current national vesting rate. Under a different head, the task team dealing with C-AMPs and U-AMPs advised that regulations under GIAMA need to be prioritised to assist with the full implementation of GIAMA. Meetings of the GITC are ongoing, the minutes of which give a sense of the tremendous scale and complexity of the task of creating asset registers for all state-owned immovable property in the country.

95. The coming into operation of GIAMA and the process of its implementation have not prevented the national and provincial spheres from continuing to dispose of their immovable properties, and we submit that they should not do so.

Whether Sea Point falls within a restructuring zone

96. 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 regulation 6.1 of the Provisional Restructuring Zone Regulations.[105]

97. The order violates the constitutional principle of separation of powers because it usurps the role of the Minister, who is authorised in terms of s 3(1)*(f)* of the SH Act to designate restructuring zones. It was not for the Court to designate restructuring zones. It had neither the expertise nor the constitutional authority to do so.

98. A restructuring zone is a geographic area that has been identified by a municipality, with the concurrence of the provincial government, for purposes of social housing; and that has been designated by the Minister in the *Government Gazette* for approved projects (the relevant statute being the SH Act). Grant funding from national government is available

105 GN 848 in *GG* 34788 of 2 December 2011.

for social housing only if it is intended to provide such housing in a restructuring zone.[106]

99. What the NU respondents relied on for the declaratory relief that they sought, and what was similarly relied on by the Court *a quo* in granting such relief, is a notice, published by the national Department of Human Settlements in the *Government Gazette*, of what is called in the notice a *provisional* restructuring zone.[107] It is only provisional, and was merely published "*for public information*".[108]

100. The Court *a quo* did not in its judgment explain why it was unpersuaded by the principal argument advanced on behalf of the WCG, which is that s 3(1)*(f)* of the SH 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 this argument at all. The notice is unconstitutional and invalid for want of lawful authority.

101. The order is moreover based on an impermissible approach to interpretation, with the Court relying on the evidence of a City official as to what was intended by the notices.[109] The Court found "*that the evidence establishes on a balance of probabilities that Sea Point falls within the [restructuring zone]*".[110] Interpretation of publications in the *Government Gazette* should not be based on evidence,[111] nor should the interpretation be decided on a balance of probabilities.

102. The Court further found that the way in which to clarify uncertainty in a publication in the *Government Gazette* is to ask the author what was intended (describing the failure on the part

106 Section 1 of the SH Act.

107 Annexure "JG34", record 10/1688, read with annexure "JG33", record 10/1685.

108 On its plain wording "*provisional restructuring zones*" in the notice means just that. The word "*provisional*" is, according to its dictionary definition, synonymous with "*temporary*", "*interim*", "*conditional*", "*make-shift*", "*short-term*", "*draft*".

109 Judgment paras 343, 344 and 349, record 20/3771, 3772 and 3773.

110 Judgment para 506, record 20/3836.

111 *KPMG Chartered Accountants (SA) v Securefin Ltd and another* 2009 (4) SA 399 (SCA) para 39.

of the provincial Cabinet to seek clarification from the Minister and her department to be "*demonstrative of* mala fides").[112] This is similarly at variance with established authority on interpretation.[113]

103. The order is in any event based on an incorrect interpretation of the notices. The Court interpreted the word "*surrounds*" by starting with the literal interpretation and applying it to a plan view of Cape Town's city centre.[114] 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.[115] 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*".[116] 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*".[117]

104. The notice does not of course refer to Sea Point. Regulations are not to be read in isolation, but are where possible to be construed consistently with the empowering statute under which they are made.[118] Although the notice is not a regulation, there is no reason why the

112 Judgment paras 348 and 350. In any event, and if such evidence were admissible, the Minister does not assert that she actually designated Sea Point as falling within a restructuring zone.
113 See for instance *Endumeni supra* para 18; *Chisuse and others v Director-General, Department of Home Affairs and another* 2020 (6) SA 14 (CC) paras 47-48.
114 Judgment paras 328 and 329, record 20/3762.
115 Para 329, record 20/3762.
116 Para 330, record 20/3762.
117 Para 331, record 20/3762.
118 *South African Reserve Bank v Khumalo and another* 2010 (5) SA 449 (SCA) para 12.

same interpretative approach would not apply. Section 3(1)*(f)* of the SHA requires that restructuring zones be "*specifically provided for in a municipality's integrated development plan*".[119] On no basis can it be said that Sea Point has been specifically provided for as a restructuring zone. Salt River, Woodstock and Observatory are not *examples* of "*surrounds*" of the central business district of Cape Town: they *are* the surrounds intended by the notice. The notice does not use language such as "*including*" or "*for example*".

105. If Woodstock, Salt River and Observatory were used for illustrative purposes only, then it is not apparent why the Department should have used three contiguous geographic areas for the illustration.

The obligation to consult

106. In paragraph 1 of the second order,[120] the Court *a quo* declared that the failure of the WCG to inform the national government of its intention to dispose of the Tafelberg properties, and to consult with 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 Intergovernmental Relations Framework Act 13 of 2005 ("the IGRFA"). Specifically, the Court found that the duty on the WCG had been to inform, consult with and engage the Minister and her department, and the order was made in response to contentions advanced in the application of the Minister and others ("the NM respondents").

107. The order assumes that a provincial government is under a legal duty to consult with ministers and departments within the national government as regards its intention to dispose of its immovable assets, without identifying the source of such duty. Specifically, the order assumes that there is a duty to consult with the Minister and her department

119 Our emphasis.
120 Record 20/3847.

where the immovable asset in question could *possibly* be used for housing. Since almost all land can notionally be used for housing, this finding applies to almost all sales, leases or donations of land to any third party by any provincial government henceforth. But also, since land can often be used for hospitals, police stations, schools and so forth, the implication is that a provincial government must in addition consult with the Ministers and Departments of Health, Safety and Security, Basic Education *et cetera*.

108. To the extent that the Court (and the NM respondents) 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.[121]

109. The true constitutional position is that such a duty would amount to an impermissible interference by the national sphere with an exclusive provincial executive power. Thus s 41(1) requires of all spheres of government that they respect the constitutional status, powers and functions of government in the other spheres; that they not assume any power or function except those conferred on them in terms of the Constitution; and that they exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

110. Whether or not a duty exists is to be found not in s 41, but must be sought elsewhere in the Constitution.[122] The purported reliance of the NM respondents on s 41 is therefore an instance of impermissible bootstrapping.

111. In terms of s 125(5) of the Constitution, the implementation of provincial legislation in a province is an exclusive provincial executive power. This is made subject to s 100, which

121 *My Vote Counts supra* paras 53 and 54.
122 *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 57.

allows for national intervention in provincial administration only in very particular circumstances.

112. The IGRFA is the legislation that gives effect to **s** 41(2) of the Constitution. It is, as the title and the long title make clear, framework legislation. To the extent that the Court nevertheless relied on s 5 of the IGRFA for the source of the legal duty, it overlooked the fact that 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 affects neither the national government nor the material interests of the national government.

113. In any event, were s 5 of the IGRFA to be applicable to the disposal of immovable property by the WCG, the requirement to inform and consult with the Minister and her department would be at variance with the provisions regarding disposal of property in the WCLAA, which require very limited processes in relation to the national government to be followed, and do not require any interaction with the Minister.[123] There is also national legislation regarding the disposal of state-owned land, which indicates how the national legislature views such disposal.

114. The Local Government: Municipal Finance Management Act 56 of 2003 provides, in s 14, for the disposal of capital assets by municipalities. It does not require that either the national government or the relevant provincial government be informed of the municipality's intention to dispose of a capital asset. It also does not require that the

123 In terms of **s** 3 of the IGRFA, its provisions do not necessarily prevail over provincial legislation. Any conflict between a provision of the IGRFA and provincial legislation must be resolved in terms of **s** 146 of the Constitution. None of the circumstances listed in subsections (2) and (3) under which national legislation prevails over provincial legislation arises in this instance, nor have the NM respondents given any evidence in support of a conclusion that the IGRFA prevails over the WCLAA.

municipality consult and engage with either the national government or the relevant provincial government, or both, prior to disposing of a capital asset. It is inconceivable that a greater duty of information, consultation and engagement would be placed on provincial governments in respect of the disposal of their immovable assets.

115. The national government disposes of land owned by it in terms of s 2 of the State Land Disposal Act 48 of 1961, which does not require the national government to inform and consult with either the relevant provincial government or the relevant municipality. As a fact, the national government does not consult with the other spheres of government before disposing of property belonging to it.[124] It is not explicable why a legal obligation to inform and consult would work in one direction, but not in the other.

116. The reason why there is no such legal duty is, with respect, self-evident. The asset in question is owned by the relevant organ of state, whether it is the national government, a provincial government, or a municipality. It would be inherently strange if the owner had to inform and consult with other spheres of government before it could dispose of its own property. The right to alienate property is an important incident of ownership and property rights.[125] Moreover, structures would have to be created that allowed for a process of information and consultation. Who exactly must a municipality inform that it intends to sell a property belonging to it? With whom exactly must it consult before doing so? Decision-making would inevitably slow down. There would be a substantial cost to government in following these processes. It is notable that, despite the fact that government in all three spheres regularly dispose of property owned by them, there are no

124 WCG AA (NM) para 230, NM record 18/3382-3383.

125 *Mkontwana v Nelson Mandela Metropolitan Municipality and another; Bissett and others v Buffalo City Municipality and others; Transfer Rights Action Campaign and others v MEC, Local Government and Housing, Gauteng, and others (KwaZulu-Natal Law Society and Msunduzi Municipality as* Amici Curiae*)* 2005 (1) SA 530 (CC) para 33.

reported judgments dealing with this section: this is at least an indication that no-one had previously thought that questions of co-operative government arise in regard to disposals.

117. Consultation with other spheres of government gives rise to a very real possibility of what the Constitutional Court has described as the "*spectre of administrative paralysis*", emphasising the important goal of administrative efficiency in a democracy, and most importantly that "*courts must remain vigilant not to impose unduly onerous administrative burdens on the State bureaucracy*".[126]

Conclusion

118. It is respectfully submitted that the appeals in both matters should be upheld, with no order as to costs in the NU application and with costs, including the costs of three counsel, in the NM application.[127] In the NU application no variation is sought of paragraphs 7 and 8 of the order,[128] but it is submitted that the application otherwise falls to be dismissed. In the NM application no variation is sought of paragraphs 2, 3 and 4 of the order,[129] but it is submitted that the application otherwise falls to be dismissed with costs, including the costs of three counsel, such costs to be payable jointly and severally by the first, second and third applicants. It is further submitted that this Honourable Court should find that:

118.1. GIAMA is not, and was never intended to be, the legislation which determines the powers of the national government and provincial governments to dispose of immovable property owned by them – in the case of the WCG it is the WCLAA that regulates the acquisition and disposal by the WCG of immovable property;

126 *Joseph and others v City of Johannesburg and others* 2010 (4) SA 55 (CC) para 29.

127 It is submitted that the test of "*exceptional or extraordinary difficulty, complexity, heavy documentation or multiplicity of issues*" is met (*Fisheries Development Corporation of SA Ltd v Jorgensen and another; Fisheries Development Corporation of SA Ltd v A W J Investments (Pty) Ltd and others* 1980 (4) SA 156 (W) at 172C-H), and that it would be fair for the purpose of doing justice between the parties to allow the costs of three counsel.

128 Amended notice of appeal paras 1 and 2, record 21/3913.

129 Amended notice of appeal paras 3 and 4, record 21/3914.

118.2. The Court *a quo* misdirected itself in finding that it is impermissible for a provincial government to dispose of immovable property without a U-AMP and a C-AMP being in place.

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22 March 2022