IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case no: CCT128/2024

In the matter between:

MINISTER OF HUMAN SETTLEMENTS	First Applicant
NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	Second Applicant

and

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

FIRST AND SECOND APPLICANTS' WRITTEN ARGUMENT

A. INTRODUCTION

1. This is an application by the first and second applicants (jointly referred to as "*the Minister*") for leave to appeal to this Court, in terms of Rule 19(1) of the Rules of the Constitutional Court[1], in respect of the order of the Supreme Court of Appeal

[1] Rule 19 read with the Chief Justice's Practice Direction dated 17 March 2015

("SCA"), *per* Dambuza AP (Zondi, Schippers and Molefe JJA and Unterhalter AJA concurring), handed down on 12 April 2024, under SCA case numbers 522/2021 and 523/2021 *("the SCA judgment").*

2. On 26 July 2024 the Chief Justice issued directions setting this application down for hearing in due course.[2]

3. On 14 August 2024 the Chief Justice issued further directions requiring written argument, including argument on the merits of the appeal, to be filed.[3] This is the aforesaid written argument on behalf of the Minister.

B. JURISDICTION AND LEAVE TO APPEAL

4. Section 167(3) of the Constitution provides as follows:

> *"The Constitutional Court –*
> *(a) …;*
> *(b) may decide -*
> *(i) constitutional matters; and*
> *(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court;*
> *…."*

5. In *Jiba* this Court stated the following as to section 167(3):

> *[35] For leave to appeal to be granted in this Court, the applicant must meet two requirements. These are that the matter must fall within the jurisdiction of this Court and that the interests of justice warrant the granting of leave. For this Court's jurisdiction to be engaged the*

[2] Vol 15: 1502 - 1503
[3] Vol 15: 1504 - 1507

matter must either raise a constitutional issue or an arguable point of law of general public importance that ought to be heard by this Court.

[36] The interests of justice enquiry, on the other hand, involves the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors."[4] (Footnotes omitted)

6. This case concerns the disposal, by the Provincial Government of the Western Cape ("*the Province*"), of a strategically-located piece of land ("*the Tafelberg property")* in the suburb of Sea Point, in Cape Town. The land was previously utilised by the Province as a school and, in respect of a portion thereof, as rental accommodation. Prior to its disposal, the property had been identified as a potential site for social housing.

7. In this regard, and as early as 2012, the Chairperson of the National Association of Social Housing Organisations ("NASHO"), together with the Cape Town Partnership, wrote to the Premier of the Western Cape motivating the utilisation of, *inter alia,* the Tafelberg property for social housing.[5]

8. In 2013 the Head of the Western Cape Department of Human Settlements wrote to the Manager: Property Planning in the Western Cape Department of Transport and Public Works in response to a letter from the latter proposing the disposal of the Tafelberg property. The letter said, *inter alia,* the following:

"… Funding has already been invested by the Social Housing Regulatory Authority [SHRA][6] *and NASHO in order to evaluate site feasibility for rental*

[4] *General Council of the Bar of South Africa v Jiba and Others* 2019(8) BCLR 919 (CC)
[5] Founding Affidavit, Vol 1: 18-19 at para 23
[6] Established in terms of section 7 of the Social Housing Act, Act 16 of 2008

housing. … The Tafelberg school property is very well suited for residential use, and Social Housing in particular."[7]

9. Against that background, the Minister contends that there are two central issues which require and warrant determination by this Court, as they concern matters of constitutional importance, and raise arguable points of law which are of general public importance, and ought to be considered by this Court, namely:

   9.1. Whether, in disposing of the Tafelberg property, the Province was required to comply with the mandatory provisions of the Government Immovable Asset Management Act, No. 19 of 2007 ("GIAMA"), whether the Province complied with those mandatory provisions, and if not, the consequences of such non-compliance.

   9.2. Whether the provisions of the Intergovernmental Relations Framework Act No 13 of 2005 ("IGRFA"), which give effect to Chapter 3 of the Constitution, obliged the Province to consult with the National Government, represented by the Minister, prior to taking the decision to dispose of the Tafelberg property.

10. This Court has recently affirmed that, in considering whether it is in the interests of justice to grant leave to appeal, the Court will consider the prospects of success, the importance of the issues and whether the determination of the matter will have an impact only on the parties before the Court or beyond them.[8]

[7] Founding Affidavit, Vol 1: 21 at para 31; Annexure "MT4": 78
[8] Mafisa v Road Accident Fund and Another 2024 (4) SA 426 (CC) at para 31, referring to S v Boesak 2001 (1) SA 912 (CC) at paras 11 to 12

11. There can be no doubt that this matter raises important constitutional issues, including whether the Provincial Government has complied with the principle of legality and with its constitutional obligations in terms of Chapter 3 of the Constitution.

12. That the case concerns constitutional matters is accepted by both the Province[9] and the City.[10]

13. By the same token, this matter concerns arguable points of law that are of general public importance. The case raises squarely the question of whether provincial governments may dispose of their property solely in terms of their own provincial legislation, and are not also required to comply with GIAMA. It also raises the question of whether they may ignore the material interests of other spheres of government, including those of national government, when so doing. These issues concern all the provinces, and any judgment by this Court would affect all future disposals of property by the provinces. This is not denied by the Province, or by the City.

14. Both the Province and the City deny however that there are reasonable prospects of success in the appeals.[11]

15. The Minister disagrees as to reasonable prospects of success in its appeal. This is fully dealt with in our substantive submissions below in respect of the two points that the Minister wishes to advance on appeal, *viz non*-compliance by the

[9] Province's Answering Affidavit in the application for leave to appeal, Vol 15: 1414 at para 13
[10] City's Answering Affidavit in the application for leave to appeal, Vol 15: 1458 at para 10
[11] Province's Answering Affidavit, Vol 15: 1416 at para 15.5; City's Answering Affidavit , Vol 15: 1457 at paras 10 and 11. It should be noted that the City's Answering Affidavit does not deal at all with the Minister's application for leave to appeal, but only with that of NU in Case CCT126/24, which will be heard together with this case.

Province with GIAMA, and the consequences thereof, as also the Province's failure to comply with its intergovernmental obligations, specifically the requirement that it consult with the Minister inasmuch as the disposal of the Tafelberg property affected the material interests of the Minister and of the national department.

16. Prospects of success inform both the consideration as to whether there is an arguable point of law to be advanced on appeal[12], as also the interests of justice consideration.[13]

17. In addition to the Minister's prospect of success on appeal, we submit that it is in the interests of justice that this Court grant leave to appeal, for the following further reasons:

    17.1. As far as the parties have been able to ascertain, the two judgments delivered thus far in respect of this matter are the first to deal with the proper interpretation of GIAMA, and the extent to which it regulates the disposal of provincial property. These issues require determination by this Court, in light of the SCA judgment.[14]

    17.2. A further consideration in favour of the grant of leave to appeal is the fact that the High Court and the SCA have come to diametrically opposed conclusions as to both the proper interpretation and effect of GIAMA, as also the Province's obligations in relation to co-operative governance.[15]

[12] *Paulsen v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at paras 21-22
[13] Footnote 4 above
[14] *Jiba,* id at para 36
[15] *Jiba* id at para 3. See also *Clicks Retailers (Pty) Ltd v Commissioner for the South African Revenue Service* 2021 (4) SA 390 (CC) at paras 23-30

18. Finally, with regard to the application for leave to appeal, both the Province and the City rely on mootness as a reason why it is not in the interests of justice to grant leave to appeal.[16]

19. There is no merit in the mootness point. That was also not the stance of the Province or the City when they sought leave to appeal to the SCA, and when the matter was argued in that court.

20. This Court has recently, in *Minister of Tourism and Others v Afriforum NPC and Another*[17], affirmed the principles relating to mootness, as follows:

> *"A case is moot when there is no longer a live dispute or controversy between the parties which would be practically affected in one way or another by a court's decision or which would be resolved by a court's decision. A case is also moot when a court's decision would be of academic interest only"*[18]

21. Although the Tafelberg property sale may have fallen through after the High Court judgment, a judgment by this Court on the issues raised by the Minister in the application for leave to appeal would clearly have a practical effect on both the parties and way beyond. As explained above, a judgment by this Court would clarify the question of the application of GIAMA to provincial disposals of property, and also the obligations of provincial governments toward national government where the latter's material interests are affected by such disposals. Such judgment would, accordingly, affect all provinces in relations to all future such disposals.

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[16] Province's Answering Affidavit, Vol: 15 1415 to 1416 at para 15.4; City's Answering Affidavit, Vol 15: 1458 to 1459 at para 12.1. It is to be noted that the point is raised by the City only in relation to the application for leave to appeal in the NU matter.
[17] 2023 (6) BCLR 752 (CC)
[18] At para 23, following *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at footnote 18

22. Tellingly, the Province says the following in its affidavit opposing the grant of leave to appeal in respect of the Minister's application:

> *"Peculiarly, the Minister persists in seeking a finding that would invalidate all disposals of immovable property by the national government (as well as all provincial governments) since the enactment of GIAMA and that would preclude any future disposals of such property until certain long-running processes under that legislation have been completed."*[19]

23. The Court is thus not being asked to provide an advisory opinion.[20] Nor is this matter one requiring detailed factual consideration.[21] The facts are largely, if not entirely, common cause.

24. In considering whether it should entertain a matter, even though moot, because of the interests of justice, this Court has held the following considerations to be potentially relevant:

    a) The nature and extent of the practical effect that any possible order might have;

    b) The importance of the issue;

    c) The complexity of the issue;

    d) The fullness or otherwise of the argument advanced; and

    e) Resolving disputes between different courts.[22]

[19] Province's Answering Affidavit, Vol 15: 1437 at para 17
[20] Compare President of the Republic of South Africa v Democratic Alliance 2020 (1) SA 428 (CC) at para 35
[21] Id, at para 38
[22] MEC for Education: Kwazulu-Natal and Others v Pillay 2008 (1) SA 474 (CC) at para 32

25. We emphasise, for purposes of this case, the considerations in (a) and (b) in particular. We have dealt with same above.

26. In conclusion, as to the mootness point, we submit that the matter is not moot, but even if it is, it is in the interests of justice that this Court nonetheless entertain the appeal.

27. For all of the above reasons we respectfully submit that this Court's jurisdiction is engaged and that the Court should grant the application for leave to appeal, and proceed to consider the merits of the appeal.

C. THE MERITS

The Government Immovable Asset Management Act, No. 19 of 2007 ("*GIAMA*")

Relevant provisions

28. The Preamble to GIAMA states that it is intended to provide for a uniform framework for the management of an immovable asset that is held or used by a national or provincial department; to ensure the coordination of the use of an immovable asset with the service delivery objectives of a national or provincial department; to provide for issuing of guidelines and minimum standards in respect of immovable asset management by a national or provincial department; and to provide for matters incidental thereto.[23] (Emphasis supplied)

[23] Preamble to GIAMA

29. Section 1 defines "*surplus*" as "*in relation to an immovable asset, … that the immovable asset no longer supports the service delivery objectives of a user*;" (Emphasis supplied)

30. In terms of section 4(1) of GIAMA, the relevant departments within the national and provincial governments are custodians and users of immovable assets that vest in them.

31. A "user" is defined, in section 1 of GIAMA, as "*a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy, represented by the Minister of such national department, Premier of the Province or MEC of such provincial department, so designated by the Premier of that province."* (Emphasis supplied)

32. A "custodian" is defined, in section 1 of GIAMA, as a national or provincial department, referred to in section 4, and a custodian acts as the caretaker of the immovable asset of which it is the custodian.[24]

33. The objects of GIAMA include -

    33.1. to provide a uniform immovable asset management framework to promote accountability and transparency within government;[25]

    33.2. to ensure effective immovable asset management within government[26]; and

[24] Section 4(2)(a)
[25] Section 3(a)
[26] Section 3(b)

33.3. to ensure co-ordination of the use of immovable assets with service delivery objects *(sic)* of a national or provincial department and the efficient utilisation of immovable assets.[27]

34. Section 4(2)(b) provides that a custodian may –

(i) in the case of a national department, acquire and manage an immovable asset as contemplated in section 13, and, subject to the State Land Disposal Act No. 48 of 1961, or any other Act regulating the disposal of state land, dispose of that immovable asset; and

(ii) in the case of a provincial department, subject to the relevant provincial land administration law, acquire, manage and dispose of an immovable asset.

35. Section 4(4) provides that a custodian and a user must settle any dispute between them in the manner contemplated in IGRFA.

36. Section 5 deals with the principles of immovable asset management. They include, *inter alia*:

36.1. 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;[28]

36.2. Section 5(1)(f) is of particular importance in this matter. It states as follows:

[27] Section 3(c)
[28] Section 5(1)(a)

"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."

(Emphasis supplied)

37. In terms of section 6(1) of GIAMA:

37.1. the accounting officer of a custodian must prepare a custodian immovable asset management plan ("*C-Amp*") in respect of all the immovable assets which are in its custody as well as a user immovable asset management plan which relates to all the immovable assets which the custodian uses or intends to use in support of its own service delivery objectives; and

37.2. the accounting officer of a user must prepare an immovable asset management plan to be known as a user immovable asset management plan ("*U-Amp*") in relation to the immovable assets which that user uses or intends to use.

38. Importantly, the C-Amps and U-Amps must, *inter alia*, meet the objects of GIAMA and adhere to the principles contemplated in section 5 thereof.[29]

[29] Section 6(2)(a) and (b)

39. In addition, a C-Amp must contain at least, *inter alia*: a portfolio strategy and management plan for each immovable asset throughout its life cycle; a performance assessment of the immovable asset; a disposal strategy and a management plan.[30]

40. A U-Amp must contain at least, *inter alia*: a strategic needs assessment and an immovable asset surrender plan.[31]

41. In terms of section 9 the accounting officer of a custodian, and/or user, must, on a date determined by the relevant treasury, submit a copy of its C-Amp and of its U-Amp, respectively, to such treasury and in the case of the accounting officer of a user, to the custodian in respect of such immovable asset, in each case on a date determined by the relevant treasury or custodian as the case may be.

42. A user has obligations arising from the U-Amp in respect of the immovable assets which that user uses or intends to use:

> *"A user management asset management plan –*
>
> *(a) is the principal immovable asset strategic planning instrument which guides and informs all immovable asset management decisions by the user;*
>
> *(b) binds the user in the exercise of its executive authority, except to the extent of any inconsistency between a user immovable asset management plan and this Act or the immovable asset management guidelines published by the Minister under section 19, in which case this Act or those guidelines prevail."*[32]
>
> (Emphasis supplied)

[30] Section 7
[31] Section 8
[32] Section 10

43. Section 11 provides that a user must give effect to its U-Amp and conduct immovable asset management in a manner which is consistent with GIAMA and with its U-Amp.

44. Section 12 provides for the annual revision, and possible amendment, of C-Amps and U-Amps.

45. Section 13(3) further regulates the disposal by a custodian of an immovable asset:

> *"A custodian* may *dispose of a surplus immovable asset* –
>
> (a) *by the allocation of that immovable asset to another user; or*
>
> (b) *subject to the State Land Disposal Act, 1961 (Act No. 48 of 1961), and any provincial land administration law, by the sale, lease, exchange or donation of that immovable asset or the surrender of a lease."* (Emphasis supplied)

46. In terms of section 15, the Minister may, by notice in the *Gazette*, in respect of certain immovable assets or categories of immovable assets, exempt any organ of state or part thereof from any provision of GIAMA for a period determined in the notice.

47. In terms of section 21, the accounting officer of a national or a provincial department is guilty of an offence, and liable to a fine or imprisonment in the case of a wilful or negligent contravention of any provision of GIAMA.

The correct interpretation of *GIAMA*

48. In *Cool Ideas*[33] this Court set forth the proper approach to statutory interpretation, *viz:*

> *"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, 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)."*[34]

49. The SCA commenced its discussion of GIAMA by recording that it was not in dispute that the Province and the relevant provincial departments had no C-Amps or U-Amps at the time of the initial decision to dispose of the Tafelberg property. Furthermore, although there were asset management plans when the Province resolved not to resile from the sale in 2017, the Tafelberg property was not included in them.[35]

50. The SCA however then went on to reason that the source of the power of the Province to acquire and dispose of provincial immovable property was not GIAMA. That statute, so the SCA reasoned, only regulates disposal of

[33] *Cool Ideas 1186 v Hubbard and Another* 2014 (4) SA 474 (CC). More recently, in Chisuse and Others v D-G, Department of Home Affairs and Another 2020 (6) SA 14 (CC) at paras 46-49 this Court dealt with the relevant principles applicable to statutory interpretation flowing from *Cool Ideas*.
[34] At para 28
[35] SCA judgment, Vol 14: 1346 at para 57

immovable assets, and requires "*an asset disposal strategy*"[36] as part of its asset management objective.[37]

51. According to the SCA, the Western Cape Land Administration Law ("*WCLAA")* is the legislation that was enacted for the effective exercise of the powers concerning matters listed under Schedule 4 of the Constitution. Section 3(1) of the WCLAA, so held the SCA, empowers the Premier '*to dispose of provincial state land on such conditions as are deemed fit'.*[38]

52. The SCA observed (although this was never contended to be the case by the Province, either in the High Court or the SCA), that it was not clear why "*the details of the intended disposal of the Tafelberg property, first as part of the regeneration programme, and later as part of the development of the four identified properties within the city, did not constitute an acceptable asset management strategy*[39] *that fulfilled the purpose of s 7 of GIAMA".*[40] (Emphasis supplied)

53. The SCA also observed that the Province had explained that the requirements of GIAMA in relation to asset management plans were being implemented incrementally by all organs of state under the guidance of the GIAMA Implementation Technical Committee which was co-ordinated by the National Department of Public Works, with the concurrence of National Treasury. This process was not yet completed in 2010.[41]

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[36] As we discuss below, there is no such phrase in GIAMA.
[37] Id, at para 58
[38] Id, at para 59
[39] There isalso no such phrase in GIAMA
[40] Id, at para 56
[41] Id, at para 56

54. With regard to the absence of C-Amps or U-Amps, specifically in respect of the Tafelberg property, the SCA dealt with this in two paragraphs:

> *"[60] The provisions of GIAMA, on which the respondents rely, in contesting the decision to sell the Tafelberg property must be interpreted harmoniously with s 3 of the WCLAA which empowers provinces to dispose of State property. A sensible interpretation requires consideration of the fact that the Tafelberg property had not been in use since 2013, and from 2010 its disposal had been under consideration. It is in that context that its exclusion from the custodian and user asset management plans should be considered.*
>
> *[61] The absence of a custodian management plan in 2010 must also be viewed within the context that GIAMA became effective on 30 April 2009. In addition, as stated, and as the preamble to GIAMA indicates, the legislation is primarily intended to introduce a uniform framework for management of government immovable assets. It is not the empowering legislation in respect of acquisition and disposal of immovable assets by provinces. It is in that context that the references in the Act to inclusion of immovable asset disposal strategy* (sic) *in the management plan must be viewed."*[42]

55. The SCA further observed that the High Court judgment did not identify a specific provision in GIAMA or the WCLAA that required the Province to consider not only whether the Tafelberg property could be used by another department within the Province, but also at national government level[43].

56. Its further observation that the High Court also did not identify a legislative provision to the effect that the Tafelberg property could be disposed of only in exceptional circumstances, and even then, in order to meet compelling social needs[44], may be immediately dispensed with. This was never the Minister's case,

[42] Id, at paras 60 and 61
[43] Id, at para 62
[44] Id

either in the High Court or in the SCA. Such an interpretation would clearly be at odds with a proper construction of GIAMA.

57. Finally, the SCA concluded that the Tafelberg property became surplus to the Western Cape Department of Education when the remedial school vacated the site in 2010. It also found that the custodian department, the Western Cape Department of Transport and Public Works ("the DTPW"), had complied with section 5(1)(f), and observed in this regard that the Western Cape Department of Human Settlements ("the DHS") had withdrawn its objection to the disposal of the property[45]

58. It is submitted that the SCA erred, both in its approach and its reasoning, as set out above.

59. In particular, it did not first seek to interpret GIAMA on its own terms, and in accordance with the approach mandated in *Cool Ideas*. Instead, it engaged in a comparison of the provisions of GIAMA and those of the WCLAA, and concluded, incorrectly, that the latter was the operative and only statute which governed the disposal of the Tafelberg property.

60. This approach was however not in accordance with the jurisprudence of this Court. The SCA further misconstrued GIAMA's provisions insofar as it did undertake an analysis of same.

61. The first enquiry, the proper construction of GIAMA, should have been undertaken without reference to the provisions of the WCLAA. If it subsequently had transpired that GIAMA, properly construed, conflicted with the provisions of

[45] Id, at para 64

the WCLAA, similarly properly construed, such conflict may have called for resolution as envisaged in section 146 of the Constitution. That issue does not arise in this matter, because there is no conflict between GIAMA and the WCLAA, in each case properly construed, as we demonstrate below.

62. However, before being in a position to determine whether GIAMA applied to the disposal of the Tafelberg property, and if so, whether its provisions were complied with, that statute had to be properly interpreted by the SCA.

63. That is precisely what this Court did in *ACDP*.[46] In that case, what was at issue was whether the requirements as to payment of a deposit for purposes of participating in municipal elections in terms of the Municipal Electoral Act had been complied with by the *ACDP.* In concluding that they had[47], this Court first undertook an analysis of the relevant provisions, set against the backdrop of the constitutional values that favour participation in elections, as opposed to exclusion therefrom.[48]

64. The Court expressed itelf as follows:

> *"These foundational values require a court of law, and the Electoral Commission, when interpreting provisions in electoral statutes, to seek to promote enfranchisement rather than disenfranchisement and participation rather than excusion. The exercise, however, remains one of interpretation."*[49]

65. Because the SCA approached the matter incorrectly, it failed to give any, or proper, consideration to the following issues that arise in this case:

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[46] *African Christian Democratic Party v Electoral Commission and Others* 2006 (3) SA 305 (CC)
[47] At para 34
[48] At paras 24 and 27 to 33
[49] At para 23

65.1. The purpose and function of C-Amps and U-Amps in relation to disposals;

65.2. The proper interpretation and application of the concepts of "government" and "user" in GIAMA;

65.3. The proper interpretation of section 5(1)(f), and its central role in disposals;

65.4. The proper interpretation and application of the concepts of "surplus" and "disposal" in GIAMA.

66. We undertake that analysis below, mindful of the fact that the interpretative exercise remains one that commences with a consideration of the language used in the enactment or its relevant provisions[50], and that same is to be undertaken in accordance with section 39(2) of the Constitution[51]. The right in the Bill of Rights implicated in this case is section 26, the right of access to adequate housing, which includes social housing.

C-Amps and U-Amps

67. It is submitted that a proper construction of the provisions of GIAMA set out above, undertaken purposively and contextually, indicates the following:

67.1. The purpose of GIAMA is to provide a uniform framework for the management of immovable assets of national or provincial

[50] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18, especially 603(f)
[51] Independent Institute of Education (Pty) Ltd v KwaZulu-Natal Law Society and Others 2020 (2) SA 325 (CC) at para 23

departments within government and to ensure the co-ordination of the use of such assets with the service delivery objectives of such national or provincial departments. The Preamble states as much.

67.2. Management of such assets, including their disposal, must take place in accordance with formalised plans, the C-Amps and U-Amps, which must be drawn up in the prescribed manner, contain what is required by sections 7 and 8 respectively, be submitted to the relevant treasury or custodian, and may be revised from time to time.

67.3. In the case of C-Amps, and in relation to disposals, they must deal with the manner in which a custodian is required to consider whether a particular immovable asset can be used by another user or jointly by different-users, in relation to the social development-initiatives of government, and to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth[52].

67.4. This is because section 6(2)(b) requires a C-Amp, which is the relevant plan in respect of disposals, to adhere to the section 5 principles. One of these is that contained in section 5(1)(f).

67.5. It is apparent from the above that the C-Amps and U-Amps lie at the centre of the legislative scheme contemplated by GIAMA.

[52] Section 5(1)(f)

67.6. In the case of disposals, the C-Amp plays a central role[53]: to prevent the arbitrary and isolated consideration of the disposal of state assets, in favour of a structured process, where careful attention is given to the ongoing usefulness to government of each immovable asset held by the State, and, prior to disposal, consideration is given to the question of whether such asset can be used by another user for the purposes of government's broad social development and socio-economic objectives, including addressing the legacies of apartheid.

67.7. Accordingly, the existence of C-Amps and U-Amps, and the need for any particular disposal to comply with the provisions of the C-Amp, is an essential requirement for a lawful disposal of any immovable asset held by national or a provincial government.

67.8. In the absence thereof in this case, the disposal of the Tafelberg property was unlawful.[54]

68. The Province however resists this conclusion and contends that the section 5 principles are only intended to govern processes internal to government, to ensure that assets are not disposed of without the custodian giving careful consideration to how that asset might be used internally and to achieve government objectives[55].

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[53] It is to be noted that, in terms of section 13(3) only a custodian may dispose of an asset, including by a sale. A user may only surrender an asset to the custodian (See section 8(d)).
[54] Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA 374 (CC); Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at para 49
[55] Province's answering affidavit in the application for leave to appeal, Vol 15: 1438, at para 77 and 1439: footnote 84, the second paragraph

69. The Province is incorrect.

70. First, the Minister's interpretation gives effect to the requirement of section 6(2)(b). The Province's does not.

71. Secondly, the Province seeks to characterise C-Amps and U-Amps as part of a standardisation process, primarily to inform the budget process[56]. In essence, it would reduce the purpose and function of such plans to administrative tools. This characterisation does not accord with a contextual or purposive reading of GIAMA however.

72. The Province's interpretation must of necessity apply to both C-Amps and U-Amps. Section 10(a) however makes it clear that U-Amps are the principal planning instrument which guides and informs all decisions by a user, and section 10(b) provides that it binds a user in the exercise of its executive authority.

73. One of the consequences of this is that a user can only surrender an asset to a custodian in accordance with the U-Amp in respect of that asset[57]. Moreover any dispute between the two has to be resolved in the manner contemplated in IGRFA[58].

74. Finally, the accounting officer of a custodian or a user is guilty of a criminal offence and may be fined or imprisoned for any wilful or negligent contravention of any of GIAMA's provisions[59].

[56] Id, 1438-1439, at paras 77-78
[57] Section 8(d) read with section 10 and section 11
[58] Section 4(4)
[59] Section 21

75. Accordingly, the purpose and function of C-Amps and U-Amps go far beyond what is contended for by the Province, and the SCA should have so found.

The concepts of "government" and "user" in Section 5(1)(f)

76. The Minister contends that, properly construed, these terms when used in GIAMA, and in particular in section 5(1)(f), refer to both national and provincial government. Such interpretation arises from a proper application of the principles in *Cool Ideas*. In this regard:

76.1 In *Eskom Holdings*[60], in discussing the preamble to IGRFA, the SCA said the following:

> "*The IGRFA is the legislative measure contemplated in s 41(2) of the Constitution. In its preamble, the broad object of s 41 is taken further by stating, amongst other things, that 'all spheres of government must provide effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the progressive realisation of their constitutional rights'. It goes on to state that the pervasive need for government to redress the legacies of apartheid and discrimination are 'best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'. Whilst recognising that piecemeal legislation exists to regulate this area in particular parts of the government, it deemed it necessary 'to establish a general legislative framework applicable to all spheres and in all sectors of government to ensure the conduct of intergovernmental relations in the spirit of the Constitution'.*"

[60] Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others [2020] ZASCA 185 at para 63

76.2 It is submitted that the meaning of "*government"* in section 5(1)(f) bears the same meaning as in the above passage. The context in both cases is the same, viz the need to redress the legacies of apartheid.

76.3 Moreover, construing it as such, advances the constitutionally-compliant reading of section 5(1)(f) identified in *Eskom Holdings*, viz that such legacy is best addressed in a co-operative and integrated manner by government as a whole.

76.4 Construing "government" in section 5(1)(f) as referring only to the government of which the custodian is part would, on the contrary, serve no constitutional purpose. It would impede, rather than advance, the goals in the section.

76.5 Considered textually and contextually, one arrives at the same conclusion.

76.6 The three requirements of the section have each to be considered by the custodian. This follows from the use of the conjunctive "and" after section 5(1)(f)(ii).

76.7 Given that "user" in section 5(1)(f)(i) is defined as a national or provincial department that uses or intends to use an asset for its service delivery objectives, the Minister's interpretation accords with the use of the term "user" in the section. The contrary interpretation does not.

76.8 Finally, the Minister's interpretation accords with the ordinary meaning of the word[61].

77 It follows from the above analysis, particularly in relation to the need to interpret section 5(1)(f) in a manner that advances constitutional goals, that the terms "another user" and "different users" in section 5(1)(f)(i) are also to be understood as referring to users in both spheres of government.

78 That accords with the definition and the context in which the words appear in the provision. There is no basis to read them otherwise.

79 Because the Province, and the SCA, misunderstood the need for, and effect of, C-Amps and U-Amps for a valid disposal, no proper regard was paid to the requirements of section 5(1)(f), properly construed, and the manner in which same had to be given effect to by a custodian. In this regard:

79.1 The SCA only refers to section 5(1)(f) in the context of whether the Tafelberg property was surplus[62]. That is a necessary, but separate, question.

79.2 The anterior question was whether, in complying with section 5(1)(f), the custodian of the Tafelberg property, the Western Cape Department of Transport and Public Works (the "DTPW"), considered the initiatives or objectives of national government.

[61] The Cambridge Dictionary defines 'government', when used as a noun, to mean 'the group of people who officially control a country' and as 'the system used for controlling a country, city or group' [dictionary.cambridge.org].
[62] At para 64

79.3 On a proper construction of the provision, as dealt with above, this was required.

79.4 Because there was neither a C-Amp or a U-Amp in place in respect of the Tafelberg property, there was no disposal strategy and management plan, as required by section 7(f), which could form part thereof.

79.5 Such plan, had it existed, would have had to deal, inter alia, with how the custodian was to consider national government's initiatives and objectives.

79.6 The Province deals in its answering affidavit with GIAMA's application to the disposal of the Tafelberg property.[63] It is apparent therefrom and from other passages in the affidavit that no consideration was given to national government's concerns, initiatives and objectives, precisely because the Province considered them irrelevant.[64]

79.7 This failure is an additional, albeit related, reason rendering the disposal unlawful. The SCA should have so found.

The concepts of "surplus" and "disposal"

80. The SCA found, on the facts, that the Tafelberg property became surplus to the Western Cape Department of Education in 2010 when the remedial school vacated the site. It then appears to have concluded that there was no further

[63] Vol 6: 535-6
[64] 536: para 462 read with 538: para 470 and 561: para 563

impediment to the property being disposed of to the outside world.[65] It erred in this regard.

81. A surplus immovable asset is defined in GIAMA as one that no longer supports the service delivery objects of a particular user. That understanding is reinforced by section 5(1)(a). That does not however mean that such asset can, without further ado be disposed of to the outside world.

82. Upon becoming surplus to a user, the asset passes into the caretakership of the custodian department, in terms of section 4(2)(a).

83. A user is defined as including a national or provincial department that intends to use an immovable asset in support of its service delivery objectives.

84. Section 13 envisages two types of disposals. The first, in terms of section 13(a), is by way of allocation to another user. The second, in terms of section 13(b), is by way of outright disposal, including a sale.

85. Accordingly, and if a custodian wishes to dispose of an asset that has become surplus to a particular user, consideration must first be given as to whether another user requires the use of the asset for its service delivery objectives.

86. On the Minister's construction of the terms "government" and "user", set out above, which we submit to be the correct one, that would include a user in the other sphere of government. On the facts of this case, that would have been the national department, the SHRA, on the Housing Development Agency.

[65] SCA Judgment: 1348-9 at para 64

87. The SCA refers to the fact that the Western Cape Department of Human Settlements ("DHS") wished to utilise the Tafelberg property for social housing, but was persuaded to withdraw its objection after being informed that a decision had been taken by Cabinet to dispose of the property.[66]

88. The SCA failed however to appreciate the implications of this state of affairs, because it did not construe GIAMA correctly. DHS was a user at the time of the disposal, because it wished to use the Tafelberg property for social housing, and had concluded that it was ideal for such purpose. It accordingly objected to the disposal by DTPW.

89. Had C-Amps and U-Amps been in place, the Tafelberg Property would have been dealt with therein, in the C-Amp of DTPW, and in the U-Amp of DHS, respectively. Any dispute between them would have had to be resolved in the manner contemplated in IGRFA.

90. Precisely because there was not, DTPW was allowed to bully DHS into withdrawing its objection, as observed by the SCA. The SCA remarked that DHS did so "grudgingly"[67]. With respect, this misses the point. Had the statutory scheme been complied with by the Province, DHS would not have been able to withdraw its objection, grudgingly or not. It would have been compelled to comply with its U-Amp in respect of the Tafelberg property, under pain of criminal prosecution.

[66] SCA Judgment: 1319, para 7, 1321, para 12 and 1349, para 64
[67] At para 12

91. For these reasons too, the disposal was unlawful, and the SCA should have so found

The WCLAA

92. This interpretation and understanding of GIAMA is entirely consistent with both the Constitution of the Western Cape and the WCLAA. This context was entirely ignored by the SCA in its interpretation of GIAMA and the WCLAA.

93. Section 7(a) of the Western Cape Constitution provides as follows:

> *"As part of the provincial sphere of government of the Republic of South Africa, the Western Cape government must –*
>
> *(a) act in accordance with the principles of co-operative government and intergovernmental relations set out in the national Constitution in all its dealings with the national government, the other provincial governments and the municipalities in the Western Cape;"* (Emphasis supplied)

94. Section 3(1) of WCLAA provides as follows:

> *"3(1) Unless otherwise expressly provided for in any other law, the Premier may dispose of provincial state land on such conditions as are deemed fit, …."* (Emphasis supplied)

95. Section 4 provides as follows:

> *"4(1) The Premier must co-ordinate the provincial government's actions regarding the administration of provincial state land with the national and local spheres of government as contemplated in Chapter 3 of the Constitution and section 7 of the Constitution of the Western Cape.*
>
> *(2) The co-ordination referred to in subsection (1) will, among other things, be with a view to –*

(a) *realising the nation's commitment to land reform and the other reforms required to bring about equitable access to all South Africa's relevant natural resources, and*

(b) *rationalising the province's custody, administration and disposal of provincial state land."*

(Emphasis supplied)

96. As section 3(1) makes clear, the power of the Premier to dispose of provincial state land on such conditions as are deemed fit, is expressly made subject to the provisions of "*any other law*". GIAMA is such a law. The SCA erred when it failed to mention or consider the implications of this.[68]

97. The WCLAA expressly, in section 4(1) requires co-ordination of the provincial government's actions, including the disposal of provincial state land, with the national and local spheres of government.

98. In terms of section 4(2) the co-ordination required is with a view to, among other things, realising the nation's commitment to land reform, and the other reforms required to bring about equitable access to all South Africa's relevant natural resources, and to rationalise, *inter alia,* the disposal of provincial state land.

99. Accordingly, the WCLAA itself makes clear that it does not envisage disposals of provincial state land to take place in isolation. It requires, in express terms, that the provincial government's actions be co-ordinated with those of the national and local spheres of government, precisely in order to realise the nation's commitment to land reform, and for this purpose to rationalise the Province's custody, administration and disposal of provincial state land.

[68] SCA judgment:1347, at para 59

100. Nothing could be clearer. The Province's own legislation required GIAMA and the WCLAA to be read in conjunction with eact other and in harmony, and for the Province to engage with national government in the case of any disposal in which it had, or could be considered reasonably to have, an interest. The Tafelberg property was clearly such a case.

101. Accordingly, a proper construction of GIAMA, and the WCLAA, indicates that the two enactments are not in conflict with each other, nor do they operate to the exclusion of each other.

102. Properly construed, when the Province disposes of provincial land, it must comply with both GIAMA and the WCLAA. This obligation arises both from a purposive, textual and contextual interpretation, but also from a proper understanding of the manner in which the national and provincial spheres of government are intended to operate under the Constitution, in order to advance and achieve the socio-economic objectives of government as a whole.[69]

103. In *Maccsand*[70] this Court dealt with an analogous situation. In that case the Minister for Mineral Resources had granted a mining right to *Maccsand*, which it wished to utilise. However, the land where mining activities was to take place was not zoned for such purpose and required authorisation from the City of Cape Town, in terms of the Land Use Planning Ordinance ("*LUPO").* The question that arose was the interplay between the mining legislation (the MPRDA) and LUPO.

[69] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Limited and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* [2020] ZASCA 185 at para 63
[70] Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC)

104. In concluding that there was no conflict between the two pieces of legislation and that both had to be complied with in order for mining to take place this Court said the following:

> *"If it is accepted, as it should be, that LUPO regulates municipal land planning and that, as a matter of fact, it applies to the land which is the subject-matter of these proceedings, then it cannot be assumed that the mere granting of a mining right cancels out LUPO's application. There is nothing in the MPRDA suggesting that LUPO will cease to apply to land upon the granting of a mining right or permit. By contrast s 23(6) of the MPRDA proclaims that a mining right granted in terms of that Act is subject to it and other relevant laws."*[71] (Emphasis supplied[72])

105. In *Maccsand,* the two pieces of legislation dealt with different matters, the one with mining and the other with municipal planning. Nonetheless, this Court had no difficulty in concluding that they both had to be complied with. In this regard this Court said the following:

> *"While the MPRDA governs mining, LUPO regulates the use of land. An overlap between the two functions occurs due to the fact that mining is carried out on land. This overlap does not constitute an impermissible intrusion by one sphere into the area of another because spheres of government do not operate in sealed compartments."*[73]

and:

> *"The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the*

[71] At para 44
[72] The underlined wording mirrors section 3(1) of the WCLAA
[73] Id at para 43

Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another."[74]

106. In light of our analysis above, we turn to deal with the reasoning of the SCA, as set forth earlier.

107. The SCA's reasoning as to the source of the Province's power to dispose of property was, with respect, irrelevant to the interpretation exercise. It was never the Minister's case that GIAMA was the source of such power. The Minister's contention was always that GIAMA had to be complied with by the Province in disposing of provincial assets. The fact that the WCLAA also had to be complied with does not detract from the Minister's argument.

108. The SCA's reference to the details of the intended disposal of the Tafelberg property in the regeneration programme, as part of the development of various properties within the City, possibly constituting an acceptable asset management or disposal strategy is incorrect for a number of reasons. In this regard:

    108.1. First, as we have pointed out, this was never the Province's argument, in either the High Court or the SCA.

    108.2. Secondly, the use by the SCA of the words "*asset management strategy*" and "*asset disposal strategy*" is unfortunate. Such wording is not to be found in GIAMA. GIAMA requires an asset management plan, of which a disposal strategy must form part. These are formal

[74] Id at para 47, internal citation omitted

documents, prepared by the accounting officer of the department concerned, and submitted to treasury.

108.3. GIAMA uses the term "*asset management plan"* throughout. It is apparent from that wording, as also the provisions regarding the preparation and submission of such plans, referred to above, that same are documents prepared for the specific purposes set forth in GIAMA, and that same must comply with its requirements as to minimum content and the like. They cannot, accordingly, be gleaned from vague and isolated details in other documents, let alone arise from events.

108.4. The SCA, despite its, possibly rhetorical, question, was thus correct in concluding, as a fact, that there were no C-Amps and U-Amps in place at the time of the disposal of the Tafelberg property. Such absence was, as we have submitted above, fatal to the lawfulness of the disposal.

109. As to GIAMA's provisions being implemented incrementally, the point of such observation is, with respect, unclear.

110. We have referred above to the trite authority that require compliance with legal requirements in order for any action by an organ of state to pass constitutional and legal muster.

111. It would be entirely inconsistent with the principle of legality, a founding value of the Constitution[75], were government, in any sphere, to be able to argue that it was only complying with legal requirements incrementally. That is no answer.

112. In *BE obo JE v MEC for Social Development*[76] this Court had to consider whether wrongfulness in the sense of a legal duty to prevent harm to a child at an ECD centre, had been established. In finding that it had not, this Court approved of the reasoning by the SCA in *Western Cape Department of Social Development v Barley and Others*[77] where the SCA found that, upon a proper construction thereof, the legislative framework there at issue remained aspirational, and that the intention must have been that government, through the various government departments, would develop a plan to effect progressive access to ECD services, and that strict adherence to legal prescripts was an unattainable ideal.[78]

113. Neither the Province nor the SCA referred to or relied upon either *BE* or *Barley.* In any event, these judgments do not assist the Province, for the following reasons:

113.1. What was at issue in *Barley* was guidelines, not a binding statute.

113.2. It is not the Province's case that compliance with GIAMA, in the case of the Tafelberg property was impossible. It has, in fact, offered no explanation on affidavit as to why GIAMA's requirements in respect of the disposal of the Tafelberg property was not complied with. What is

[75] Section 1(c)
[76] 2022 (1) SA 1 (CC)
[77] 2019 (3) SA 235 (SCA)
[78] At paras 23 and 24

known however is that GIAMA was considered by the Premier and Cabinet prior to the decision not to resile from the agreement with the Day School.[79] We do not however know what advice the Premier and Cabinet received in this regard.

113.3. Should the Province have considered GIAMA's requirements not to be capable of being complied with, it was open to it to apply for the necessary exemption as provided for in section 15 of GIAMA. It did not do so.

114. In conclusion as to GIAMA we address two arguments which are raised by the Province in its answering affidavit in the leave to appeal application by the Minister, but which were not taken up by the SCA in its judgment. It may, however, be expected that the Province will raise them in argument in this Court.

115. First, the Province argues that the interpretation of GIAMA contended for by the Minister would result in all disposals, by both national and provincial governments, taken without compliance with GIAMA, unlawful and invalid[80]. This appears to be an argument raised against the Minister's interpretation. So understood, the argument is without merit.

116. First, Province's argument is not understood as premised upon the presumption of interpretation against absurd results. That principle continues to find application in the constitutional era.[81]

[79] Vol 2: 124, Annexure "MT15"
[80] Province's answering affidavit, Vol 15: 1437, at para 70
[81] See: *Fraser v Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC)

117. However, there is nothing absurd in the Minister's interpretation being upheld by this Court. As we have submitted above, such interpretation accords both with the approach set forth in *Cool Ideas,* as also with a consideration of what is required in terms of the WCLAA. The resultant legislative scheme for the disposal of provincial property by the Province is both harmonious and rational.

118. Moreover, the Province raises a bogeyman. Even though a court would have no discretion but to make a declaration of invalidity, in terms of section 172(1)(a) of the Constitution, in the event of a disposal contrary to the requirements of GIAMA, it would have the power, in terms of section 172(1)(b), to make an order that would be just and equitable in the circumstances, including not setting aside any disposals prior to the legal position having been clarified by the judgment of this Court.

119. As to the Province's second argument, this relates to the alleged intrusion into the constitutionally protected domain of provincial government, by the interpretation of GIAMA contended for by the Minister[82]. It is submitted that the argument is without merit.

120. As explained in *Maccsand*,

> *"The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. It is in this context that the Constitution obliges these spheres of government to cooperate with one*

[82] Province's answering affidavit, Vol15: 1438, at para 74

another in mutual trust and good faith, and to co-ordinate actions taken with one another."[83]

121. In this case, the relevant provincial legislation itself, the WCLAA, requires co-ordination and co-operation with national government, and makes a disposal in terms of section 3(1) subject to "*any other law"*. Giving effect thereto would not constitute an impermissible intrusion by national government into the affairs of the Province.

122. In any event, and had this been a genuine concern of the Province, it could and should have challenged GIAMA's constitutionality. It has not done so.

123. For the above reasons, we respectfully submit that the SCA's judgment and order, premised insofar as it was on its conclusions as to GIAMA, are unsustainable, and stand to be set aside by this Court.

The obligation to consult in terms of the Intergovernmental Relations Framework Act 13 of 2005 ("*IGRFA*")

124. The SCA dealt with this important aspect of the Minister's case, and the High Court judgment, in eight paragraphs[84]. It reasoned, insofar as can be discerned, as follows:

124.1. The Minister's entitlement to 'inquire' into the disposal of the Tafelberg arose upon communication of the Province's decision not to cancel the contract;[85]

[83] Supra, at para 47
[84] SCA Judgment, Vol 14: 1358-1361
[85] Id, at para 88

124.2. It was unclear where the source of the obligation to be consulted lies[86];

124.3. The Province's obligation to notify affected organs of state was complied with by sending the notices contemplated in sections 3(2) and 3(3) of the WCLAA, read with sections 5(b) and (c) of IGRFA[87];

124.4. The Minister's case "caved in" when counsel conceded that there was no obligation to consult on every proposed disposal, as the case had been pleaded as an across the board obligation to inform and consult[88].

125. The SCA was, with respect, wrong in reaching of each of these conclusions. Before dealing with them, we deal with the relevant jurisprudence. None is cited by the SCA in its judgment.

126. In *Independent Electoral Commission v Langeberg Municipality*[89], this Court said the following:

> *"All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other. They are all interrelated. None of these spheres of government nor any of the governments within each sphere have any independence from each other. Their interrelatedness and interdependence is such that they must ensure that, while they do not tread on each other's toes, they understand that all of them perform governmental functions for the benefit of the people of the country as a*

[86] Id, at para 89
[87] Id, at paras 91 and 92
[88] Id, at para 93
[89] 2001 (3) SA 925 (CC)

whole. Sections 40 and 41 were designed in an effort to achieve this result."[90]

127. In *National Gambling Board v Premier, KwaZulu-Natal and Others*[91] the relevant organs of state differed as to the correct interpretation of legislation. In that context, this Court said the following:

> "*Moreover, organs of State's obligation to avoid litigation entails much more than an effort to settle a pending court case. It requires of each organ of State to re-evaluate its position fundamentally."*[92]

128. In *Minister of Police and Others v Premier Western Cape and Others*[93], this Court emphasised the need for organs of state to arrange their affairs in a manner that bolsters co-operative governance:

> *"[64] It must be added that spheres of government and organs of state are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance. If they do not do so, they breach peremptory requirements of the Constitution. ... Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their co-operative governance obligations well before resorting to litigation."*[94]

129. In the same judgment the Court accepted that, although the Premier had the power to appoint a Commission of Inquiry, she was still bound to comply with section 41(1)((h)(iii) and (iv) of the Constitution in so doing.[95] It found, on the facts, that she had done so.

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[90] At para [26]
[91] 2002 (2) SA 715 (CC)
[92] At para 36
[93] 2014 (1) SA 1 (CC)
[94] At para 64
[95] At para 62

130. IGRFA was enacted in 2005.

131. The SCA discussed the obligation on governments to engage with one another as required by section 41 of IGRFA in *Eskom Holdings*[96]:

> *"[63] The IGRFA is the legislative measure contemplated in s 41(2) of the Constitution. In its preamble, the broad object of s 41 is taken further by stating, amongst other things, that 'all spheres of government must provide effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the progressive realisation of their constitutional rights'. It goes on to state that the pervasive need for government to redress the legacies of apartheid and discrimination are 'best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'. Whilst recognising that piecemeal legislation exists to regulate this area in particular parts of the government, it deemed it necessary 'to establish a general legislative framework applicable to all spheres and in all sectors of government to ensure the conduct of intergovernmental relations in the spirit of the Constitution'."*

132. As regards the scope of the obligation imposed by section 41(2) of IGRFA, the SCA stated:

> *"[66] It is important to note that the s 41(2) obligation, to 'make every reasonable effort to settle the dispute', is already relevant before a dispute is declared a 'formal intergovernmental dispute'. Thus, in effect, organs of state are obliged at two (separate) stages of the process to resolve their disputes with each other, by means of whatever mechanism*

[96] [2020] ZASCA 185

or procedure available to them in the circumstances, outside of the courts."[97]

133. Against that backdrop, we deal with the SCA's reasoning set out above.

134. The Minister's case was not that she first obtained an interest in the matter upon becoming aware of the Province's decision. Her case was that she and the national department should have been consulted prior to the decision being taken.[98]

135. Section 41(1)(h) of the Constitution states:

> *"All spheres of government … must -*
>
> *(h) co-operate with one another in mutual trust and good faith by –*
>
> *…*
>
> *(iv) informing one another of, and consulting one another on, matters of common interest;*
>
> *(v) co-ordinating their actions and legislation with one another;".*

136. IGRFA is the legislation contemplated in Chapter 3 of the Constitution.

137. Section 5(b) and (c) of IGRFA provide that, in conducting their affairs, the national government, provincial governments and local governments must seek to achieve the object of IGRFA, *inter alia*, by:

> *"(a) taking into account the circumstances, material interests and budgets of other governments and organs of state in other*

[97] *Id,* at para 66
[98] Founding Affidavit, Vol 1: 45, at para 103

governments, when exercising their statutory powers or performing their statutory functions;

(b) *consulting other affected organs of state in accordance with formal procedures, as* determined *by any applicable legislation, or accepted convention or as agreed with them or, in the absence of formal procedures, consulting them in a manner best suited to the circumstances, including by way of -*

(i) *direct contact; or*

(ii) *any relevant intergovernmental structures;*

(c) *co-ordinating their actions when implementing policy or legislation affecting the material interests of other governments*."

138. The above emphasised provisions provide the source of the obligation on the Province to inform and consult the national government prior to taking the decision to dispose of the Tafelberg property, provided that such disposal involved a matter of common interest, or affected national government's material interests. Patently, it did.

139. The SHRA was the third applicant in the Minister's application in the High Court. It filed a detailed affidavit dealing with the question of social housing, the constitutional and legislative context in relation thereto, the history of the Tafelberg property, and the continuing effects of spatial apartheid in Cape Town, including Sea Point, and the need for government to address these[99].

[99] Vols 2-3: 149-228

140. We have referred above to the fact that both NASHO and the SHRA had, as early as 2012, engaged with the Tafelberg property, that funds had been expended, and a feasibility study undertaken.

141. Mr Gallocher, on behalf of SHRA, explains that the feasibility study was in fact undertaken in 2011, and was submitted to DTPW[100]. It showed that development of social housing on the Tafelberg site was feasible and laid out a potential business plan[101].

142. He goes on to say the following:

142.1. The SHRA is established in terms of section 7 of the Social Housing Act, is responsible for the social housing programme, is a public entity for purposes of the Public Finance Management Act, and is accountable to the Minister and to Parliament[102].

142.2. The decision to dispose of the Tafelberg property undermines the availability of social housing opportunities in Cape Town, and also the SHRA's ability to deliver same, and that it accordingly has a material interest in the lawfulness and constitutionality of the decision[103].

142.3. The implementation of the social housing programme is done in partnership between the three spheres of government. The provincial and local authorities identify the land to be used for investment in social housing. Since social housing can only take place in a

[100] Vol 2, SHRA affidavit: 157-8, at paras 26.5-26.7
[101] Id, at para 26.6
[102] Id: 150, at para 6
[103] Id:151, at paras 8-9

restructuring zone, the municipality must identify same, in terms of section 5(d)(i) of the SHA. The provincial executive then submits the details of the zone to the Minister, who must then designate same, in terms of section 3(1)(f)[104].

142.4. Consultation between the three spheres of government on the achievement of social housing is integral to the programme[105].

142.5. When expressions of interest were called for by the Province in respect of the Tafelberg site, more than 4000, 89% of respondents, expressed the desire that the site be used for the housing needs of the poor[106].

142.6. The development of Sea Point for European settlers began in earnest in the early 1800s in an area that historically formed part of the Gorachqua and Goringhaiqua grazing paths. When the Sea Point tramline was opened in 1862, housing for the workers was constructed, resulting in the only non-white residential area in Sea Point, in Tramway Road. With the advent of apartheid, all non-white people were removed from Sea Point, by order, in 1957[107].

142.7. Regarding the restructuring zone issue, it is not uncommon for the provinces and municipalities to consult with the SHRA and the national department in this regard. The latter are generally extremely receptive of requests to earmark an area as a restructuring zone. The

[104] Id:152, at para 13
[105] Id, at para 14
[106] Id:158, at paras 28 and 30
[107] Id:194, at paras 93-95

concept of restructuring zones is not meant to be an obstacle to the development of social housing[108].

142.8. In the circumstances, if the restructuring zone was an issue at all for the use of the Tafelberg site for social housing, one would have expected the Province to consult with the City, the national department, and the SHRA in respect of the possible extension of the zone to include the area where the site is located. Had this been done, the SHRA would have vigorously supported such extension. It would have been surprising if the City and the national department had adopted a different view[109].

143. In the Minister's founding affidavit the following is stated:

143.1. That in terms of section 4 of the Housing Act she has published the National Housing Code that contains the national housing policy, that is binding on the provincial and local spheres of government[110].

143.2. That the Social Housing Act regulates the provision of social housing by social housing institutions ("SHI")[111].

143.3. The Housing Development Agency Act was enacted, inter alia, to fast-track housing development for low-income earners. For this purpose the Housing Development Agency ("HDA") was established. One of its functions is to, after consultation with the landowner, identify,

[108] Id:200-201, at para 112
[109] Id: 201, at paras 113 and 113.1
[110] Founding affidavit, Vol 1: 35, at para 74
[111] Id, at para 76

acquire and hold land registered or vested in the state or any organ of state and which the landowner is prepared to dispose of, for residential or community development purposes[112].

143.4. With reference to the letter referred to earlier from DHS to DTPW[113], same specifically said: "*The instrument which can be utilised is the Social Housing Programme, which has been used to fund developments in Milnerton, Bothasig and Steenberg recently. The rental stock developed is managed by social housing institutions."*[114]

143.5. Following the first court order setting aside the notices in terms of section 3 of the WCLAA, as they had not been published in isiXhosa, fresh notices were published. These elicited a large number of comments and submissions from members of the public, residents, and interested and concerned organisations and bodies[115].

143.6. In July 2016 Cabinet resolved that it was unable meaningfully to consider the comments without a full financial model regarding the financial implications of the development of social housing on the Tafelberg site. Such a model was thereafter commissioned[116].

143.7. Once the model was obtained, it was made available for public comment. Further comment, both in favour of the disposal and opposed thereto, was received[117].

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[112] Id, at paras 79-80
[113] Footnote 7 above
[114] Id: 21, at para 30
[115] Id: 26-7, at paras 45-48
[116] Id, at para 49
[117] Id, at para 49

143.8. Cabinet considered all of the above and decided, on 22 March 2017, not to resile from the sale[118].

143.9. This elicited a letter from Minister Sisulu on 30 March 2017 indicating that she believed that there was a national objective that can and must be achieved through the development of the Tafelberg property by providing social housing. She stated that she intended pursuing social housing on the property, and also invoked section 5 of IGRFA[119].

143.10. The Premier responded on 5 April 2017. She raised two preliminary issues, viz the basis on which the Minister asserted a right to develop social housing on the property, and the basis on which the Minister challenged the decision of the Provincial Government to dispose of the property. She further indicated a willingness to engage with the Minister once these issues had been responded to[120].

143.11. Further correspondence followed[121], but there was no formal engagement between the parties, whether in terms of IGRFA or otherwise.

144. The Minister has clarified that, notwithstanding any ambiguity in her first letter, the national department does not itself undertake the development of any housing projects, including for social housing. This is left to local authorities or agencies like the HDA and SHRA, who undertake the development with funding from national or provincial government.[122]

[118] Id: 28, at para 52
[119] Id, at para 54
[120] Id: 28-9, at paras 55-56
[121] Id: 29-32, at paras 57-66
[122] Id: 43, at para 99

145. The Minister states that she, and national government, had a material interest in the disposal, and sets out the constitutional and statutory basis therefor[123].

146. She states that, had the Provincial Government consulted with her and the national department, it would have been left in no doubt as to their strong views. She then goes on to explain what those views were, as also the specific proposals that would have been made as alternatives to the sale of the property[124].

147. Certain aspects of the explanation bear emphasis.

148. The Minister states that any concern as to the property not falling into a restructuring zone could have been addressed in the ongoing processes in relation to the amendment, and increase, of such zones throughout the country. She states that the Provincial Government would have been well aware of these processes, as it participated therein in [the Human Settlements] MinMEC[125][126].

149. She further states that it would have been pointed out that, in line with processes that the Provincial government was equally aware of, agencies reporting to national government, such as SHRA and the HDA, stood ready to assist in the development of affordable housing, including social housing, on the site[127].

[123] Id: 44, at para
[124] Id: 44-47, at paras 102-107
[125] Id; 45, at para 103.
[126] Minmec is defined in IGRFA as 'a standing intergovernmental body consisting of at least a Cabinet member and members of the provincial Executive Councils responsible for functional areas similar to those of the Cabinet member'.
[127] Id, at para 104

150. The proposed alternatives to a sale that would have been proposed to the Province included disposal to the HDA, an SHI, the DHS, or the City, in most cases with funding sourced by the SHRA[128].

151. The Minister states that these options would have well-known to the Provincial Government, as it participates in the Human Settlements Minmec, which meets regularly to discuss, amend and better implement government's housing policy and programmes[129].

152. Finally, with respect to the facts, the City has affirmed that it has at all material times been willing to develop the Tafelberg site for housing, but that it was not able to acquire the property at market-related rates[130].

153. To return to the issues raised by the SCA. The disposal of the Tafelberg property was plainly one that involved a matter of common interest, and that affected national government's material interests. In this regard:

    153.1. The property is one of the few State-owned properties on the Atlantic Sea-Board, a generally wealthy area, with a dearth of accommodation for poorer persons, many of whom work in the area.

    153.2. DHS, SHRA and the City all considered the site suitable for the development of social housing, or some other form of housing that would assist in addressing the legacy of spatial apartheid, a goal of government's housing policy.

[128] Id: 45-46, at para 105
[129] Id: 47, at para 106
[130] City's answering affidavit in the application for leave to appeal, Vol15: 1458-9, at para 12.1

153.3. Indeed, DHS, SHRA, and NASHO, considered it ideal for this purpose.

153.4. SHRA, an agency of national government, expended funding on investigating the feasibility of the property for social housing.

153.5. The very lengthy process culminating in Cabinet's decision not to resile from the sale was characterised not only by successful litigation, but by numerous reports and studies in respect of the site, being submitted to Province, and at least two public participation processes, which elicited thousands of responses. This was clearly not an ordinary sale.

153.6. The fact that it was not an ordinary sale is further demonstrated by the fact that Cabinet itself took the decision to sell, and then not to resile from the sale.

153.7. One of the reasons given by Cabinet for not resiling from the sale was the fact that Sea Point did not fall within a restricting zone. Even if correct, as both the Minister and Mr Gallocher point out, this could have been resolved, using the Minmec forum. This provides a further, discrete, reason as to why the Minister should have been consulted.

153.8. The aforementioned litigation, by NU, informed the Province that its decision to sell the property would be challenged on review, inter alia, on the basis that it failed to address the ongoing effects of spatial apartheid.

154. We submit, on the basis of the above facts, that the Province's duty, in terms of section 41(1)(h)(iv) of the Constitution, and sections 5(a) and (b) of IGRFA, first to inform the Minister of the intention to dispose of the Tafelberg property, and thereafter to consult her in this regard, was undoubtedly triggered. Section 5(b) of IGRFA provides a number of options as to the form and nature of the required consultation. There are no doubt others. Its failure to do so rendered the sale unconstitutional and unlawful.

155. The SCA found that sections 3(2) and 3(3) of the WCLAA constituted the "*formal procedure"* contemplated in section 5(b) of IGRFA, and hence the Minister had been notified of the proposed sale. It made no finding in respect of the express requirement in section 5(b) that affected organs of state be consulted[131]. The SCA erred. In this regard:

155.1. The SCA conflated the duties to inform, and to consult. Section 5(b) does not include an express duty to inform. Section 41(1)(h)(iii) of the Constitution, however, does.

155.2. The notices contemplated in section 3(2) and 3(3) of the WCLAA could, however, never be construed as the constitutionally-required notification to an affected organ of state.

155.3. Section 3(2) contemplates a notice to the public, to be published in the Provincial Gazette, and in three newspapers. Section 3(3) requires a copy of that notice to be sent, inter alia, to the provincial directors of

[131] SCA Judgment, Vol 14: 1360-1, at paras 91 and 92

the national departments of Land Affairs, Public Works, and, if applicable, Agriculture.

155.4. The purpose behind the identification of these departments is not clear, but, presumably has to do with their line functions being implicated or affected.

155.5. What is however clear is that the national department of Human Settlements is not sent a copy of the notice. It is however the Minister and her department that are the affected parties, for purposes of section 5(b) of IGRFA.

155.6. The constitutional requirements of co-operating in mutual trust and good faith, and fostering friendly relations, are not advanced by construing a copy of a public notice, sent to provincial officials of other national departments, as the constitutionally-required duty to inform the Minister.

156. Even were the duty to inform complied with, the duty to consult was not. Again, the SCA did not find that it had.

157. In *Minister of Home Affairs and Others v Scalabrini Centre and Others*[132] the SCA described consultation as entailing "*a genuine invitation to give advice and a genuine receipt of that advice*"[133], and in *Electronic Media Network*[134] this Court

[132] 2013 (6) SA 421 (SCA)
[133] At para 42
[134] Electronic Media Network Limited and Others v e.tv Ltd and Others 2017 (9) BCLR 1108 (CC)

said that it required "*a genuine and objectively satisfactory effort … to create a platform for the solicitation of views*"[135].

158. The section 3 notices relied upon by the SCA did not have any of these attributes, i.e, they were not directed at the organ of state affected, they did not genuinely, objectively, or in any other manner, contain an invitation to consult, and they did not achieve such purpose.

159. Given that no consultation took place, the decision to sell, in the absence of soliciting, and giving serious consideration to, the views of the Minister, is fatally defective, and was both unconstitutional and unlawful.

160. Finally, the SCA concluded that the Minister's case 'caved in' when it was conceded that not every disposal required her to be informed and consulted, as her case had been pleaded on an across the board obligation to be consulted, and once the concession was made, it was not clear which disposals required consultation, and what the source of the obligation to consult was[136].

161. The SCA erred in reaching these conclusions. In this regard:

    161.1. The Minister's case was never that there was an across the board obligation to inform and consult her in respect of every disposal of an immovable asset by the Province, and presumably, every other province. That would be an absurd proposition.

    161.2. Her case was that the disposal <u>of the Tafelberg property</u> required her to be informed and consulted, because of the history preceding and

[135] At para 37
[136] SCA Judgment, Vol 14: 1360-1, at paras 89 and 93.

the circumstances surrounding the disposal, and because it affected her material interests. These have been dealt with above. Her case was expressly pleaded as such from the outset[137].

161.3. There was no concession, as found by the SCA. Counsel was simply clarifying what was obvious.

161.4. We have dealt with the source of the obligation on Province to inform the Minister of the proposed disposal, and to consult her in this regard.

Conclusion

162. The Minister submits that leave to appeal should accordingly be granted, and the appeal upheld.

163. Given the passage of time and events, the Minister submits that the appropriate order would be to reinstate only the relief granted in paragraph 1 of the High Court Order in Case No. 12327/2017.[138]

164. The Minister does not seek costs.

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14 October 2024

[137] See Founding affidavit, Vol: 12, at para 4, and 44-47, at paras 102-104 and at para 107
[138] High Court judgment, Vol 13: 1304