IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CCT Case No: **126/2024**

In the matter between:

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

and

MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	**First Respondent**
PREMIER OF THE WESTERN CAPE	**Second Respondent**
PROVINCIAL GOVERNMENT OF THE WESTERN CAPE	**Third Respondent**
MINISTER FOR HUMAN SETTLEMENTS: WESTERN CAPE	**Fourth Respondent**
CITY OF CAPE TOWN METROPOLITAN MUNICIPALITY	**Fifth Respondent**
THE SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA	**Amicus curiae**

***AMICUS CURIAE'S* WRITTEN SUBMISSIONS**

I INTRODUCTION

1. The Socio-Economic Rights Institute of South Africa (**SERI**) was admitted as *amicus curiae* in terms of this Court's order of 7 January 2025.

2. SERI is a public interest law centre that has a particular focus on housing and land and conducts litigation on behalf of poor communities and publishes research in this area.

3. SERI's interest in the matter relates to the delivery by the state of affordable housing and specifically the disposal of public housing stock.

   3.1. The term 'public housing stock' is used in these submissions to refer to immovable property that, in whole or part, is currently being used to provide housing, has been so used in the past, or has been proposed for such use by government or another relevant role-player, such as a social housing agency.

   3.2. It accordingly would not include all land, and would exclude land that is used by government for other purposes, such as schools, hospitals, government offices and police stations.

   3.3. It is submitted that the Tafelberg property constituted public housing stock because it is publicly owned and had been used, in part, to provide affordable rental housing before those occupiers were evicted prior to the proposed disposal.

3.4. Province and the City took the position in response to SERI's request for consent to be admitted that the Tafelberg property was not housing stock.[1] This is incorrect, as the property had been used in part to provide housing previously and because the City and National Government had identified it as being suitable for social housing. In any event, the issues and relief in this matter extend beyond the Tafelberg property.

4. There are two themes on which SERI intends to focus in these written submissions as *amicus curiae*:[2]

4.1. at a substantive level: the principle of non-retrogression, as applicable to the sale of public housing stock; and

4.2. at a procedural level: the requirements of public participation as applicable to housing-insecure communities, and more specifically, in buildings already occupied the need for meaningful engagement prior to the disposal of state-owned and/or state-regulated land.

5. The principles of (i) non-retrogression and (ii) participation (including engagement) are bedrock principles of South African social rights jurisprudence under the Constitution. In addition, they are undergirded by international law, in particular, two human rights treaties that South Africa has ratified and by which it is bound: the International Covenant on Economic, Social and Cultural Rights

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[1] See annexures 'NZ2' and 'NZ3' to FA in amicus application.

[2] SERI FA para 13.

(**ICESCR**);[3] and the African Charter on Human and Peoples' Rights (**the African Charter**).[4]

6. In these written submissions, by way of overview, we make the following submissions on the requirements of non-retrogression and participation as applicable to the contentious issues in the appeal:

6.1. The principal parties have addressed the state's duty to progressively realise the rights in section 26(1) and (2) and 25(5) of the Constitution, but not had regard to non-retrogression. The doctrine of non-retrogression is a key principle of constitutional jurisprudence and international law. The disposal of public housing stock constitutes a retrogressive measure. Such a disposal is therefore required to be fully justified with reference to all relevant factors, including:

6.1.1. The purpose of the proposed disposal and whether it constitutes a reasonable justification;

6.1.2. Whether alternatives were comprehensively examined;

6.1.3. Whether there was genuine participation in the process by affected groups;

6.1.4. Whether the disposal is directly or indirectly discriminatory;

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[3] International Covenant on Economic, Social and Cultural Rights, entry into force 3 January 1976 UNTS 999 p 3 (**ICESCR**).

[4] African Charter on Human and Peoples' Rights (Banjul Charter), adopted 27 June 1981, OAU Doc. CAP/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986 (**African Charter**).

6.1.5. The impact of the disposal on the realisation of rights to housing and land, including on spatial justice;

6.1.6. Whether there was independent review of the measure at national level.

6.2. Participation rights are an integral component of the rights in section 26(1) and (2) and 25(5). They include the right to genuine participation of affected groups in any proposed disposal of public housing stock; and meaningful engagement with actual occupiers, above and beyond any public consultation process.

6.3. As applied to the contentious issues:

6.3.1. In respect of the spatial justice relief: The appropriate focus of inquiry is the general policy of Province and the City. That general policy is not to provide affordable housing in central Cape Town, but to do so in other areas where it is less costly. It is also their position that it is legitimate and defensible to sell immovable property in central Cape Town (such as the Tafelberg property) in order to generate revenue to meet their obligations. In doing so, they fail to recognise that such disposal constitutes a retrogressive measure. The general policy position of Province and the City is inconsistent with the Constitution.

6.3.2. In respect of the Government Immovable Asset Management Act 19 of 2007 (**GIAMA**): Its provisions must be interpreted to promote constitutional rights and values. This requires an interpretation of

'surplus' and of the principles governing disposal that recognise that the sale of public housing stock is a retrogressive measure that requires justification.

6.3.3. In respect of the obligation to consult National Government: International law authorities relating to non-retrogression and participation require the involvement of National Government in any process relating to the proposed disposal of public housing stock. Therefore, applicable legislation should be interpreted to require consultation with National Government.

6.3.4. In respect of the constitutionality of the WCLAA regulations:[5] Regulations 4(1) and 4(6), in providing for consultation at the final stage when the transaction is complete and a contract concluded fail to provide for genuine participation of affected groups because such groups are deprived of an opportunity at a meaningful stage to make input on the terms of the proposed disposal itself, including possible terms relating to the provision of affordable housing or the inclusion of current residents.

7. We begin by addressing the doctrine of non-retrogression.

II NON-RETROGRESSION

General

8. The sale by the state of public housing stock (as defined to include land previously used for housing or identified by government as suitable for the

[5] Regulations issued in terms of the Western Cape Land Administration Act 6 of 1998 (WCLAA).

provision of public housing) constitutes, in principle, a retrogressive measure in the context of the pervasive lack of adequate housing in South Africa. The courts below, and the principal parties[6], have failed to have regard to this salient consideration in understanding the constitutional principles applicable to such disposals.

9. It is, of course, not submitted that the state may never sell public housing stock. Rather, the process and the substantive considerations informing the decision need to reflect the position that the sale of public housing stock constitutes a retrogressive measure that must be justified.

10. Non-retrogression is a doctrine in human rights law that prohibits states from taking deliberate measures that result in a backward step in the enjoyment of rights. The doctrine is closely related to, and a corollary of, the obligation to progressively realise socio-economic rights to the maximum of available resources. As Samtani explains:

> "*Progressive realisation requires the state to take steps towards the realisation of a right; non-retrogression bars it from moving backwards or 'regressing' once it has taken these steps to realise a right. The principle of non-retrogression (also known as the principle of non-regression) thus encapsulates an integral step towards the realisation of human rights — a move to a more just and equal society, without turning back. It guarantees that once the state has taken a step forward to realise a right, it must at the very least maintain that new standard of protection. In other words, the state may not renege on the positive, progressive measures that it may have taken in order to fulfil certain rights*."[7]

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[6] We refer to the principal parties as "*the applicants*", "*Province*", "*the City*" and "*National Government*".

[7] S Samtani 'International Law, Access to Courts and Non-Retrogression: Law Society v President of the Republic of South Africa' (2020) 10 *Constitutional Court Review* 197-225 at 217.

11. Retrogressive measures are not absolutely prohibited.[8] Rather, any such 'backward step' in relation to socio-economic rights will require to be justified by the state.[9]

12. In the remainder of this part, we address the doctrine of non-retrogression under the Constitution; its development in international law, including regional law; and the application of the doctrine to the disposal of public housing stock.

Retrogressive measures in South Africa's jurisprudence

13. The doctrine of non-retrogression is a recognised principle of South African law that has been applied in the context of a range of human rights – for the most part, social rights, but even some civil and political rights.[10]

14. The Court in ***Grootboom***[11] first recognised the doctrine. This laid the foundation for the jurisprudence that followed. In explaining the concept of progressive realisation, Yacoob J held:

> "*The extent and content of the obligation consist in what must be achieved, that is, "the progressive realisation of this right." It links subsections (1) and (2) by making it quite clear that the right referred to is the right of access to adequate housing. The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively*

[8] Samtani (n 7 above) at 224.

[9] Ibid.

[10] Id at 218-219.

[11] *Government of the Republic of South Africa v Grootboom [2000] ZACC 19; 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC)* (***Grootboom***) at para 45.

facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses. The phrase is taken from international law and Article 2.1 of the Covenant in particular. The committee has helpfully analysed this requirement in the context of housing as follows:

> *'Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.'*

Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of "progressive realisation" in the context of our Constitution. The meaning ascribed to the phrase is in harmony with the context in which the phrase is used in our Constitution and there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."[12] (emphasis added)

15. Accordingly, in ***Grootboom*** this Court adopted the approach of the Committee on Economic, Social and Cultural Rights (**CESCR**) in General Comment 3 to progressive realisation, including the principle that any deliberately retrogressive

[12] *Grootboom* at para 45, citing with approval the Committee on Economic, Social and Cultural Rights, "General Comment 3: The nature of States Parties' obligations (art 2(1))" Fifth Session, 1990, U.N. Doc E/1991/23 (**General Comment 3**) at para 9 .

measures would require "*the most careful consideration*" and need to be "*fully justified*".

16. Since Grootboom*,* the doctrine of non-retrogression has been applied in a line of cases dealing with different rights, including:

15.1 In ***Mazibuko***, in which this Court again cited with approval para 9 of General Comment 3,[13] although the Court ultimately concluded that the move from a deemed consumption system to pre-paid meters including a free allocation did *not* constitute a retrogressive step in relation to the right to water.[14]

15.2 In ***Shoprite Checkers***, in the context of an attempt to use pre-constitutional notions to limit the scope of the constitutional right to property;[15]

15.3 In ***Law Society***, in holding that the conduct of the President in depriving South Africans of access to the SADC Tribunal violated the right of access to justice.[16]

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[13] *Mazibuko v City of Johannesburg* [2009] ZACC 28, 2010 (3) BCLR 239 (CC), 2010 (4) SA 1 (CC) (***Mazibuko***) at para 40 and fn 31.

[14] *Mazibuko* at para 142.

[15] *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs And Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC), 2015 (9) BCLR 1052 (CC) at para 59.

[16] *Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51, 2019 (3) BCLR 329 (CC), 2019 (3) SA 30 (CC). Although the majority does not use the term "*non-retrogression*", it uses equivalent language that includes "*put us and the people of SADC in a position that is worse than before*" (at para 79), "*rights are likely to be undermined or extinguished at any level where they used to be enjoyed"* (at para 78), and "*a regressive international agreement that seeks to take away the citizens' right of access to justice at SADC level*" (at para 82). See Samtani (n 7 above) at 220-221.

15.4 In ***SA Childcare***, relying on the principle in holding that the Minister of Social Development and the MECs for Social Development in eight provinces had violated the rights to children by withdrawing subsidies for early childhood development centres;[17]

15.5 In ***Equal Education***, to hold that the government's decision to suspend the National School Nutrition Programme violated the rights to nutrition for children and education under section 28(1)(c) and section 29(1)(a);[18]

17. The doctrine of non-retrogression has therefore been applied across a range of rights and contexts,[19] though its primary application remains in the field of social rights.

18. Most recently and of direct relevance, in ***Commando v City of Cape Town***,[20] this Court applied the doctrine in assessing the reasonableness of the City's emergency housing policy. Mathopo J for the majority of this Court held that the City's conduct in implementing urban regeneration in the context of gentrification led to displacement of poor and vulnerable people, rendering the City's conduct, "*a retrogressive measure*":

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[17] *SA Childcare (Pty) Ltd v Minister of Social Development*, unreported judgment of the Gauteng Division of the High Court, Pretoria, Case No 36962/2020 (20 October 2020) at para 47. This case was overturned in *Minister of Social Development v SA Childcare (Pty) Ltd* [2022] ZASCA 119; 2022 JDR 2535 (SCA) but not in relation to the doctrine of non-retrogression. The SCA did not speak to that issue.

[18] *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP). The Court endorsed the approach of the CESCR and the UN Committee on the Rights of the Child to non-retrogression at paras 43-46.

[19] See Samtani (n 7 above) at 218-219, citing further South African cases in which non-retrogression was referred to by the courts without playing a determinative role in the outcome of matters.

[20] *Commando and Others v City of Cape Town* [2024] ZACC 27 (***Commando***).

> *"It is cold comfort that the City does not make provision for temporary emergency housing programme within the inner city. The City should have foreseen in its planning that urban regeneration would lead to displacement. Its conduct was unreasonable because it failed to mitigate the effects and consequences of gentrification on the most vulnerable. It, in effect, forced the most vulnerable out of the city. This is a retrogressive measure particularly in the light of South African history. The effect of what the City is doing, whilst ostensibly using the forces of the market, is reminiscent of the ravages wreaked upon the nearby District Six after the passing of the shameful Group Areas Act. The City's stance that it is better to develop permanent housing in the city rather than emergency housing because it is not in a position to provide individual tracts of land to the beneficiaries which includes Woodstock residents is untenable."*[21]

19. The minority judgment of Bilchitz AJ (which concurred with the majority on all issues save for the question of a structural interdict) reached the same conclusion. The minority, providing additional reasons in support of the majority order, held that there is a two-stage inquiry: first, whether there has been a retrogression from existing programmes or policies, an inquiry focusing on the impact of any changes rather than the state's intention; and, second, "*whether the retrogressive measure can be justified – in our constitutional framework, that would involve an assessment of whether such a measure met the requirements of reasonableness*".[22]

20. Reasonableness is, of course, already the test for the constitutionality of measures to realise social rights. However, retrogressive measures attract a presumption of unreasonableness. They must be fully justified and a particularly

[21] *Commando* at para 103.

[22] *Commando* at para 155 (per Bilchitz AJ).

weighty justification is required to establish that they are reasonable.[23] Liebenberg argues that the existing reasonableness standard in socio-economic rights jurisprudence should apply to the justification of retrogressive measures. In order to apply reasonableness to assess retrogression, she argues that it is necessary to articulate the end goals of progressive realisation of the right, and to incorporate a proportionality inquiry in cases where retrogressive measures have a significant negative impact on disadvantaged and economically excluded groups.[24]

21. If the retrogressive measure is a legislative measure, even if not justified under the relevant socio-economic right, it will be subject to limitations analysis and may in principle be saved under section 36 of the Constitution.

Non-retrogression under international law

22. The initial endorsement of the principle of non-retrogression by this Court in ***Grootboom***, and similarly in ***Mazibuko***, was grounded in the international law principle arising from ICESCR. Accordingly, it is necessary to have regard to how the principle has continued to be developed under international law. Non-retrogression has also been recognised and addressed under the African Charter by the African Commission on Human and Peoples' Rights. We address the approach under both treaties.

[23] See S Liebenberg "Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression"*, South African Journal on Human Rights* (2021) at 191; Samtani (n 7 above) at 224.

[24] Id at 198.

23. In terms of section 39 (1)(b) of the Constitution, courts must consider international law when interpreting the Bill of Rights. Section 233 requires that, when interpreting any legislation, every Court must be for any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is not.

24. The interpretive injunction to have regard to international law when interpreting the Bill of Rights includes non-binding and binding law.[25] While the weight to be attached to a particular principle of international law will vary, where the relevant international law principle binds South Africa, it may be directly applicable.[26]

25. Although it is possible to interpret the Bill of Rights without taking international law into account, s 39(1)(b) makes it obligatory to consider it.[27] Ultimately, international law should be followed in interpreting the Bill of Rights unless it is not "reconcilable" with the Constitution.[28]

26. The international law authorities on which SERI relies arise from two treaties that South Africa has ratified and which accordingly impose binding obligations on the state. It is, therefore, submitted that this Court should prefer an approach consistent with South Africa's international law obligations.[29] This will avoid the risk that South Africa will be found - when reporting to the relevant international

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[25] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC) (***Makwanyane***) at para 35.

[26] *Grootboom* at para 26.

[27] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 201.

[28] *See also Law Society of South Africa v President of the Republic of South Africa* [2018] ZACC 51; 2019 (3) SA 30 (CC) (***Law Society***) at para 75.

[29] *Sonke Gender Justice NPC v President of the Republic of South Africa* [2020] ZACC 26; 2020 JDR 2619 (CC); 2021 (3) BCLR 269 (CC) at para 60.

bodies under those treaties - to have breached its obligations under those treaties.

ICESCR

27. The doctrine of non-retrogression has received recognition through General Comment 3, adopted by the UN CESCR in 1990. General Comment 3 ultimately gives effect to state parties' obligations under Article 2(1) of the ICESCR.

28. Article 2(1) imposes a duty on states parties to take steps to progressively realise the Covenant rights. In General Comment 3, the CESCR explained the relationship between progressive realisation and non-retrogression:

> *"in the light of the overall objective, indeed the raison d'être, of the Covenant, which is to establish clear obligations for States parties in respect of the full realisation of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."*[30]

29. It was this paragraph of General Comment 3 that this Court cited with approval in ***Grootboom*** and ***Mazibuko***, and which was cited subsequently by later courts.

30. In later General Comments, the CESCR has reiterated this general approach and confirmed the presumption against retrogressive measures and that any such measures must be justified.[31] In General Comment 19 on the right to social

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[30] General Comment 3 at para 9.

[31] See General Comment No. 13: the Right to Education (Article 13 of the Covenant) UN Doc E/C.12/1999/10 (1999) at para 45; General Comment No. 14: the Right to the Highest Attainable

security, the CESCR provided guidance on assessing whether retrogression is justified:

> *"The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level."*[32]

31. The concept of retrogressive measures has also played a role in the jurisprudence of the CESCR under the Optional Protocol to the Covenant.[33]

32. Under the Optional Protocol to ICESCR, the CESCR may receive communications from individuals or groups that claim violations of ICESCR rights against states parties. The CESCR has already decided a number of communications, in particular in respect of housing and evictions, and published its views. These constitute a second authoritative source for the interpretation of ICESCR.

Standard of Health (Article 12 of the Covenant) UN Doc E/C.12/2000/4 (2000) at para 32; and General Comment No. 15: the Right to Water (Articles 11 and 12 of the Covenant) UN Doc E/C.12/2002/11 (2003) at para 19. See also BTC Warwick 'Unwinding Retrogression: Examining the Practice of the Committee on Economic, Social and Cultural Rights' (2019) 19(3) Human Rights Law Review 467–468.

[32] CESCR General Comment No. 19: The Right to Social Security (Article 9 of the Covenant) UN Doc E/C.12/GC/19 (2008) para 42.

[33] Optional Protocol to the International Covenant on Economic, Social and Cultural Rights *(adopted 10 December 2008, entered into force 5 May 2013) UN Doc A/63/435.*

33. Significantly, Article 8(4) of the Optional Protocol adopted the standard of reasonableness for the adjudication of communications. In doing so, it was heavily influenced by this Court's reasonableness jurisprudence in socio-economic rights cases.[25] Article 8(4) provides:

> *"When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."*

34. The adoption by the CESCR of South African reasonableness means that its jurisprudence on socio-economic rights is compatible with our own and of particular value to South African courts; doubly so, bearing in mind that the CESCR is interpreting binding international law obligations that South Africa has voluntarily assumed by ratifying the treaty.

35. In the communication of ***Djazia and Bellili v Spain***,[34] the CESCR specifically held that the sale by Spanish government authorities of public housing stock in Madrid constituted a retrogressive measure and that, in the circumstances, Spain had failed to justify the measure:

> "*Moreover, the State party has not explained to the Committee why the regional authorities in Madrid, such as the Madrid Housing Institute, sold part of the public housing stock to investment companies, thereby reducing the availability of public housing, despite the fact that the number of public housing units available annually in Madrid was significantly fewer than the demand, nor has it explained how this measure was duly justified and was the most suitable for ensuring the full realization of the rights recognized in the Covenant. For instance, in 2013, the Madrid Housing Institute sold*

[34] *Djazia and Bellili v Spain*, CESCR Communication No. 5 of 2015, U.N. Doc. E/C.12/61/D/5/2015 (2017) (***Djazia***).

> *2,935 houses and other properties to a private company for €201 million, justifying the measure by a need to balance the budget.*
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> *17.6 The Committee considers that States parties have a certain amount of discretion to make the most appropriate use of tax revenue with a view to guaranteeing the full realization of the rights recognized in the Covenant, and that, in certain circumstances, they may take deliberately retrogressive measures. However, in such cases, the State must demonstrate that the decision was based on the most thorough consideration possible and was justified in respect of all the rights under the Covenant and that all available resources were used. In times of severe economic and financial crisis, all budgetary changes or adjustments affecting policies must be temporary, necessary, proportional and non-discriminatory. In this case, the State party has not convincingly explained why it was necessary to adopt the retrogressive measure described in the preceding paragraph, which resulted in a reduction of the amount of social housing precisely at a time when demand for it was greater owing to the economic crisis."*[35]

36. The CESCR in ***Djazia*** accordingly confirmed that the sale of public housing stock in circumstances where the need exceeds the supply constitutes a retrogressive measure that must be justified by the state. Spain failed to justify the Madrid sales.

37. Following ***Djazia*** and after its ratification of ICESCR, South Africa submitted its first periodic report to the CESCR detailing the steps taken to comply with South Africa's obligations. The CESCR conducted the process of engagement with the Government and produced its Concluding Observations in 2018.[36]

[35] *Djazia* at paras 17.5-17.6.

[36] Concluding Observations of the CESCR on the Initial State Report of South Africa, 29 November 2018 E/C/12/ZAF/CO/1 ("**Concluding Observations**").

38. The Concluding Observations made several significant findings regarding South Africa's compliance with its obligations in respect of housing under ICESCR, including stating:

> *"The committee is concerned with the large number of people living in inadequate housing, including those in informal settlements, without access to basic services; the growing number of informal settlements in urban areas due to rapid urbanisation and the decrease in the number of social housing units provided by the state party."*[37]

39. The CESCR specifically recommended that South Africa "intensify its efforts to improve housing conditions and to meet the increasing demand, including by continuing to provide adequate social housing in urban areas and in-situ in informal settlement upgrading".[38]

40. The Government formally responded to the Concluding Observations and to a follow-up letter from the CESCR, reaffirming its commitment to its obligations under ICESCR and to implement the recommendations of the CESCR in its Concluding Observations.[39]

41. In addition to these authorities under the ICESCR, non-retrogression has been addressed at regional level.

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[37] Concluding Observations para 58.

[38] Concluding Observations para 59.

[39] Committee on Economic, Social and Cultural Rights, 'Information Received from South Africa on Follow-up to the Concluding Observations on its Initial Report' 21 May 2021, E/C.12/ZAF/FCO/1 para 17.

The African Charter

42. South Africa ratified the African Charter on 6 June 1994. The African Charter has been ratified by 54 African states, such that it has close to universal ratification on the continent.

43. The African Charter does not contain an explicit right to housing. However, in ***SERAC***, the African Commission on Human and Peoples' Rights interpreted the African Charter to include the right to housing on the basis that it is a necessary corollary of the rights to health, property and family life.[40]

44. On 24 October 2011, the African Commission adopted the 'Guidelines and Principles on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights' (**the African Guidelines on ESCRs**).[41] As the Preamble to the African Guidelines on ESCRs states, their "*purpose… is to assist State Parties to comply with their obligations under the African Charter*".

45. The African Guidelines on ESCRs must be understood as an especially weighty interpretation of the African Charter by its specialist treaty body, the African Commission on Human and Peoples' Rights, giving greater content to the

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[40] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria, communication 155/96 (African Commission on Human and Peoples' Rights)* (***SERAC***) at para 60, holding:

> *"Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the [African] Charter a right to shelter or housing which the Nigerian Government has apparently violated."*

[41] Available at: https://achpr.au.int/index.php/en/node/871 (Last accessed 15 January 2025).

obligations of South Africa (and other states parties). They have status analogous to a General Comment of a United Nations Treaty Body.

46. The African Guidelines on ESCRs provide that, under the African Charter, there is a presumption against retrogressive measures:

> "***Presumption against Retrogressive Measures***
>
> *20. Measures that reduce the enjoyment of economic, social and cultural rights by individuals or peoples are prima facie in violation of the African Charter. Any such measures must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources. In this context available resources refers to both the State's own resources and international assistance and cooperation (see paragraph XX below.) In determining whether a state party has violated the Charter by implementing a retrogressive measure the Commission will consider whether:*
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> *a. there was reasonable justification for the action;*
>
> *b. alternatives were comprehensively examined and those which were least restrictive of protected human rights were adopted;*
>
> *c. there was genuine participation of affected groups in examining the proposed measures and alternatives;*
>
> *d. the measures were directly or indirectly discriminatory;*
>
> *e. the measures would have a sustained impact on the realisation of the protected right;*
>
> *f. the measures had an unreasonable impact on whether an individual or group was deprived of access to the minimum essential level of the protected right; and*
>
> *g. there was an independent review of the measures at the national level.*"

47. In this respect, the regional law approach under the African Charter is very similar to the approach under ICESCR, from which our courts drew the principle of non-retrogression.

48. The African Charter and ICESCR approaches to non-retrogression are consistent with (and certainly 'reconcilable with') the constitutional approach, and should accordingly be followed to give guidance in the development of our law.

Sales of housing stock and retrogression

49. It is submitted that the sale of public housing stock constitutes a retrogressive measure in relation to the rights to housing in section 26(1) and (2) and land in section 25(5) for the following reasons:

    49.1. Lack of adequate housing and lack of access to land are pervasive and there are major backlogs in state housing delivery;

    49.2. The state – across the levels of government – owns significant housing stock;

    49.3. Well-located land is generally unaffordable for the state to acquire.[42]

    49.4. If the state sells well-located public housing stock, it is unlikely to be able to replace it at the same cost and the only meaningful way to address this shortage is to use existing well-located state-owned land;[43]

[42] City's written submissions, p 35 para 58.9.

[43] As the City puts it in its written submissions: *"[It is] common cause… that the City cannot afford to pay market related prices for the acquisition of land in the inner city, and the only meaningful way in which this shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land that exist in and around the CBD*" – City's written submissions, p 35 para 58.9.

49.5. The sale of well-located public housing stock impedes the pursuit of spatial justice.

50. A sale of housing stock must be shown to be reasonable. Such retrogression must be ‘fully justified’ and requires ‘weighty justification’ in order for disposal to be consistent with the Constitution.

51. In deciding whether it is justified, it is submitted that all relevant factors, including the following, must be taken into account:

51.1. The purpose of the proposed disposal and whether it constitutes a reasonable justification;

51.2. Whether alternatives were comprehensively examined;

51.3. Whether there was genuine participation in the process by affected groups;

51.4. Whether the disposal is directly or indirectly discriminatory;

51.5. The impact of the disposal on the realisation of rights to housing and land, including on spatial justice;

51.6. Whether there was independent review of the measure at national level.

52. While there is accordingly a presumption against the disposal of public housing stock, such a disposal may be justified having regard to these factors.

53. As appears from this discussion, one factor informing whether a retrogressive measure (sale of public housing stock) can be justified is whether there was genuine participation in the process by affected groups. It is to this issue of participation that we turn in the next section.

III PUBLIC PARTICIPATION

54. We do not intend to repeat the submissions made by the parties with respect to public participation under administrative law. Instead, we focus on the specific nature of public participation with respect to the disposal of state-owned/controlled housing stock and land with the potential of being used for housing.

55. We make two submissions:

55.1. First, un-housed or precarious communities within the area of jurisdiction of the property that is proposed to be sold have a particular interest and any process of public notice and comment needs to prioritise their participation and give weight to their views;

55.2. Second, if the property is occupied by vulnerable residents, the relevant authorities will have a duty – beyond the more general public participation process – to meaningfully engage with the occupiers regarding the proposed disposal.

Participation of housing-insecure communities

56. Participation rights lie at the heart of the constitutional schema, including in relation to law- and policy-making,[44] as well as the implementation of laws and policies affecting particular groups.

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[44] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (***Doctors for Life***) at paras 110-116, discussing the "*participative nature of our democracy*" under the Constitution.

57. Our housing jurisprudence has developed to include strong procedural rights of participation for residents at risk of eviction. These include the possibility of mediation, which this Court highlighted and commended in ***Port Elizabeth Municipality***;[45] and the requirement of meaningful engagement articulated in ***Olivia Road***.[46] We deal with engagement specifically in the next section.

58. We submit that any processes of public comment in relation to proposed disposal – whether under the WCLAA or other provincial laws – need to prioritise the participation of housing-insecure communities (including those representing them), as the most affected groups. These laws must be interpreted and applied so as to maximise the participation of affected groups in the decision-making process.

59. It is therefore regrettable, and not a mere formality, that the initial call for public comment on the Tafelberg property did not include notice in isiXhosa, and to be welcomed that this was remedied.[47] However, the subsequent substantial body of comments received demonstrates that housing-insecure communities are determined to be heard in processes regarding public housing stock and are capable of meaningful participation that will enrich decision-making.

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[45] *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (***PE Municipality***) at paras 39-47.

[46] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC) ; 2008 (5) BCLR 475 (CC) (***Olivia Road***).

[47] SCA judgment paras 13 and 63.

Engagement with actual occupiers

60. Although disposal of housing stock does not lead automatically to the eviction of occupiers, it is likely ordinarily to create a high risk of eviction proceedings. Disposal will also radically reduce the options on which engagement is possible. It is an irreversible step with severe consequences for occupiers.

61. Accordingly, it is submitted that the ordinary obligation on the state to meaningfully engage with occupiers before seeking an eviction order will extend to engaging about a proposed disposal.

62. Put differently, the meaningful engagement obligation is triggered when government as owner of an occupied property is considering disposal, and not merely at the later stage when it has sold the property and is considering eviction.

63. In **Grootboom**, this Court held that "[e]very step at every level of government must be consistent with the constitutional obligation to take reasonable measures to provide adequate housing."[48]

64. Drawing on this principle, in ***Olivia Rd*** the Court confirmed that a municipality has a duty to meaningfully engage people who may be rendered homeless by eviction. The Court held that this duty is grounded in section 26(2) of the Constitution.[49] The Court reasoned:

> "*Reasonable conduct of a municipality pursuant to section 26(2) includes the reasonableness of every step taken in the provision of adequate housing. Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless*

[48] *Grootboom* at para 82.

[49] Id at para 17.

> *person must also be reasonable if it is to comply with section 26(2).*"[50] (emphasis added)

65. Yacoob J held that that "*[t]he Constitution therefore obliges every municipality to engage meaningfully with people who would become homeless because it evicts them*."[51]

66. A decision to dispose of property that is occupied is a "step taken in the provision of housing". It is an act that is directly relevant to the discharge of the state's section 26 obligations.

67. Accordingly, if an organ of state is considering disposing of a property that is occupied by people who are at risk of homelessness, the duty to meaningfully engage will be triggered at the point where the possibility of disposal is being considered, not after the act of disposal is complete.

68. In practice, this means that the relevant government department must not only conduct a public comment process, but also specifically initiate meaningful engagement with the actual occupiers of a property. The failure to do so may render any decision to sell the property unreasonable.

APPLICATION OF PRINCIPLES TO THE CONTENTIOUS ISSUES

69. As *amicus curiae*, SERI does not engage all the issues in dispute. We limit ourselves to making such submissions on some of the main issues in contention

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[50] Id at para 17.

[51] Id at para 18.

as arise from the principles relating to non-retrogression and participation that we have developed above.

Spatial justice relief

70. The retrogression and participation principles articulated above are relevant to reasonableness inquiries at two levels in this matter: (i) decisions to sell particular public housing stock (such as Tafelberg); and (ii) the provision of housing in Cape Town to redress spatial Apartheid.

71. We have already addressed the approach to (i) decisions to sell public housing stock and the role of retrogression and participation (including engagement) in such decisions above.

72. Here, we address (ii) the spatial justice relief sought by the applicants and what these principles add to that inquiry.

73. The starting point in relation to this issue is now the decision of this Court in ***Commando***. The Court (unanimously on this issue) held that the City's policy not to provide any temporary emergency accommodation in the inner city was unreasonable and therefore unconstitutional.[52] In reaching this conclusion, the Court clarified that location is a central component of the reasonableness of alternative accommodation. The Court also concluded that the City's approach "*compounds spatial apartheid*".[53]

[52] *Commando* paras 110-111.

[53] *Commando* paras 85 and 116, at para 4(v) of the order.

74. The stance of the City and Province in the present matter is, in several respects, inconsistent with the approach of this Court in ***Commando***. Their resistance to identifying or defining "*central Cape Town*" and their shared policy position in relation to the provision of affordable housing in central Cape Town (or, for that matter, the inner city or the CBD) cannot be reconciled with the Court's decision.

75. If it is unreasonable to decline to provide temporary accommodation in the inner city, the same must, perforce and with greater force, apply to permanent affordable accommodation, including social housing. Any policy approach that fails to provide for affordable accommodation in the inner city must be inconsistent with the Constitution.

76. The policy positions of the City and Province are more opaque in this matter than the absolutist stance in *Commando*. However, what emerges is the following:

    76.1. Province is generally opposed to developing affordable housing, including social housing, in 'central Cape Town', its preference being to develop "*more affordable units outside this area*".[54]

    76.2. Province as a general policy does not implement its housing programmes in central Cape Town.[55] Province's reasons for this position are: the programmes target immovable property with existing buildings or

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[54] Province's written submissions p 9 para 24: "*The provision, at a certain point in time, of affordable housing units in 'central Cape Town' at the expense of many more affordable housing units outside this area may well be inequitable, depending on the circumstances*."

[55] Province HC AA Vol 11 pp 1117-1118 paras 132-133.

settlements outside this area;[56] it is not cost-effective to develop housing in central Cape Town because national funding is inadequate for the purpose and Province would have to meet the shortfall from its own funding;[57] Province prefers to deliver housing elsewhere to as many people as possible, preferring "*breadth as opposed to in depth*".[58]

76.3. Province is accordingly open to selling immovable property that it owns in 'central Cape Town', and considered the sale of the Tafelberg property to be appropriate and defensible as a means to "generate revenue" for the purpose of service delivery.[59]

76.4. Similarly, the City articulates that its "focus [is on] providing as high as possible a number of state subsidised housing opportunities to alleviate a growing number of homelessness and housing shortages with the concomitant effect where subsidised housing, including social housing, is not provided in other areas like the City's central business district ('CBD' or 'the applicants' central Cape Town')".[60]

77. While the policy positions of Province and the City are less categorically stated in respect of affordable housing (including social housing) than they were in respect of temporary emergency accommodation, they are nevertheless clear

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[56] Province HC AA Vol 11 pp 1117-1118 para 132.3 and 132.4 (referring to informal settlements and hostels outside central Cape Town).

[57] Province HC AA Vol 11 p 1118 para 133

[58] Province HC AA Vol 11 p 1118 para 133.

[59] Province HC AA Vol 11 p 1070 para 21.

[60] City HC AA Vol 22 p 2289 para 4.10.

and the effect is comparable. Their policy is generally *not* to provide affordable housing in central Cape Town (leaving aside the definitional debates regarding that term, which take matters no further). This is coupled with a willingness to consider the sale of public housing stock in that area, action which both Province and the City have failed to recognise constitutes a retrogressive measure that must be fully justified.

78. It is this general policy position of Province and the City that is relevant to the determination of this matter. It informs the exercise of all their statutory powers and the implementation of specific, periodic policies. The statutory powers and discrete policies of the City and Province are facilitate and empowering, but it is the general policy position of Province and the City that direct how they are implemented. It is this policy position that makes it necessary for this Court to intervene.

79. The retrogressive measure of selling public housing stock in central Cape Town would aggravate the unreasonableness of the failures of positive provision. If government not only fails to provide affordable housing in central Cape Town but also disposes of public housing stock there, the position will further deteriorate because possibilities for future development in these areas will be lost. Therefore, the spatial justice issue entails consideration both of the general policy position for positive provision of housing and concomitantly the approach to the sale public housing stock.

80. SERI also agrees with Province[61] and the City[62] regarding the need for National Government to be included in any structural relief directed at addressing the provision of affordable housing in central Cape Town, given its role in financing housing development, its co-ordinating responsibility, and the need to take account of South Africa's international obligations to provide affordable housing.

GIAMA

81. Progressive realisation and non-retrogression are the core constitutional principles applicable to the disposal of public housing stock under ss 26(1) and (2) and 25(5) of the Constitution.

82. GIAMA must be interpreted to promote the spirit, purport and objects of the Bill of Rights.[63]

83. GIAMA does not expressly recognise that disposal of public housing stock constitutes a retrogressive measure that requires justification. The technical language of GIAMA tends to invite a commercial paradigm in which concepts of 'assets', 'value', 'surplus' and 'management' predominate. This is potentially in tension with the constitutionally mandated paradigm for the use of public housing stock, with the constitutional rights in sections 26 and 25 at its core.

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[61] Province's written submissions p 23 para 61.

[62] City's written submissions p 13 para 19.4.

[63] Section 39(2) of the Constitution; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 45.

84. However, the principles of immovable asset management in section 5 of GIAMA are capable of being interpreted to give effect to the constitutional paradigm, including the concept of non-retrogression.

84.1. Section 5(1)(a) introduces the concept of immovable assets becoming "*surplus to a user*". Where dealing with public housing stock, the concept of "*surplus*" must to be construed in relation to public housing stock *availability* and *need*, rather than solely in relation to the specific plans of the custodian.

84.2. Section 5(g) of GIAMA provides that "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.*"

84.3. Section 5(g) must be interpreted to include the principle of non-retrogression. Therefore, when considering whether the immovable asset (being public housing stock) "*can be used… in relation to government's socio-economic objectives, including land reform*…", the custodian must have regard to the impact of a sale of public housing stock. They must take into account that such a disposal will constitute a retrogressive measure that requires justification, rather than a neutral policy option available to them.

84.4. This construction of ‘surplus’ and of the section 5 principles will then apply to section 13 of GIAMA, which provides that a custodian may dispose of a surplus immovable asset.

84.5. The constitutionally mandated interpretation of the principles in section 5 of GIAMA will best be given effect to in the custodian and user asset management plans required to be adopted in terms of sections 7 and 8 of GIAMA. These plans should acknowledge the adverse impact of disposal of public housing stock and that such a disposal will require justification on the basis of the factors set out above.

85. So interpreted, GIAMA is consistent with the constitutional principles relating to progressive realisation and non-retrogression.

The duty to consult national government

86. International law supports the position that national government must be consulted in respect of any proposed disposal of housing stock that would constitute a retrogressive measure, for the following reasons:

86.1. South Africa bears international obligations under ICESCR and the African Charter in terms of which a disposal of housing stock would constitute a retrogressive measure requiring justification. It is appropriate that all levels of government engage, with appropriate national co-ordination, in order to ensure that the state meets its international obligations and is able to account for them. As noted above, the CESCR has already expressed concern regarding the delivery of social housing in response to South

Africa's last state report, and South Africa accepted its obligations in response.

86.2. In terms of the African Guidelines on ESCRs, one relevant factor in assessing the justification of such a disposal is whether "*there was an independent review of the measures at the national level.*"[64] Accordingly, under the African Charter a specific review role for national government is envisaged.

87. SERI accordingly submits that the principles on which it focuses support the conclusions reached by National Government regarding the duty to consult National Government. SERI would submit that this duty applies, in particular, to any proposed disposal of public housing stock in at least the following situations:

87.1. The property is occupied by poor residents;

87.2. Any organ of state or interested party has proposed that the property not be sold but be developed to provide affordable housing, including social housing or temporary emergency accommodation; and

87.3. National Government has previously engaged with the relevant provincial or local authority and expressed an interest in the property.

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[64] African Guidelines on ESCRs para 20(g).

The WCLAA Regulations

88. The scheme of the WCLAA Regulations, in regulations 4(1)[65] and 4(6)[66], is that Province receives offers, obtains a valuation, accepts its preferred offer, and only that opens the process to public consultation, protected by a resolutive condition permitting it to resile from the contract if it so decides.

89. The SCA described regulation 4(6), which provides that a written contract signed on behalf of the Province "*shall be a proposed disposal or proposed acquisition*" as a "*peremptory*" provision.[67] It is not. It is a *deeming* provision that deems an otherwise completed disposal to be a proposed disposal until the notice and comment process is undertaken.

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[65] Regulation 4(1) provides:

> "*4(1) An offeror shall:*
> *(a) Complete and sign a written offer, and*
> *(b) Submit that offer to the Head of Component as a formal offer;*
> *Provided that all offers of disposal shall contain a provision to the effect that the offeror acknowledges that –*
> *(i) The Provincial Cabinet, after consulting the Committee, may, within 21 days of the receipt of written representations received pursuant to section 3(3) of the Act, or such longer period not exceeding 3 months as the Provincial Cabinet may determine in writing prior to the expiry of that 21 day period, resile from any contract resulting from the offer, and*
> *(ii)In the event of the Provincial Government so resiling the offeror will have no right of recourse against the Province or any of its organs or functionaries, but if the Province intends to sell the land at a higher price than that specified in the formal offer within a period of three months from the date when it resiled, the Province must first offer to sell the land to the offeror at that price*."

[66] Regulation 4(6) provides:

> "*If a written contract has been duly signed on behalf of the Province, that contract shall be a proposed disposal, or proposed acquisition and, in the case of proposed disposals, the Minister shall exercise the powers and comply with the duties conferred on the Premier by section 3(2), (3) and (4) of the Act*."

[67] SCA judgment para 99.

90. The applicants submit that this renders the process unfair. Province defends the regulations on the basis that it enables public comment to benefit from fuller information on the specific proposed disposal.

91. It is a principle of international law – under both ICESCR[68] and the African Charter[69] - that whether there was "*genuine participation of affected groups*" is a significant factor in deciding whether a retrogressive measure is justifiable. In the context of the sale of public housing stock, the affected groups include housing-insecure communities and, most significantly, any residents of a property proposed for sale.

92. The rights in the Bill of Rights and any legislation giving effect to those rights should be interpreted, where possible, consistently with this principle of genuine participation of affected groups.

93. It is submitted that the right to housing – as interpreted by the courts – and the WCLAA itself, do provide for genuine participation.

94. However, the WCLAA Regulations fall short of providing genuine participation of affected groups. The WCLAA Regulations should be assessed from the perspective of an affected housing-insecure community, or in the extreme case actual residents of a property. The opportunity for such groups to submit comment in response to a general public call, at the belated stage where the

[68] General Comment 19 at para 42.

[69] African Guidelines on ESCRs at para 20(c).

entire transaction is complete save for consultation, falls short of what the Constitution requires.

95. Regulations 4(1) and 4(6) are inconsistent with the Constitution because they fundamentally curtail the scope of participation for affected groups. At the stage at with the regulations allow public comment, what is presented to the public is a transaction – complete with a buyer, terms, price and every other aspect already determined. The public is offered a 'take it or leave it' opportunity to comment. The problem with this is not merely one of form. In substance, this late-stage comment process precludes the possibility of making comment at an earlier stage on issues such as:

95.1. The possibility of disposing of the property to social housing agents or other government agents for the purpose of developing affordable housing (including social housing) or emergency accommodation;

95.2. The possibility of allowing current residents to acquire rights in the property, whether by purchase or by protecting their occupancy rights and making any sale subject to such occupation;

95.3. The terms or purpose of acquisition, including incorporating conditions that require any private purchaser to develop a portion of the property as social housing.

96. The effect of the regulations is that Province will already have taken a view on issues of this nature and the proposed disposal presented for public comment will have determined all such issues. This does not allow 'genuine participation' of affected groups; nor is it a fair process in the circumstances. Additionally, it

fails adequately to safeguard against the risk of retrogressive measures in the form of sales of public housing stock. Participation is one protection against such measures.

97. Allowing comment at the earlier – and we submit, natural – stage in the process before offers are considered allows members of the public, including affected groups, to influence the terms of the proposed disposal itself, not merely whether to proceed.

CONCLUSION

98. The Court's approach to the substantive question of non-retrogression and the procedural question of public participation has the potential to significantly influence how South Africa's cities will look in generations to come; who will live in them; and which sections of society are at the heart of our cities or at their margins.

99. Spatial apartheid enjoys a powerful inertia that continues to exercise a gravitational pull on policy-making and implementation around housing delivery. It is easier, and less costly, to plan and implement within the lines drawn under apartheid, and in particular to concentrate housing development for poor communities in the urban periphery rather than centrally located areas with access to amenities and opportunities. It is also unconstitutional to do so, as this Court confirmed in ***Commando***.

100. Non-retrogression and the requirement of public participation (including engagement with occupiers) offer powerful normative counter-forces to the inertia of spatial apartheid. Non-retrogression restrains government from too

readily selling off public housing stock where such disposal cannot be justified. The procedural rights of participation of housing-insecure communities and engagement rights of occupiers complement this substantive principle by ensuring that the voices of those most affected are genuinely heard.

JASON BRICKHILL

NASSIR SH ALI

Counsel for the *amicus curiae*

Chambers, Johannesburg

20 January 2025

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