IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CCT Case Number:	**126/2024**
SCA Case Numbers:	**522/2021 & 523/2021**
WC Case Numbers:	**7908/2017**

In the matter between:

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

and

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

FIFTH RESPONDENT'S WRITTEN SUBMISSIONS

A. **Introduction**[1]

1. The litigation between the Applicants and the Fifth Respondent ("*the City*") arose consequential to a decision by the Western Cape Government ("*the WCG/Province*") to sell two erven in Sea Point, Cape Town (*"the Tafelberg land"*). The Applicants wanted the land used for social housing. The land in question did not belong to the City, and the City posed no impediment to the land being used for any purpose. The City had no say over whether the land should be sold, who the land should be sold to, what procedures should be followed or if so, for what price it should be sold. What the City did indicate then (back in 2012) is that it was not in a position to purchase the land at commercially determined prices. In addition, the City had tried to purchase the land, with the intention to use the same, however the agreement to purchase never materialised.[2] To quote the Applicants *"The City cannot afford to pay market related prices for property in central Cape Town for purposes of affordable housing.*"

2. In its practice note the Applicants identify *"the manner in which organs of state can, and should, use state-owned land"* as lying at *"at the heart of the application".*

[1] To avoid confusion and unnecessary prolixity, we shall refer to the parties as they are referred to in the High Court and use abbreviations, evidence from the papers and Judgments.
[2] Mr Molapo's affidavit, vol.26, p.2727 "Annexure **PM6** ", Email dated 12 Sept 2012 from the City."

3. But what is at the heart of the Applicants' complaint was that the Tafelberg land specifically was to be sold as opposed to being used for social housing. What followed thereon was an application that, apart from what involved the Tafelberg land, morphed to one in which the Applicants in their Notice of Motion, sought further relief in the form of a declaratory order and a structural interdict, against the City.

4. The High Court - despite making no negative factual findings in relation to any of the City's policies or actions, nor reaching a conclusion that the policies were unconstitutional - made far-reaching punishing orders against the City, including imposing a structural interdict and costs order against City (jointly with the Province). It did so despite undisputed evidence to the effect of what is being sought would have costed the City so much more and would have resulted in less housing across the metropole to meet the ever-growing demand for housing that the City faced.

5. Of material relevance is that the Applicants artificially reconstructed, and the High Court accepted, a fundamentally reconstructed "*central Cape Town*" which bears no resemblance to any municipal demarcated area, which was then used to determine that social housing in this specific geographical area – despite costs and other factors – warranted preferential treatment in relation to housing, more particularly social housing. Using this artificial construct, the City was chastened with a

declaratory order and a structural interdict, despite the absence of any fault with the City's housing approach or policies.[3] But more importantly, it elevated the provision of one type of housing, social housing, in a specific geographic to a constitutional right which was to be prioritized over any other housing rights and obligations.

6. In seeking to meet housing needs, taking into account costs and demands, the City has the difficult task and has to make unenviable choices in balancing its housing obligations and meeting the ever-growing demands as it devises and implements policies to cater for various housing options to meet these different demands, which does not remain static at all given the ever-growing demands.[4]

7. The City appealed the judgment and orders of Judges Gamble and Samela, from the High Court dated 31 August 2020 under both case numbers 7908/2017 ("*the Adonisi order*"), more particularly paras 1 to 6 and 12 thereof, and case number 12327/2017 ("*the Human Settlement order*") with reference to para 7 thereof to the SCA.[5] The latter related only to costs, and which is not persisted with in this Court.

8. The City's appeal in the **Adonisi** matter, principally related to the declaratory relief granted by the High Court and was informed by the

[3] High Court Judgement, vol. 34, pp 3588 – 3590 paras 494-497.
[4] High Court Judgement, vol. 34, pp.3570 – 3571, para 450.
[5] High Court Judgement, vol. 34, pp 3600 – 3605.

reasoning in its judgment, and the structural interdict. The SCA, insofar as it relates to the relief sought by the City on appeal, agreed that the Applicants had failed to show the genesis of the additional obligations it wanted to impose on the City and set out a thorough explanation, among other, of the principle of constitutional subsidiarity underpinning its reasoning.[6]

9. In addition to the principle of subsidiarity, the SCA - having considered the undisputed evidence from the City and the Province of the various housing policies, and specifically how much social housing had been and is being built in and around the City - made it clear that the City was indeed meeting its obligations insofar as it was required by the constitution and various housing legislation.

> *"[47] .... However, there was evidence of a number of social housing projects in the City which yielded 2 168 social housing units at a cost of R686 489 804. By March 2017, the number of social housing units in the metropolitan pipeline programme was 10 810. In addition, as at 25 April 2018, the total number of houses planned for the Cape Metropole was 11 007, with an additional 3 844 units under discussion. The appellants describe the social housing pipeline as 'a working document, which is updated as projects progress in terms of readiness planning'.*

10. The SCA, also highlighted the other social housing projects which were in the process of being planned and or were in the implementing stage.

[6] SCA judgement, vol. 37, pp.3804 – 3808, paras 31 -36.

All of this evidence was either ignored or not dealt with by the Applicants in their submissions before the SCA, as the SCA stated:

> *[49]….The respondents did not give much consideration to the appellants' evidence relating to the social housing pipeline. However, this factual context cannot be ignored. Their case was built around the unacceptability of the Regeneration programme and an alleged total disregard by the Province and the City of their constitutional obligations. Against the detailed evidence tendered by the appellants on ongoing provision of social housing within the City…"*

11. The SCA then correctly identifies the claim of the Applicants, as *"the obligation of the City to provide social housing in its version of Central Cape Town"*[7] and systematically sets out its reasoning as to why the relief against the City and the Province was set aside. In this regard the SCA stated:

> "50… *The real questions are (1) whether the Province and City had an obligation to provide social housing at a specified location - central Cape Town, and (2) whether they failed to meet this obligation. As apparent from the roles and responsibilities, and functions of the provincial and local governments set out above, there is no such obligation. Apart from the roles and responsibilities set out in the Housing Act and Social Housing Act, the Province and the City were obliged to apply the general principles applicable to the Housing Act and the Social Housing Act This legal framework entails no obligation to provide social housing in a specific location. Social legislation of this kind, by its very nature, must give a broad measure of optionality to the Province and the City as to how to achieve the general principles the legislation lays down. To interpret the legislation otherwise would render it incapable of practical implementation because the courts would*

[7] SCA judgement, vol. 37, p.3808, para 37.

become the arbiters of detailed implementation, an outcome we should be careful to avoid."[8] *(own emphasis)*

12. In addition to the above, the SCA referred to the decision of this court in *The Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[9] stating:

> *"... Moreover, the Constitution does not guarantee a person a right to housing at government expense at the locality of his or her choice. Locality is determined by a number of factors including the availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment."*

13. Therefore, the SCA, comprehensively and succinctly dealt with the principal relief granted against the City in the High Court, and it is maintained that the same should be held by this Court, despite the Applicants now seeking an order overturning the SCA decision for reasons discussed below.

14. In relation to the relief against the City, the Applicants seek to make out a case that the SCA failed, on a number of grounds. Its focus, however, is on an alleged failure to interpret the constitutional provisions dealing with socio-economic rights in a constitutional 'manner' and an alleged failure to deal with the spatial justice challenge and the principle of

[8] SCA judgement, vol. 37, p.3815, para 50.
[9] 2009 (9) BCLR 847 (CC) at par 254 (per Ngcobo J).

subsidiarity in respect of the Province and the City.[10] It is so that the SCA did not agree with the Applicants, but this does not clothe its judgement with the criticism now raised by the Applicants, nor does it entitle the Applicants to the relief now being sought – some for the first time.

15. Before this Court the City deals with what the Applicants refer to as the spatial apartheid declaratory relief and the structural interdict sought and in the course of dealing therewith shall deal with:

15.1. The application for leave to appeal and prospects of success;

15.2. The principle of subsidiarity;

15.3. The City's failure to comply with its constitutional obligations;

15.4. Reasonableness of measures taken by the City; and

15.5. The structural interdict relief which the Applicants seek.

B. The application for leave to appeal and prospects of success

16. For reasons that follow, the City contends that prospects of success are absent in the present circumstances and leave should not be granted.

[10] Affidavit of Ms D Govender, vol. 38, p.3852, para 17.

17. The relief sought against the City is academic in that:

17.1. First, this application arose in the context of the disposal by the WCG of the Tafelberg land. The City had no power in relation to the decision to sell such property. It also had no say in the sale thereof. At all material times, the City has been willing to develop the Tafelberg land for housing. It is common cause that what the City is unable to do is pay for such property at market related prices. The sale the Applicants objected to is no longer proceeding. As the sale is no longer alive, and any relief arising therefrom is moot.

17.2. Second, there is no dispute that spatial apartheid requires redress. The City continues to seek to address it throughout the City within its available budgets and as required by the Spatial Planning and Land Use Management Act 16 of 2013 ("SPLUMA").[11] This being the only legislation dealing with spatial planning, the constitutionality of which is not under attack. The CBD or inner City or even the Applicant's artificially created central Cape Town, does not exist in a factual and/or economic vacuum. It is one economic hub. But what makes it a preferable economic hub for the provision of social and/or

[11] As set out in the preamble and in the Objects of the Act read together with its other chapters.

affordable housing to others that are and have been created (and are growing) and which are arguably closer to where people reside?

17.3. On the papers. it appears that the only distinguishing feature, is the number of commuters, apart from its historical status in the pre-constitutional era. But it is no longer so that the City is the only place for crucial and essential commercial and governmental services.

17.4. Third, by its own admission, in the judgement granting the City leave to appeal, the High Court accepts that it may have conflated the obligations of the City and the Province in making the order and that another court may well set it aside and that was what the SCA did.[12]

18. In addition, both the High Court and the SCA made factual findings in support of the City which the Applicants either ignore or minimize.[13]

[12] High Court Judgement, Leave to Appeal. vol. 35, p.3680 paras 50-51 the following is stated:
"[50] Given the purpose and form of our orders in the RTC application, the City's fate is inextricably bound in with that of the Province, albeit that the City has gone some limited way towards coming up with a policy of sorts. It was argued by Ms Bawa SC in the application for leave that we had impermissibly conflated the duties and functions of the two spheres of government in making our order binding on both the Province and the City.
[51] I am of the respectful view that there may be some merit in this argument and upon consideration of all the facts and circumstances, I believe that the City has *reasonable prospects of success on appeal against the constitutional relief granted against it in the RTC application.*

[13] SCA Judgement, vol. 37, pp.3815-3816, para 51. High Court Judgement, vol. 34, pp. 3588-3589, para 494.

Included in this, and which is a consistent theme of both judgments is that:

18.1. The City had taken reasonable steps, within its means, to provide social housing in and around Cape Town.[14]

18.2. There was no specific legislation which required the City to provide social Housing in a particular location.[15]

18.3. The City has limited land available to build social housing in the in and around 'central' Cape Town, despite having requested other organs of state to release viable land for social housing.[16]

18.4. Though the High Court noted the importance of the other organs of state and spheres of government in a constitutionally compliant social housing policy, the structural interdict issued only bind the City and the WCG. It does so because these are the only parties which have been cited, however, by its own admission, the order will be ineffective if the other spheres of government are not required to comply:

> *"[492] Importantly, as the facts of this case demonstrate, extensive consultation would no doubt be required in perfecting such a policy, and a court would want to be*

[14] High Court Judgement, vol. 34, pp3570 - 3575, para 450 - 455. SCA Judgement, vol.37, pp 3813-3814 para 47 and pp.3814 -3815 para 49.
[15] SCA Judgement, vol. 37, pp3815, para 50 "... This legal framework entails no obligation to provide social housing in a specific location".
[16] High Court Judgement, vol. 34, pp. 3589-3590, para 496 – 497.

assured that all three spheres of government pursue an integrated and consolidated approach to bring about the necessary changes and implementation of a constitutionally compliant social housing policy, with the common intention of breaking down the barriers of spatial apartheid. This would notionally require consultation and co-operation between the Province and national departments such as the DHS, DPW, Treasury and Agriculture, Land Reform and Rural Development (to just name a few that come to mind) on the one hand, and between the Province and the City, on the other hand.

[*493] In my view the only feasible way to achieve this constitutional objective is to subject both the Province and the City to the statutory interdict sought by RTC…* (our underlining)

19. More particularly, with reference to the SCA:

19.1. The order granted by the High Court to the effect that the City, together with the Province, failed to comply with their respective obligations under the legislation enacted to give effect to the socio-economic rights, namely, the Housing Act, 107 of 1997 (*"the Housing Act*") and the Social Housing Act, 16 of 2008, (*"the SHA*") points to no section that was breached nor any basis that the City had failed to comply with the **Grootboom** judgment. In effect, it ignored undisputed evidence provided by the City in relation to the strides made by the City in its housing policies over the last 20 years in relation to social housing.

19.2. The High Court did not take issue or disagree with the evidence presented by the City at all.

19.3. The structural relief against the City was misplaced. The City dealt extensively with its past, current and future housing programmes and the implementation thereof.

19.4. The fundamental difficulty the City faces is obtaining access to vacant land under the control of the National Government – Departments of Human Settlements and Public Works – both of which were cited before the High Court. Yet, in making the structural interdict, both were excluded from any structural interdict, despite the purposes thereof being to accelerate housing development. Where a particular obligation or competency lay with the National government, their absence from any structural interdict has an inevitable consequence that were local and provincial authorities to embark on such process, that it would be doomed to failure, rendering any such order unenforceable.[17]

20. Whilst the City does not quibble that the application deals with constitutional matters, however, additional thereto, the Applicants for leave to appeal must show that it is in the interests of justice for leave to

[17] High Court Judgement, vol. 34, p. 3588, para 492.

appeal to be granted.[18] One key factor in determining whether the interests of justice warrant the granting of leave is whether there are reasonable prospects of the appeal succeeding.[19]

21. The relief of a structural interdict without joining or binding the Minister of Human Settlements who is not a party to the Adonisi proceedings, will render the order, with or without the City ineffective. Therefore, it is not only an issue of mootness, but also the effectiveness of the order sought by the applicants. As such, the City is of the view that the prospects of success of the appeal are poor, insofar as the Applicants seek relief against it and should fail.

22. Next, we consider the alleged failure to comply with the City's obligations.

23. The SCA's approach must be accepted, namely that a particular type of housing cannot be demanded in any specified area – in other words there is no right to a geographically determined house that can be demanded by anyone. For that reason, there can be no prospects of success and in the premises, there is no basis for this Court to grant leave to appeal.

[18] *Nomandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC and Another* 2020(4) SA 409 (CC) at paras [36] and [40].
[19] *Shaik v Minister of Justice and Constitutional Developments and Others* 2004 (3) SA 599 (CC) at para [16].

C. The principle of subsidiarity

24. At the outset it is to be noted that both the SCA[20] and the High Court[21] concluded that the City had not shied away from its statutory obligations rooted in section 25 and 26 of the Constitution.

25. The City argued that the Applicants have not identified the legislation which obligates it to develop social housing in a particular location or as demanded by the Applicants. In the absence of such an obligation the relief that the Applicants seek, specifically against the City is without merit. The chances of this Court finding otherwise, in light of the extensive jurisprudence on subsidiarity, are minimal.

26. The SCA referred to the **City of Cape Town v Commando and Others**[22] which dealt with the request for emergency housing in a particular location.

> "[39]… 'For this contention [that the State has an obligation to provide emergency residential accommodation at a specified location] to withstand scrutiny, a source of the duty had to be identified. The legislative measures and programmes taken by the government giving effect to s 26 of the Constitution do not impose a duty on it to provide temporary emergency accommodation *at a specific locality.* Nor have line of cases since *Grootboom* interpreted the duties flowing from s 26 to oblige the government to provide emergency housing at a specific location. In fact the opposite is suggested. In *Thubelitsha* Ngcobo J observed that 'the Constitution does not

[20] SCA Judgment, vol. 37, p.3815-3816, para 51.
[21] Western Cape High Court Judgement, vol.34, p3588- 3589 para 494.
[22] [2023] 2 All SA 23 (SCA) at para [39].

guarantee a person a right to housing at government expense *at a locality of his or her choice.* Locality is determined by a number of factors including availability of land. However, in deciding on the locality, the government must have regard to the relationship between the location of residents and their places of employment'.[23]

27. The SCA Judgement deals with the issue of constitutional subsidiarity, and highlight the following:

28. First, the obligations on the City flow from the legislation cited in the application, namely the Housing and Social Housing Acts which were enacted to give effect to sections 25 and 26 of the Constitution. Nowhere in these statutes, is a right to social housing in a particular location entrenched or even stated.

29. Second, the SCA considered the exercise undertaken by the High Court in considering the enacted legislation through the prism of the Constitution and the interpretation of socio-economic rights using the guiding principles relevant to interpretation, set out in the judgments of the Constitutional Court, including **Mazibuko**,[24] **Grootboom**,[25] and **TAC**.[26] Furthermore, the SCA engaged with the principle that courts must promote the spirit, purport and objects of the Bill of Rights as

[23][2023] 2 All SA 23 (SCA) at para 53.
[24] *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at 87-88.
[25] *Government of the Republic of South Africa and Others v Grootboom and others* 2001 (1) SA 46.
[26] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC).

required under the s 39(2) of the Constitution, [27] and accord to statutory provisions a contextual, purposive meaning which is consistent with these objectives.[28] The SCA still found, despite considering that process followed by the High Court, that the obligation should be rooted in legislation before holding the City to a standard, not found in these Acts. The SCA uses the example of *SPLUMA* and the obligation therein to emphasis the point and states the following:

> [32] It is necessary, first, to highlight that the principle of constitutional subsidiarity is part of our Constitutional framework. The foundational norms of the Constitution are expressed in general terms. Where legislative and other measures have been enacted to realise the rights and obligations in the Constitution, the foundational norms espoused in the Constitution should find expression in such legislative measures. By way of example, the preamble to SPLUMA recognises that many people in South Africa continue to live and work in places defined and influenced by past spatial planning, land use laws, and practices, which were based on racial inequality, segregation, and unsustainable settlement patterns. It provides that it is the obligation of the State to realise the constitutional imperatives in ss 24, 25, 26, and 27(1) of the Constitution. Section 12(1) of SPLUMA imposes an obligation on the national, provincial and local governments to prepare spatial development frameworks. <u>The statute, rather than the Constitution, is therefore the direct source of the rights and obligations relating to preparation of spatial development frameworks. It is to its statutory provisions that litigants must look in asserting their rights and the obligations owed to them</u>" (own emphasis).

[27] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC).
[28] SCA Judgement, vol 37, pp,3815-3816 paras 31-32.

30. Paragraphs 32 to 34 of the SCA judgement[29] set out succinctly the difficulty that the Applicants face in trying to impose a non-existent statutory obligation against the City and why the prospects of this Court finding otherwise are non-existent.

31. In addition, the City agrees with the SCA in that the concept of constitutional subsidiarity has been considered and ventilated in this Court, in particular when it comes to socio-economic rights jurisprudence. There was no need for the SCA to repeat what is trite and accepted as part of our law. Nothing thus turned on it being dealt with succinctly and decisively in two paragraphs. This does not constitute neglect of the principle.

32. It is also not so that the SCA failed to take into account section 25(5) of the Constitution.[30] It was pertinently considered and acknowledged that it gave effect to SPLUMA.

33. The Applicants had the Housing Act, SHA and SPLUMA to rely on to try and hold the City to account for the so-called alleged failures, alternatively to seek relief that these statutes fail to properly address the plight facing them and other persons in their position. The Applicants did

[29] SCA Judgement, vol.38, pp.3806 – 3806, paras 33 -34.
[30] Applicant's heads of argument, pp. 22-23, para 45.1.

not do this, they directly engaged section 25(5) and 26 of the Constitution. The SCA pertinently pointed this out at paragraph 32.

34. It bears noting that the Applicants before this Court now allege that the core of their complaint relates to the access to land in terms of section 25(5) of the Constitution – but this was not the case that the City had come to the High Court to meet.

35. To bolster this, it is accompanied by submissions now that as no legislation gives full effect to the rights held in section 25(5) of the Constitution, the principle of subsidiarity, in respect of section 25(5) should play no role. The City, disagrees. In that if legislation does not give effect to that right then it must be challenged for its under-inclusivity, prior to any reliance directly on the constitutional rights. This principle plays a significant role in ensuring that the separation of powers is maintained by the Courts, and that the public rely on legislation or then challenge the statutes passed by their duly elected representatives who are supposed to give effect to their promises.

36. Fourth, the findings and order of the High Court, in respect of the City were far-reaching and created unrealistic unimplementable obligations for the City, the essence of which was that the High Court held it appropriate to determine that at a level of principle, delivering less homes in ‘central Cape Town’ should be preferred to delivering more

homes, where land is cheaper, and that it was constitutionally permissible to do so for the benefit of some at the expense of others. Moreover, it does so bypassing national legislation and adopted City policies, and the City's obligations as it is required to comply with under national legislation, without a word of criticism or mention of any shortcoming in relation thereto.

37. The High Court, as evident, in its judgment accepted that in 2018, when the City filed its answering affidavits, it provided a comprehensive account of its policies and programs, which meets the requisite standard of reasonableness. The information before this Court was of the *status quo*, six years ago. Even then, there was no *mala fides* attributed to the City, nor a lack of cooperation with the Court. It was accepted that the City had played open cards with the Court, had a comprehensive plan in place and ongoing housing projects.[31]

38. The City fulfilled its obligations to account in relation to its policies and projects. For that reason alone, the structural interdict granted by the High Court was inexplicable, and correctly set aside by the SCA, as there were no objective reasons before the High Court for structural or constitutional relief to be granted. Given that six years have lapsed, there remains even less reason to do so based on what is now outdated

[31] Western Cape High Court Judgement, vol.34, p3589- 3590 para 497.

information before this Court and given that the sale of the Tafelberg land is not proceeding.

D. City's compliance with its Obligations

39. The declaratory order granted by the High Court is premised on allegations that the City failed to comply with its obligations in terms of the Housing Act and the SHA[32] and as a result was in breach of sections 25(5), 26(1) and 26(2) of the Constitution,[33] are not borne out by the High Court's findings of fact and evaluation of the evidence in the Judgment with reference **to all the relevant circumstances** [34] or in the evidence as presented to the High Court by the City, read with the Applicants' founding papers.

40. It is in effect the first time that it has arisen that there is a constitutional right to social housing (the other cases related to emergency housing) that can be invoked with reference to a particular geographic area and in respect thereof the High Court found the City to be wanting ostensibly for its failure to take adequate steps to redress spatial apartheid. This

[32] In terms of the Housing Act 107 of 1997 and Social Housing Act 16 of 2008.

[33] ***25. Property***

(5) "The state must take reasonable legislation and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

26. Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."

[34] WCHC Judgement, vol. 34, pp. 3561 - 3563 para 427.

within the already contrived geographic boundaries of the Applicants' "*central Cape Town*".

41. First principles remain that an applicant must in their founding affidavit set out sufficient facts to disclose a cause of action, and necessary to establish a *prima facie* case,[35] which facts should exist at the time of the initiation of the proceedings[36] and the facts must be primary facts and not merely secondary facts. Primary facts being those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Secondary facts, in the absence of primary facts on which they are based, are nothing more than the deponent's own conclusions, or,as in this case, the personal views of Mr Herron as expressed in a Ground Up article contained in an annexure to the supplementary affidavit, and on which the Court extensively relied, and premised as conclusions. If we correct in this regard, then the entire basis on which the Applicants sought to rely for their attack on the City is without any credence.

42. The City's defence in the High Court was that the Applicants failed to make out a case on the papers for the relief they sought against the City.

[35] **Riddle v Riddle** 1956 (2) SA 739 (C) at 748.

[36] **Treasure Karoo Action Group and Another v Department of Mineral Resources and Others** [2018] 3 All SA 700 (GP) at paras [10] – [11].

There was no case of unconstitutionality pleaded that the City had to answer. This was not the challenge that the City came to Court to meet.

43. In addition, the SCA's finding that there is no obligation to provide social housing in a specific location underpins this point.

> *"50… Apart from the roles and responsibilities set out in the Housing Act and Social Housing Act, the Province and the City were obliged to apply the general principles applicable to the Housing Act and the Social Housing Act. <u>This legal framework entails no obligation to provide social housing in a specific location."</u> (own emphasis)*

44. The Applicants cannot plead a failure to meet a constitutional obligation (to provide social housing in a particular location) when there is no legal framework for such an obligation.

45. The City is clear, that there is no dispute that the legacy of apartheid and spatial apartheid requires redress across the City and for that matter it is so across the country. But there appears to be, from the Applicants' papers an insistence and elevation that this be corrected with one chosen area being given preference over others around Cape Town and in relation to one kind of housing obligation in preference of others.

46. Further, that this be redressed in relation to a specifically demarcated area unilaterally determined by the Applicants, even though the High Court

– at para [97] of its Judgment[37] recognised the broad impact of spatial apartheid development and the huge housing gap prevalent in greater Cape Town – even outside the CBD.

47. First, to reach the aforementioned, would mean that a grouping simply identified as a "*significant segment*" has an entitlement to dictate where and when housing (or more specifically, social housing) should be provided, in respect of the hierarchy of the City's housing obligations.

48. Second, that a group can conjure up a specific demarcated geographic area with their own boundaries to do so and that there was an entitlement to such demands from the commencement of the constitutional era for social housing in their central Cape Town. In coming to this conclusion it would mean that it is acceptable to ignore the housing demands of those in the greater Cape Town area and the mix of policy measures put in place to meet the various housing obligations under section 25 of the Constitution, read with the plethora of obligations under various national legislation, in furtherance of social housing, because that, in effect, is what the judgement of the High Court did.

49. This should be contrasted with the dicta in **Commando and Others v Woodstock Hub (Pty) Ltd and Another**:[38]

[37]High Court Judgement, vol. 33, p.3431. para 97.
[38] [2021] 4 All SA 408 (WCC) at paras [158]-[160].

"[158] Consequently, in my view the differentiation in treatment which the City's emergency housing programme affords to homeless evictees in the inner City, and in Woodstock and Salt River in particular, is not only unreasonable but also irrational, because it is arbitrary in its implementation. In addition, I agree with the applicants' contention that the effect of the implementation of the programme in the inner-City precinct, and in Woodstock and Salt River in particular, ***is to give undue preference to social housing****, at the expense of the City's constitutional obligations in relation to the provision of emergency housing.*

[159] Before I continue, I must make it clear that, as a matter of law, neither the applicants nor any other evictees in the City have a right to demand to be placed in temporary emergency housing in the area or location in which they live. I also accept that it is beyond the remit of the Court's powers in matters such as these, even though they may be equity-based, to direct where social housing and emergency housing developments should be constructed. These are by definition matters of state and policy which require careful and weighty consideration, by those functionaries who are empowered by law and who are equipped with the necessary expertise, to deal with them. They are not matters which a Court can or should pronounce on. That would be in clear breach of the doctrine of separation of powers and would constitute an impermissible intrusion into the domain of the executive and legislative arms of state. Were a Court to ascribe such a power to itself it would place an impossible burden on the State, as it would result in it having to accommodate evictees who are going to be rendered homeless, in virtually every suburb or area in which they live. For obvious reasons this is untenable."

50. Although the High Court accepted as correct a general proposition that an individual (or a group for that matter) did not have a right to demand that the State provide it with social housing in central Cape Town or its surrounds, its relief granted ultimately permits precisely that.[39] Moreover, when having regard to measures that the City should have in place to progressively realise rights with reference to context, the

[39] High Court Judgement, vol. 34, p.3580, para 473.

High Court judgement relates these to the CBD and not to the Applicants' central Cape Town.[40] The two are not the same and cannot now be interposed as it appears the Applicants seek to do in by seeking to read its case for relief in "central Cape Town" to one of the "inner City", whatever that in and of itself may mean. Were the attack from inception only on the CBD or inner City with much narrow geographic boundaries, and even less available land the evidence from the City would have pointed to extensively more impediments to meeting the Applicants' demands – but this was not the case it came to Court to meet.

51. Moreover, in concluding that the City did not have policies in place in relation to progressively realising the right to housing in the CBD, this was not the Applicants' case. The City did not concede that it had an obligation to have a specific policy regulating housing in the CBD or that it had no such policy in place. The City's policies in relation to housing do not exclude the CBD. It is not geographic specific. The High Court erred in relation to the admission with reference to the City.[41] Moreover, this is contradicted in para [476][42] by the High Court's acceptance that its findings in relation to a lack of suitable policies did not apply to the City. Yet, such finding is not reconcilable with the order against the City.

[40] High Court Judgement, vol. 34, pp.3583 – 3584, para 479.
[41] High Court Judgement, vol. 34, p3584, para 479.8.
[42] High Court Judgement, vol. 34, p3582, para 476.

52. In this regard the dicta in cases such as **Grootboom** and **Mazibuko** is identified as the foundation for this argument[43] – but neither of these cases are authority for the right to determine where and the nature of the housing to be provided (save in relation to emergency shelter in **Grootboom** which is not of application). Moreover, it is not authority for making a determination of constitutional obligations within a limited geographical area without regard to the City's overall housing obligations – for e.g. it cannot in focusing on the metro's needs and entirely disregard other obligations as appears to be what the High Court did.[44] This appears to be accepted,[45] however, the High Court then proceeded to find that the Province failed to meet the **Mazibuko** test – and yet in doing so (unlike the Applicants) specifically excludes the City from this conclusion[46] stating that:

> *"At the time this application was launched by RTC, there was no policy putin place by the Province to enable working people to access affordable housing under the SHA, whether in central Cape Town 'and surrounds' or elsewhere in the Metro.* ***I do not include the City in this part of the debate because, while it does attract obligations under the SHA, it does not have functional competence in regard to housing: that is the obligation of the national and provincial spheres of government."*** *(own emphasis)*

[43] High Court Judgement, vol.34, p.3565, para 436.
[44] High Court Judgement, vol 34 pp3566 - 3567 para 438.
[45] High Court Judgement, vol 34 p3580 para 473.
[46] High Court Judgement, vol 34 p3582 para 476.

53. The High Court correctly held that SPLUMA was relatively recent legislation and so the alleged failure to address what the Applicants referred to as "*spatial apartheid*" for the last 25 years cannot be correct in the absence of a clear factual basis at the time (set out by the Applicants) and legislative provisions requiring the City to do so – but neither was before the High Court.[47] Moreover, it was not the City's case that social housing was not an imperative or that there were no social initiatives pursued. There was also no specific provision of any housing legislation, or even the SHA specifically identified that it was alleged the City did not comply with.

54. In fact, the City, accounted for its projects detailing the mix of housing from SHI, Gap to BNG, informal, land availability etc across the City. With respect, the High Court's interpretation of the submissions leading to the conclusion that the City found itself between the rock and a hard place[48] – was not an admission that social housing had fallen short[49] but rather that there was a balancing exercise required to meet competing needs with the City embarking on social housing projects[50] where land was more readily and easily available to meet local housing demands at less cost. In effect, in reaching that conclusion that it did, the High Court made a determination outside of the policy framework as to which

[47] High Court Judgement, vol.34, p.3568 para 444.
[48] High Court Judgement, vol.34, p.3568 para 443
[49] High Court Judgement, vol.34, p.3568 para 444.
[50] High Court Judgement, vol.34, p.3570 para 450.

persons' housing demands should get preference, i.e. similarly structured persons in the Applicants' central Cape Town are to be afforded preference over any other area, and in effect housing policies should now be directed at specific geographic areas. With respect, the Court in doing so sought to engage in policymaking.

55. The High Court correctly engaged the City on its obligations in respect of the prevailing legislation and found that the most relevant national legislation only came into effect in 2015 and as such the obligations to deal with spatial justice under SPLUMA[51] and in-line with national legislation and policies, was admittedly a recent phenomenon from which any enforceable obligation could be construed.[52]

> *"…But SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and both the Province and the City are duty bound to implement it to the best of their abilities. While they may not have done so in the past, they are obliged to do so, both presently and in the future."* (own emphasis).

56. At para [445][53] of the judgment, the High Court stated that:

> *"In summary then, it is fair to say that the framework legislation is in place,at both provincial and municipal level, for consideration of a programme aimed at advancing social housing under the SHA, and that all spheres of government (including national government which owns vast tracts of landclose to the CBD) need to shoulder*

[51] Act 16 of 2013.
[52] High Court Judgement, vol.34, p.3568 para 444.
[53] High Court Judgement, vol.34, p.3568 para 445.

responsibility therefor in advancing the rights of the poor under ss 25 and 26 of the Constitution."[54] (own emphasis)

57. Paras [442] to [445][55] of the High Court Judgment – being the only four paragraphs of an extensive judgment that deals directly with the City's obligations, does not point to any specific failure on the part of the City to comply with the only legislation that deals with apartheid spatial planning, SPLUMA. The conclusion appears to be based on the (erroneous) premise that the City failed in its constitutional obligations under sections 25 and 26 of the Constitution. It had to do so in the absence of any other law. This conclusion is reached despite acknowledging that the bulk of the state-owned land in or near the inner City which is available for the development of affordable housing and, in particular, social housing projects, is not under the control of the City, but rather the national Government. The evidence reflected that, despite specific request, it was not being made available to the City.

58. In relation to the High Court's finding that the City *failed to take adequate steps to redress spatial apartheid in central Cape Town (the boundaries of which were in 2017 as depicted on the map annexed hereto marked "A")* we submit that the other issue wherein the High Court failed to have serious regard to, which could have potentially serious consequences in

[54] High Court Judgement, vol.34, p.3568 para 444.
[55] High Court Judgement, vol.34, p.3568 paras 442 - 445.

litigation against the City going forward, was the Applicants' version of the CBD and Surrounds in Annexure A on which reliance was placed.

58.1. Whilst the City does not take issue with the understanding of the CBD or the colloquial understanding of the inner City to be the CBD,[56] it does take issue with obligations imposed in relation to the Applicants' definition of central Cape Town in relation to which relief was being sought, especially given that the High Court was apprised that the City regarded the area surrounding the CBD to be more extensive than the Applicants' central Cape Town as part of its housing policies. No issue was taken with the City's approach.[57]

58.2. However, it is only with the acceptance of the Applicants' definition that the High Court could have been able to disregard the social housing projects to which Mr Molapo refers, as they would fall outside of those self-created geographic boundaries.[58]

58.3. The High Court reached its conclusion having agreed with the formulation of a version of the CBD and surrounds proposed by Dr Odendaal albeit that it was premised on her ostensible

[56] The Judgment appears to use CBD, inner City and Central Cape Town almost synonymously when it does not necessarily amount to a complete overlap.
[57] High Court Judgement, vol.34, p.3527 para 342.
[58] High Court Judgement, vol.34, p.3571 para 451.

"*expert*" conclusion that the suburbs identified to be included in central Cape Town are areas which were previously designated as white only, except for Schotschekloof (Bo-Kaap). This was clearly wrong as was pointed out by the City in that those parts of the Zonnebloem, South East of Chapel Street, and parts of Woodstock, Salt River, Walmer Estate and University Estate were also not designated as exclusively white-only areas. In fact, it is quite apparent that significant parts of Woodstock, Salt River and Walmer Estate did specifically not benefit from public investment. This evidence was entirely ignored and undermined the entire foundation of Dr Odendaal's reasoning and construction of a central Cape Town. Yet these submissions from the City were disregarded.

58.4. Further, Dr Odendaal regarded the M5 and N1 as both immutable infrastructural barriers with limited transport connections beyond them. This is neither correct, nor are these regarded as barriers or borders in the context of housing planning. For these obvious inaccuracies this contrived central Cape Town should have been rejected, contrary to what is recorded in the Judgment.[59]

[59] High Court Judgement, vol.34, p.3597, para 518.

58.5. The Applicants now before this Court seek to reboot their approach and says the City did not put up expert evidence to counter Dr Odendaal. In this regard the Applicants miss the point, namely that the entire premise of Dr Odendaal's report was based on obvious factual inaccuracies - which now appear to be conceded – and if so, what reliance can and should be placed on the conclusions drawn from a report wherein it could not even be properly identified which parts of the areas surrounding the inner City were most affected by apartheid and yet that standard was being used to make further determinations. To dispute what are obvious factual inaccuracies, readily apparent to anyone who lived in apartheid Cape Town, did not require expert evidence. Moreover, the City is well able to provide the requisite evidence of its boundaries and where its housing is collected, how its suburbs were historically racially classified without resort to expert evidence.

58.6. There is no rational reason for accepting the Applicants' definition of central Cape Town which by implication excludes the areas which the City regards to be part of this precinct for development purposes and which readily and easily allows for travel and public transport to the City, for example, Maitland and Brooklyn.

58.7. The City argued that Dr Odendaal's contrived area of "*central Cape Town*" was arbitrary. The City's objection was not because a social housing project existed in Maitland but because it reflected that the M5/N1 was an artificially contrived boundary especially with Voortrekker Road / Koeberg Road being easily traversed and providing ready access to the CBD, making it indistinguishable with other areas in the Applicants' central Cape Town. The point was to show that access to the CBD was not only achieved in the manner that the Applicant was saying, and as such, its entire constitutional complaint is severely flawed, even if there was legal credence thereto.

58.8. Moreover, whilst the CBD may constitute an economic node, the remaining areas have not for planning purposes been amalgamated with the CBD and as such are not economic nodes meaning that the sole criterion of relevance is its proximity to an economic node of the CBD. This is akin to areas adjacent to Century City, Claremont and other economic nodes. To hence rely on this central Cape Town as the geographic measure for obligations is a misnomer. The High Court, erred in its

acceptance of Annexure A as valid and relying thereon for purposes of imposing obligations on the City.[60]

58.9. This was especially so given that it had accepted, what 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 meaningfulway 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 andaround the CBD. [61] Coupled with its acceptance that Mr Molapo's affidavit and explanation which was detailed and thorough (and undisputed for that matter), the Court respectively erred in reaching the conclusion that the City failed in its obligations.

59. This is readily apparent given that the conclusions reached in paras [480] *et seq* of the High Court judgement relates only to the Province and not the City. [62]

60. Further in granting the declaratory relief against the City, the High Court judgment conflated the obligations of the Province and City.

[60] High Court Judgement, vol.34, p.3519, footnote 96.
[61] High Court Judgement, vol.34, p 3432, para 101.
[62] High Court Judgement, vol.34, p.3584, para 480.

60.1. In terms of chapter 2 of SHA, the role and responsibilities of the City are set out in section 5, distinct from provincial government.

60.2. Chapter 4 of the Housing Act sets out the functions of the City in section 9 and likewise, they are distinct from the functions of the Province.

61. In both, there is no obligation on the City to specifically redress the concept of spatial apartheid.[63]

62. It is thus not apparent, precisely which provisions of the legislation the City is said to contravene leading to an infringement of those Acts and a failure to meet its constitutional obligations. None are specifically identified in the founding papers or referred to in the High Court Judgment. No right emerges from the legislation in question to seek social or affordable housing in certain areas. The SCA judgement confirms this.[64]

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[63] The issue of spatial apartheid was discussed in a Land Claims Court case of the **Minister of Land Affairs of RSA and Others v Slamdien and Others** at para [26]:

> "*The history of the Restitution Act and section 2(1)(a), as set out above, strongly points to its underlying purpose being to address dispossessions of land rights which **were the result of a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve the (then) ideal of spatial apartheid, with each racial and ethnic group being confined to its particular racial zone. These would then be those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land in order to bring about that racial zoning**. It does not, in my view, include any racially discriminatory law or practice whatsoever, regardless of the particular area of human activity where the discrimination had its impact. It was that particular class of laws which gave rise to the phenomenon of forced removals with their associated awful consequences. It is that phenomenon which the land restitution regime seeks to address."*

[64] SCA Judgement, vol.37, p.3815, para 50

63. The dissonance between the High Court judgment and its order is magnified further by the High Court's different views on the policies of the Province and those of the City. There was no criticism levelled by the Applicants or the High Court judgment in relation to the City's policies. This is in contrast to what is said about the Province.[65] In fact, the Applicants did not at any time quibble with the City's account and explanation of its policies – based on the **Mazibuko** test. It was accepted that in this regard the City has discharged its obligations openly and transparently in accordance with its policies to address spatial injustice and provided the High Court with a comprehensive account. What resulted was that no exception was taken to the reasonableness of those policies, and no shortcomings in the legislative / policy sphere were specifically pointed to.

64. The SCA agreed with the City's policies and the explanation proffered by it in respect of discharging its obligations and stated the following: [66]

> "[51] As demonstrated the Province and the City have put in place policies that are consistent with the principles applicable to social housing under the relevant statutory framework. In addition, they are in the process of implementing social housing in their areas of jurisdiction, particularly through the pipeline programme. To this extent the Province was recognised by the national government in 2013 and 2015 as the leading province for delivery of social housing. Furthermore, in 2016 and 2017 the Province wrote to the national Department of Public Works requesting that 29 national government properties identified in various areas, including

[65] High Court Judgement, vol.34, p.3584, para 480.
[66] SCA Judgement, vol.37, pp.3815-3816, para 51.

> Bellville, Constantia, and Somerset West, be released for social housing development. Their letters went unanswered. Consequently, the contention that the Province and the City have, in general, not met their constitutional obligations regarding social housing delivery finds no support in the evidence."

65. The City does not dispute that it should account to its citizens and ensure that it is acting reasonably when giving effect to socio-economic rights, such as housing. However, since inception, the City has so accounted. The High Court accepted its account without reservation and applauded the City for its openness and forthright manner.[67] The City provided two affidavits setting out facts which were undisputed by the Applicants. The SCA relied on acceptance by the High Court of the undisputed account of what had been done in the past and what is being done currently.

66. It cannot account further than that, to a challenge that it needs to provide the applicants with access to land in central Cape Town. It remains so that the reasonableness of the measures taken by the City were also accepted by the High Court and were undisputed. The SCA, had no credible basis for holding otherwise.

E. The reasonableness of the City's housing policy

67. First, the Applicants, in the face of the answering and supplementary affidavits of the City, could not set out in reply, in what respects the City had failed to comply with the Housing and SHA Acts. The facts and historical background to the City's policies up until national legislation was enacted under SPLUMA reflected compliance with constitutional obligations and housing legislation in place at the time.

68. Second, when pressed to define the concept of spatial apartheid and where it is found in South African legislation, the Applicants could not provide an answer. Therefore, the finding that the City failed to comply with a non-existent obligation cannot stand. The concept of spatial justice is described as follows, under section 7(a)(i) of SPLUMA:

> ***"7. Development principles**. –*
>
> *The following principles apply to spatial planning, land development and land use management:*
>
> *(a) The principle of spatial justice, whereby—*
>
> *(i) past spatial and other development imbalances must be redressed through improved access to and use of land …"*

69. The evidence provided by the City's specialist, was telling in how limited the City's options are, with respect to access to land in and around the CBD and as such, it was largely compelled to rely on other State parties for its ability to comply with its obligations.

70. This evidence, which was accepted by both the SCA and the High Court, is undisputed.

71. Furthermore, and in its answer to what social housing projects were underway, the City provided a comprehensive list of social housing programs and projects underway in various economic nodes around the City. The High Court was also appraised of social housing developments in Brooklyn and Maitland (and in Woodstock) which for all intents and purposes qualified as social housing in and around the CBD, but for misconceived reliance on Dr Odendaal's report and the preference of the Applicants' "*central Cape Town*" definition.

72. This evidence was not challenged, in the High Court nor in the SCA, with the result that the SCA accepted and agreed with City's evidence and submissions on its housing polices setting aside the order which found that the City had failed in complying with its obligations:[68]

> *"[496] It is true that there are instances where the City has attempted to break down spatial apartheid barriers fairly close to central Cape Town (e.g.Woodstock, Brooklyn and Maitland), but the City's inability to provide housing in and around the CBD has largely not been of its own making: the evidence of Messrs Mbandazayo and Molapo, and the interview with Mr Herron, suggests that the non-availability of suitable landat a fair price has been the City's Achilles heel…"*

[68] High Court Judgement, vol.34, p.3589, para 496.

73. The evidence referred to above was dealt with from [para [450] of the High Court judgment to para [470][69] accepting of the City's position regarding social housing and housing. Therefore, the order of High Court, subsequently corrected on appeal, was somewhat perplexing, in that the Applicants, in so far as it related to their claim against the City, failed to place evidence contrary thereto challenging the accuracy thereof. Yet, a structural interdict was imposed to effectively oversee policies being put into force for a declared geographic area. This in itself, respectfully, was contrary to the separation of powers.

74. As such, the steps taken by the City to meet its housing obligations were not disputed nor was it alleged that the City's policies were deficient.

75. In **Grootboom**[70] Yacoob J summarised the position with regard to State entities and the reasonableness criteria when giving effect to legislation, as follows:

> *"[42] The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's*

[69] High Court Judgement, vol.34, p 3570 – 3579, paras 450 – 470.

[70] 2001 (1) SA 46 at para 42.

obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations."

76. The reasonableness of the City's programs is readily evident from paragraphs [450 – 466] of the High Court Judgement.[71] Herein together with the confirmatory affidavit of Pogiso Molapo from the City,[72] setting out the City's approach to social housing reflecting the reasonable steps taken by the City. Furthermore, in the assessment of the evidence provided by the City, the High Court made the following findings:

> *"[494] As far as the City is concerned, I am of the view that the evidence put up on its behalf, particular by Mr. Molapo, establishes that it has done what it could over the years to provide affordable housing to the community. It has been hamstrung by the availability of suitable land at an affordable price and, notwithstanding its repeated requests to both national and provincial government to make such land available to it (or to facilitate such availability), it has drawn the short straw every time. In that respect one need look no further than Ms. De Lille's request to President Zuma and the City's expression of interest in the Tafelberg site for the provision of affordable housing.*
>
> *[495] The City seems to have attempted to do as best it could in circumstances where, as Mr. Molapo put it, 'the levels of co-operation among the various role-players have largely dissipated.' The City is said to have been involved in the provision of social housing for some 25 years now[73] but, as the interview with Mr. Herron shows, its service delivery in that regard has been focused on housing needs at the periphery or in areas where apartheid spatial planning is*

[71] High Court Judgement, vol. 34, pp.3570 – 3577, paras 450 – 466.
[72] Affidavit of Mr Molapo, vol.26, pp 2684 -2689, paras 10 – 21.
[73] It claims to have been involved therein long before the promulgation of the SHA.

entrenched – for example in traditionally Coloured neighbourhoods on the Cape Flats such as Belhar and Elsies River.

[496] It is true that there are instances where the City has attempted to break down spatial apartheid barriers fairly close to central Cape Town (e.g. Woodstock, Brooklyn and Maitland), but the City's inability to provide affordable housing in and around the CBD ***has largely not been of its own making****: the evidence of Messrs Mbandazayo and Molapo, and the interview with Mr. Herron, suggests that the non-availability of suitable land at a fair price has been the City's Achilles heel. That having been said, the Herron interview also discloses that there were instances where City land could be utilised for affordable housing and that it really did not take much to achieve that situation.*

[497] In the result, I am of the considered view that, while the constitutional infringement by the City has been less pronounced than that of the Province, and that such non-compliance has been explained – ***the City has played open cards with the Court at all material times*** *– the evidence does establish that in 2017, and after RTC and others began applying pressure on the authorities to come up with a solution for affordable housing closer to central Cape Town,* ***the City changed course radically****."*

77. The evidence on which the High Court placed reliance for reaching the conclusion in order to make a finding against the City was solely premised on utterances in an interview by Brett Herron, then a mayoral committee member, and a prospectus that had mentioned a change in approach in the housing delivery program. In respect hereof, the SCA stated in the **Commando** matter: "*It hardly need be stated that a political*

speech by a municipal politician does not constitute policy, carefully considered and adopted by a policy maker."[74]

78. By concluding that the City changed course, the High Court effectively rejected the evidence of the City manager, Mr Mbandazayo, that this was not so, preferring instead Mr Herron's interview (and hearsay) as the only disclosed basis for relief under section 172(1)(a). However, the High Court in every material respect accepts the undisputed evidence tendered by the City. If the City is correct that the High Court erred in this regard then the interdictory relief under section 172(1)(b) falls away.

79. The High Court places reliance on an annexure to the supplementary affidavit – being an interview with Mr Brett Heron in which it is ignored that actually when asked *"why it had taken the City so long to take action in relation to well-located affordable housing"* with reference to projects being embarked upon in Salt River and Woodstock his initial response was that he was *"not sure"* and then proceeded to speculate as to such reasons hypothesising that the focus was on providing high numbers on the outskirts. This was recorded as being an echo of counsel's address (HC Judgment at para [464]).[75] It is so that during argument the submission was made that national housing policies evolved from the RDP housing to the policies that exist today with the latter requiring bulk

[74] 2023] 2 All SA 23 (SCA) at para 63
[75] High Court Judgement, vol.34, p3576-3577, para 464.

housing to be built relatively quickly to meet needs and backlogs and given demand for housing. However, the High Court also records that on affidavit, Mr Mbandazayo and Mr Molapo indicated that affordable housing had long been part of the City's housing agenda and that the former took issue with what Mr Herron had told the Ground up journalist. There was no "*about turn*". This was not accurate.[76] This is also borne out by the social housing projects to which Mr Molapo specifically referred.

80. The summarisation of precisely what Mr Herron indicated is, with respect, misconstrued in para [496][77] and his own speculation set out in an interview in an annexure to a supplementary affidavit is elevated to the high water mark for a conclusion that *"there were instances where City land could be utilised for affordable housing and that it really did not take much to achieve that situation,"* is not borne out by the facts as Mr Herron did not point to specific land in the Applicants'central Cape Town for this alleged premise. This appears as the sole basis provided as justification for the interdictory relief against the City and for the "*less than pronounced*" constitutional infringement.

81. Similarly to the High Court in the **Commando** matter, the High Court in the **Tafelberg** matter failed to consider the rationality and

[76]High Court Judgement, vol.34, p3577 para 466.
[77] High Court Judgement, vol.34, p3589 para 496.

reasonableness of the policy approach set out by the City and which it actually factually accepted, instead relying on the utterances of Mr Herron, in the public domain. With respect it was erroneous to do so.

82. It is also now trite that a court considering the reasonableness of legislative or other measures taken by the State will not enquire into whether one or more desirable or favourable measure could have been adopted, or whether public resources could have been better spent. A wide range of possible measures could have been taken by the City to meet its obligations and many of these meet the threshold of reasonableness. Once it is shown that the measures do, then this requirement is met.

83. Therefore, the conduct of the City has been reasonable and as such the question of a breach of its constitutional obligation must, as the SCA found, fail.[78]

> *"[51] …. Consequently, the contention that the Province and the City have, in general, not met their constitutional obligations . regarding social housing delivery finds no support in the evidence."*

84. The irony of the Applicants' allegations at paragraph 55 of its affidavit in referring to **Grootboom** case, stating that *"… a state housing program*

[78] SCA Judgment, vol 37, pp. 3815-3816, para 51.

which excludes a significant segment of society cannot be said to be reasonable…", yet the relief that the Applicants seek, insofar as it relates to the spatial redress in the CDB, is said to be for a small segment of commuters – probably far less than the then estimated 200 000 people said to commute to the CBD. This may well be considerably less in the post-Covid period or even lesser given the collapse of the rail system. In any event it is considerably less than the City's list of persons waiting for housing in what is an ever-growing backlog.[79]

85. But even so, on the Applicants' approach: it was common cause that land in the CBD is limited and very costly to develop. Coupled with the affordability of such social housing, a much smaller number of recipients would benefit. The next challenge the City may well face, were it to adopt the approach the Applicants seek to enforce, is likely to be premised on using scarce resources to benefit a few at the expense of hundreds of thousands of persons on City waiting lists.

86. The Applicants, on the pleaded facts failed to set out a case that the City's policies were unreasonable and that they fell foul of the prevailing housing legislation or amounted to a breach of section 26 of the Constitution. On the contrary as already indicated this was not what they did, nor did they take issue with the City's policies.

[79] Application for leave to appeal CC, vol. 38, pp. 3871-3872, para 55.

87. It must be borne in mind that these very same policies do apply in the very geographic area to the extent that such is applicable. In other words, if houses could be built in that area of a particular nature, then such would be done.

88. The effect hereof is that the High Court decided that the City's limited resources should "*rather be spent*" in "*central Cape Town*" for the benefit of some as opposed to other housing for the benefit of others. In other words, a defined group of people is being afforded preference by the Court over people who may be similarly situated and could conceivably have been waiting for a longer period of time for housing. It was just no organisation has taken their plight up to a Court. This, without any corroboration that they would indeed qualify as recipients.

89. Yet the High Court referred to this group of individuals which the Applicants referred to as people earning an income between R5 000.00 and R15 000.00 as the affected segment or group impacted on by the City's unreasonable housing policy.

> *"[429] Against that jurisprudential backdrop counsel for RTC advanced their argument in favour of the constitutional relief as follows. Firstly, it was argued that the housing programmes implemented by the Province and the City since the commencement of the constitutional era have not been balanced and flexible, having made no provision for a significant segment of society to progressively realise the right to housing under s 26 of the Constitution. <u>That significant segment was defined as that</u>*

group of people in need of affordable housing (as opposed to RDP/BNG housing in central Cape Town." (own emphasis).

90. The distinguishing factor between these individuals and those in **Grootboom**, is that these Applicants seek affordable housing in a particular area – an area where the City had no land available and the land is costly, whereas in **Grootboom** it was access to any adequate housing anywhere as long as this was implemented reasonably.

91. Even if making this argument the Applicants could not point to any of the City's policies which failed the **Grootboom** reasonableness test and the High Court Judgment does not identify any either.

92. Further, the High Court Judgment detailed that the City's evidence was a clear and detailed explanation that met the **Mazibuko** requirements for reasonableness, when determining the actions of the City.

93. In spite of all the above, the Hight Court still found that the City had failed to act reasonably when it came to its policies. Notwithstanding that the reasoning in the High Court Judgment does not conclude that the City breached its obligations at para [493][80] the High Court tried to impose a statutory interdict against the City.

[80] High Court judgement, vol.34, p3588, para 493.

94. In doing so it is directed in para [493] that the Judgment provides guidance as to the City's obligations and presumably its failures – but in contrast the High Court judgment does not do so, instead it extricated the City from the findings made against the Province. This leaves the City bereft of ascertaining precisely the basis on which it is being subjected to interdictory relief given the High Court's acceptance that the City had done what it could over the years only to be thwarted by the provincial and national government[81] and the conclusion that the inability to provide affordable housing was not of its own making.[82]

95. The City's conduct was, however, justified and confirmed by the SCA as having met the reasonableness standard that the Courts have consistently enforced against state entities. This phrase, at paragraph 51 of the SCA Judgement aligns with the fact that on the undisputed evidence provided to the Court, the City was found to have conducted itself reasonably, in respect of complying with its obligations to its residents.

> *"[51]…the contention that the Province and the City have, in general, not met their constitutional obligations regarding social housing delivery finds no support in the evidence."*[83]

[81]High Court judgement, vol.34, pp3588-3589, para 494.
[82] High Court judgement, vol.34, p3589, para 496.
[83] SCA Judgement, vol.37, pp3815-3816, para 51.

F. The structural interdict

96. The order directing that the City and the Province *"… jointly file a comprehensive report under oath, by 31 May 2021, stating what steps they have taken to comply with their constitutional and statutory obligations as set out above, what future steps they will take in that regard and when such future steps will be taken"* is, with respect, misplaced.

97. As a starting point, the High Court made no factual finding that the City had failed to comply with its constitutional obligations and, as set out above, went as far as stating that the City had done all that it could over the years to provide affordable housing to the community.

98. The City went to lengths in explaining its housing programmes and the current and future developments underway in and around the City, namely that:

98.1. The National Development Plan have been incorporated in all the City's planning since 2013;

98.2. The spatial development framework ("*SDF*") is a spatial development document which encompasses all 8 districts in the City and provides an integrated view of the future development

of the City. This SDF is reviewed every 5 years and incorporated the spatial justice principles;

98.3. The Built Environment Performance Plan ("*BEPP*") is the document which articulates the City's investment rationale and is reviewed annually; and

98.4. The Integrated Human Settlements framework plan ("*IHSF*"), which is the City's all-encompassing housing policy document containing references to these policies and is reviewed every five years.

99. All of the above programmes and others set out what the City was doing and what it aims to achieve in its housing policy at that stage. Therefore the structural interdict seeking a report, after the City, as expressed by the High Court, played "*open cards*" with it and gave it a detailed breakdown of the City's past, present and future housing programmes, is, with respect, unsubstantiated, unnecessary and seeks to bind the City to a process that should in essence be undertaken by these State Respondents, who control the available land not provided to the City, and in respect of which no order was made as the national government departments of Human Settlements and Public Works (both of whom were cited in the proceedings) are not placed under any obligation.

G. Conclusion

100. This Court has warned that while there may be cases where the interests of justice require that a constitutional complaint be raised for the first time before this Court, these would be rare and exceptional cases.[84] Whilst in the instance case the constitutional complaint was raised, however, in the instant case the relief now being sought as reflected in the orders annexed to the Practice Note, should not be permitted where materially different to the relief sought in the High Court and the SCA as reflected in the draft relief attached to the practice note.

101. This comes to the City's attention for the first time when the practice notice is filed. It was not sought in the High Court or the SCA and not even foreshadowed in the papers before this Court. Given the number of years this litigation has ensued to do this at the last minute is an impermissible ambush that should not be permitted. The Applicants, like all other litigants, must stand and fall by their pleadings. This relief now being sought is not consonant with the procedures of this Court, which should not be lightly, and so flagrantly be ignored. Noticeably, again the national Government is not to be subjected to this relief notwithstanding that it remains, on the evidence, a significant owner of land that the City has sought to acquire (and still does) to meet its

[84] Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) at para [44], and more recently in Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC) at para [63]

housing needs. Adopting this approach, has resulted in the City and the Province, for that matter, being deprived of placing evidence relevant to this relief before this Court.

102. The City accepts that the award of cost is at the discretion and Biowatch principle, applies.

103. In respect of the application by the Minister of Human Settlements before this Court (CCT Case Number:126/2024), two issues are raised: the first relates to the Government Immovable Asset Management Act, NO. 19 of 2007 ("GIAMA"); and the second to obligations under the Intergovernmental Relations Framework Act, No. 13 of 2005. The former did not relate to the City, and in relation to the latter, at all material times the City indicated a willingness to engage with Housing Minister on the housing crisis. For purposes of the proceedings before this Court there is no *lis* between the City and the Minister as the parties are no longer in dispute and therefore nothing further need be stated in this regard.

N BAWA SC
T MAYOSI
21 October 2024