IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN

CCT Case Number:126/2024
SCA Case Numbers: 522/2021 & 523/2021
WCHC Case numbers: 7908/2017& 12327/2017

In the matter between:

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

and

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

WRITTEN SUBMISSIONS OF THE FIRST AND THIRD TO SIXTH APPLICANTS

I INTRODUCTION

1. These proceedings were prompted by the First to Fourth Respondents' (**Province**) sale of the Tafelberg property in Sea Point, to the highest bidder (the Phyllis Jowell Jewish Day School), for a purchase price of R135 million. The sale took place in the context of the Tafelberg property having being identified as suitable for affordable housing, and of well-located state-owned land being an essential requirement for redressing spatial apartheid in central Cape Town. The Tafelberg property had come to symbolise a broader campaign for affordable housing in and around central Cape Town.

2. The relief sought in the application[1] included what can broadly be termed (i) the spatial apartheid relief against Province and the City of Cape Town (**the City**) (primarily a declarator that they had failed to comply with their obligations in terms of ss 25(5), 26(1) and 26(2) of the Constitution, and legislation enacted to give effect to these rights, to redress spatial apartheid in central Cape Town);[2] (ii) a review of the sale of the Tafelberg property;[3] and (iii) relief in respect of the unconstitutionality of regulations under the Western Cape Land Administration Act 6 of 1998 (**the WCLAA**).[4] The High Court effectively upheld this relief[5] and ordered that Province's decisions in respect of the sale of the Tafelberg property be reviewed and set aside.[6]

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[1] The application brought by the applicants in the High Court under case number 7908/2017 (also referred to as the **NU application**).

[2] Amended notice of motion, vol.7, pp.670 – 671, prayers 2 – 6.

[3] Amended notice of motion, vol.7, pp.672, prayers 11 – 12.

[4] Amended notice of motion, vol. 7, pp.673 – 674, prayer 18.

[5] High Court Judgment vol. 34, pp. 3600 – 3603; High Court order vol. 35, pp.3611 – 3612, read with "A" in the High Court Judgment granting partial leave vol. 35, p.3684.

[6] High Court Judgment, vol.34, orders 6 and 7, p.3602.

3. Both Province and the City (collectively, **the respondents**) sought leave to appeal against the spatial apartheid relief, which was granted. Province also sought leave to appeal against the review relief,[7] and the WCLAA constitutional relief.[8] However, Province accepted that the review relief had become moot when the agreement of sale between Province and the Phyllis Jowell Jewish Day School was cancelled.[9] Nevertheless, Province argued that there were discrete issues of public importance which warranted an appeal hearing in the interests of justice in respect of the invalidity of the sale, namely findings that were made in relation to the interpretation and application of the Government Immovable Asset Management Act, 2007 (**GIAMA**).[10] The High Court denied leave on this aspect, but the Supreme Court of Appeal (**SCA**) granted leave.[11]

4. The SCA upheld the appeal, set aside the order of the High Court in the NU application, and replaced it with an order that the application is dismissed with no order as to costs.[12]

5. The applicants make submissions below in the application for leave to appeal against the whole of the Judgment and order of the SCA, and on the merits.[13]

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[7] Province notice of application for leave to appeal, vol. 35, pp.3625 – 3632, paras 7 – 9.

[8] Province notice of application for leave to appeal, vol. 35, pp.3621 – 3622, para 5. The High Court granted leave on this aspect.

[9] High Court Judgment granting partial leave, vol.35, p.3670, para 22.

[10] High Court Judgment granting partial leave, vol.35,p.3670, para 23.

[11] Province application for leave to appeal to the SCA pp.3711 – 3719, paras 13 – 37; NU application for leave to appeal to this Court vol. 38; p.3894 para 112, footnote 104.

[12] SCA Judgment and order vol. 37, p.3838.

[13] The second applicant in the High Court has passed away: founding affidavit leave to appeal, vol. 38, p. 3847, para 4.

6. In these submissions, we deal with the following:

6.1. leave to appeal;

6.2. the use of state land;

6.3. the spatial justice relief;

6.4. GIAMA; and

6.5. the constitutionality of the WCLAA regulations.

II LEAVE TO APPEAL

7. The applicants submit that this application raises a number of important constitutional matters and issues of general public importance. These are described in the applicants' affidavit in support of their application for leave to appeal in this Court and are not repeated.[14] We submit that: (i) it is in the interests of justice for leave to appeal to be granted; and (ii) the appeal has a reasonable prospect of success.

8. Province's contentions that it is not in the interests of justice for leave to appeal to be granted[15] are not sustainable. First, the relief sought in the application was much broader than the review, particularly the spatial justice relief. The issues raised in this application are of considerable public importance.[16]

[14] Founding affidavit leave to appeal, vol. 38, pp. 3850 – 3851, para 14. The applicants do not persist with seeking leave to appeal in respect of the proper approach to the interpretation of the notice declaring restructuring zones under the Social Housing Act and whether Sea Point falls within a restructuring zone.

[15] Province answering affidavit leave to appeal vol. 39, pp. 3923 – 3924, para 15.

[16] The SCA noted in its judgment that the issues raised pertaining to social housing and the roles of the different spheres of government are: (i) very important and require clarification; and (ii) of considerable public interest: SCA judgment, vol. 37, p. 3804, para 30.

Second, Province contends that the issues pertaining to GIAMA and the WCLAA have become moot. There have been no new developments in this regard since Province sought and was granted leave to appeal to the SCA on those issues, and since the SCA handed down its judgment. They remain issues of considerable public importance in respect of future disposals of state-owned land.

9. It is well established that mootness is not an absolute bar to the justiciability of an issue, and that this Court may entertain an appeal, even if moot, where the interests of justice so require.[17] The factors that bear consideration when determining whether it is in the interests of justice to hear a moot matter include whether any order which it may make will have some practical effect either on the parties or on others; the nature and extent of the practical effect that any possible order may have; the importance of the issue; the complexity of the issue; and the fullness or otherwise of the arguments advanced.

10. Before the SCA and in this Court, both Province and the City have accepted that there is a general constitutional obligation to redress spatial injustice, but deny that there is an obligation to do so in a specific geographic area and that there has been a failure to redress spatial apartheid in central Cape Town. The spatial justice relief therefore remains a live issue, contrary to what the

[17] *Agribee Beef Fund Ltd and Another v Eastern Cape Rural Development Agency and Another* 2023 (6) SA 639 (CC), paras 24 and 26. In *AB and Another v Pridwin Preparatory School and Others* 2020 (5) SA 327 (CC) the majority granted leave to hear an appeal that was moot because the learners had already left the school which had cancelled the schooling agreement between the parents and the learners. The Court's reasons included – amongst others – that it raised important and complex legal questions about the rights of learners under ss 28(2) and 29(1)(a) of the Constitution and the corresponding duties of independent schools, and that it was a first and rare opportunity for the Court to consider the rights of learners at independent schools (paras 112 and 116).

City contends.[18]

11. The prospects of success are dealt with further in what follows below on the merits.

III STATE LAND

12. The manner in which organs of state can, and should, use land owned by them lies at the heart of all three matters which are the subject of this application. The High Court judgment accepted, and gave effect to, the broader social function of publicly owned land,[19] while the SCA's analysis of the spatial justice claim, GIAMA and the WCLAA regulations, all took place within a framework entirely divorced from the objects of s 25 of the Constitution and the historical context against which it was enacted.

13. In this part of our submissions we shall:

    13.1. Briefly summarise the principles the SCA should have applied in interpreting the constitutional rights and legislation under consideration;

    13.2. Set out the societal limitations applicable to individual and private property rights; and

    13.3. Advance submissions concerning the implications of the broader

[18] City answering affidavit leave to appeal vol. 39, pp.3963 - 3964, paras 12 and 12.2.

[19] This is discussed in a comment on the High Court judgment entitled "They're not making land anymore: a reading of the social function of property in *Adonisi"* by Thomas Coggin, a senior lecturer at the University of the Witwatersrand, in the South African Law Journal, 2021: Volume 138/ Part 4 (**Coggin**): pp. 697 – 925.

social objectives of the property clause for the use of state land.

Interpretational principles

14. The principles of interpretation to be applied to rights in the Bill of Rights, and to legislation enacted to give effect to those rights, have been considered on numerous occasions in judgments of this Court and need only be summarised briefly.

15. It is trite that rights in the Bill of Rights are to be interpreted purposively. In several cases[20] this Court has applied the following statement by Dickson J[21] (in relation to the Canadian Charter of Rights and Freedoms) to fundamental rights in our Constitution:

> "The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect. In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be . . . a generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee

[20] *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 51.

[21] *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) (**Big M**) 321.

and securing for individuals the full benefit of the Charter's protection."

16. More recently, this Court has elaborated on the purposive approach set out in *Big M*, emphasising that: (i) constitutional rights conferred without express limitations should not be cut down by reading implicit limitations into them; and (ii) when legislative provisions limit or intrude upon constitutional rights, they should be interpreted in the manner that least restricts the right, if the text can reasonably bear that meaning.[22]

17. The purposive approach is also applicable to the interpretation of legislation which gives effect to an entrenched socio-economic right.[23]

18. The approach to statutory interpretation required under the Constitution is different to that followed under the doctrine of Parliamentary supremacy.[24] The obligation to promote the *"spirit, purport and objects of the Bill of Rights"* imposed by ss 39(2) of the Constitution is a *"mandatory constitutional canon of statutory interpretation"* and, where a right in the Bill of Rights is implicated, every court is required to read legislation through the prism of the Constitution.[25] The implications of ss 39(2) for judicial officers are twofold: (i) they are obliged to prefer an interpretation of legislation which renders it constitutionally compliant, over one which does not, where it is reasonably possible to do so;[26] and (ii) where they are faced with two interpretations which

[22] *National Union of Metalworkers of South Africa v Trenstar (Pty) Ltd* 2023 (4) SA 449 (CC) para 42, endorsing *South African Transport and Allied Workers Union and others v Moloto NO and another* 2012 (6) SA 249 (CC) at para 43.

[23] *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) (**Scribante**) at paras 24 – 25.

[24] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) (**Makate**) at para 30.

[25] *Makate,* at paras 87 – 88.

[26] *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others; In re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others*

do not limit fundamental rights, they are obliged to prefer the interpretation which better promotes the objects of the Bill of Rights.[27]

19. The search for the meaning of a statutory provision is a unitary exercise, taking into account the text to be interpreted, the broader context in which it appears, and the purpose of the provision. The role which each of these components plays is modulated by constitutional values, in particular ss 39(2) of the Constitution.[28]

20. Before considering the implications of s 25 for the use of state property, we shall discuss the societal limitations the property clause imposes on private property rights.

Societal limitations on private property rights

21. *FNB*[29] is instructive in setting out the broader societal limitations to which individual property rights are subject. Ackermann J, in his unanimous judgment:

    21.1. Noted that provisions in the property clause must not be construed in isolation, but in the context of the other provisions of s 25 and their historical context, as well as the context of the Constitution as a

2001 (1) SA 545) (CC) paras 22 – 26. In *University of Stellenbosch Legal Aid Clinic v Minister of Justice* 2016 (6) SA 596 (CC) at para 135, Cameron J, writing on behalf of the majority of the Court, referred to this principle as *"gold-plate doctrine"* in this Court.

[27] *Makate*, para 89, read together with *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) 337 (CC) at paras 46 and 84.

[28] *Independent Community Pharmacy Association v Clicks Group Ltd and Others* 2023 (6) BCLR 617 (CC) at para 238.

[29] *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

whole;[30]

21.2. Stated that ss 25(4) to (9) all aim at redressing one of the most enduring legacies of past racial discrimination, namely the grossly unequal distribution of land in the country and emphasised that under the Constitution the protection of property as an individual right is not absolute but subject to societal considerations;[31]

21.3. Commented that the preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based on social justice and noted that **the Bill of Rights places positive obligations on the state in regard to social and economic rights**;[32]

21.4. Endorsed the statements by the leading academic, Professor AJ Van der Walt that:

21.4.1. the meaning of s 25 has to be determined within an interpretative framework that takes cognisance of the *'inevitable tensions'* which characterise the operation of the property clause. The tension between individual rights and social responsibilities is to be the guiding principle *'in terms of which the section is analysed, interpreted and applied in every individual case'*;[33] and

21.4.2. when considering the purpose and content of the property

[30] At para 49.

[31] At para 49.

[32] At para 50.

[33] At para 50.

clause it is necessary to move away from a static, *'typically private-law conceptualist view'* of the Constitution as a guarantee of the *status quo* to a *'dynamic, typically public-law view'* of the Constitution as an instrument for transformation, under the control of entrenched constitutional values;[34]

21.5. Stated that the purpose of s 25 is both to protect existing private property rights as well as to serve the public interest, mainly (but not exclusively) in the sphere of land reform, and also to strike a proportionate balance between these two functions; and

21.6. Emphasised that one should never lose sight of the historical context against which the property clause was enacted: *'The background is one of conquest, as a consequence of which there was a taking of land in circumstances which, to this day, are a source of pain and tension'*.[35]

22. Section 25(4)(a) states explicitly that for purposes of *'this section'*, the public interest includes the nation's commitment to land reform. This forms the basis for Ackermann J's conclusion that the purpose of s 25 (in addition to protecting private property rights) is to serve the public interest, *'mainly in the sphere of land reform but not limited thereto'*.

23. Not only is land reform an important component of the objects of the property

[34] At para 52.

[35] At para 64.

clause, but this Court has held that land restitution and reform are a *'compelling constitutional priority'* and ss 25(5) to (7) were entrenched in the Constitution *'in recognition of our regretful history of widespread dispossession of land from individuals and communities because of discriminatory laws and practices'*.[36]

24. It is against this context that the limitations imposed on private property rights by the constitutional priority of land reform are to be understood. Two judgments of this Court illustrate these limitations:[37]

24.1. In *Scribante* the ss 25(6) right to security of tenure, together with the Extension of Security of Tenure Act 62 of 1997 (**ESTA**), imposed a positive obligation on a private landowner not only to accommodate an ESTA occupier on his land, but also (in certain circumstances) may oblige the owner to compensate the occupier for improvements to the property necessary to maintain a dignified living environment; and

24.2. *Blue Moonlight*[38] held that s 26 of the Constitution limited the landowners' right to occupation of their property by placing an obligation on them to continue to house unlawful occupiers, who, if evicted immediately, would be rendered homeless.

[36] *Kwalindile Community v King Sabata Dalindyebo Municipality and Others; Zimbane Community v King Sabata Dalinyebo Municipality and Others* 2013 (6) SA 193 (CC) at para 39.

[37] These are discussed by Coggin at p. 709.

[38] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) (**Blue Moonlight**).

Implications for the use of state land

25. The state stands in a very different position to a private landowner and the tension between individual rights and social responsibilities that characterises the latter's rights operates at an entirely different level in relation to state land. As this Court has pointed out:

25.1. the state *'is the Constitution's primary agent'*;[39]

25.2. the Bill of Rights places positive obligations on the state in regard to social and economic rights;[40]

25.3. in terms of ss 7(2) of the Constitution, the state is under the obligation not only to respect and protect, but also to promote and fulfil, the rights in the Bill of Rights by taking steps that are both reasonable and effective;[41] and, in short

25.4. the state exists to give practical expression to constitutional rights and to ensure that the aspirations of the Bill of Rights are realised.[42]

26. The state's obligation to progressively realise socio-economic rights, and particularly the rights in ss 25(5) to (7) and 26 of the Constitution, places important limitations on the way in which organs of state can use land owned by them. Moving away from a static, conceptualist view of the property clause

[39] *Member of the Executive Council for Health, Eastern Cape and another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute* 2014 (3) SA 481 (CC) at para 82.

[40] *FNB*, at para 50.

[41] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) at para 189.

[42] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at para 25.

and adopting a dynamic view of it as an instrument for social transformation – as stated in *FNB* – requires courts to view state owned land as a crucial and scarce public resource to be applied - where feasible - towards the progressive realisation of the rights in ss 25(5) and 26 of the Constitution.[43]

27. The High Court judgment exemplifies the manner in which this dynamic approach to the property clause should be applied:

27.1. in determining whether the Tafelberg property was 'surplus' for purposes of GIAMA it considered whether its disposal would further Province's land reform obligations in terms of ss 25(5) of the Constitution and ss 4(2)(a) of the WCLAA;[44]

27.2. stated that the adage *'They're not making land anymore'* is appropriate when considering what the state may do with its land, which is a valuable resource and may not be disposed of without sound reason;[45] and

27.3. applying a purposive and contextual interpretation to GIAMA and the WCLAA concluded that Province was required to assess rigorously whether the Tafelberg property could be used by another government department to advance the social initiatives of government, and, if so, *'it was duty bound to consider disposal of the property only in*

[43] M Pieterse, commenting on the High Court judgment in *'Towards a Right to the City? The Slow Convergence of Rights to Housing and Land in South African Constitutional Jurisprudence'* (2022) 11 *International Human Rights Law Review*, 36, p. 57 (**Pieterse**).

[44] High Court Judgment, vol. 34, p. 3503, para 281.

[45] High Court Judgment, vol. 34, p. 3508, para 297.

exceptional circumstances, and then too in circumstances where it did so to meet compelling social needs'.[46]

28. The SCA judgment approached the use of state land through a very different conceptual lens, which in our respectful submission failed to give effect to the purpose of ss 25(5) and 26 or the values underpinning the Constitution.

IV SPATIAL JUSTICE

29. The applicants sought an order declaring that Province and the City had failed to comply with *"their obligations, in terms of sections 25(5), 26(1) and 26(2) of the Constitution, and the legislation enacted to give effect to these rights, to redress spatial apartheid in central Cape Town (the boundaries of which are depicted on the map annexed hereto marked "A").* [47]

30. In this part of the submissions we deal with the following:

30.1. The duty to account, the nature of the litigation, and the rights in issue;

30.2. Why the applicants submit the SCA erred in the application of the doctrine of subsidiarity;

30.3. Whether Province and the City have taken reasonable measures to redress spatial apartheid in central Cape Town. This encompasses:-

30.3.1. The context to the application and the need for a co-ordinated comprehensive plan for the use of state land;

[46] High Court Judgment, vol. 34, pp. 3510 - 3511, paras 304 - 305.

[47] Amended notice of motion vol. 7, p.670, prayer 2, and p.680 (Annexure "A").

30.3.2. The attack on the applicants' definition of central Cape Town;

30.3.3. Budgetary argument defences; and

30.3.4. The applicants' proposed remedy.

The duty to account

(i) The nature of the litigation

31. In *Mogale*[48] this Court:

31.1. stated that the Constitution's vision of democracy encompasses both representative and participatory elements.[49] The latter requires that affected persons must be allowed to participate meaningfully in the legislative process. The significance of this for the advancement of our democratic project is underscored by the apartheid and colonial governments' complete disregard of the views of the people when legislating their lives;[50] and

31.2. referred to the views of contemporary democratic theorists (notably Amartya Sen) of democracy as *"government by discussion".* In terms of this model, democracy through the ballot is just the beginning. People must also have access to information and be allowed to speak freely about state conduct;[51] and

[48] *Mogale and others v Speaker of the National Assembly and others* 2023 (6) SA 58 (CC) (**Mogale**).

[49] *Mogale*, at para 2.

[50] *Mogale*, at para 3.

[51] *Mogale*, at para 4.

31.3. noted that deliberative or participatory democracy, as practised through *imbizo*, *lekgotla* and *bosberaads*, is familiar to South Africans.[52]

32. Socio-economic rights litigation is another important constitutional mechanism to advance participatory democracy or *'government by discussion'*. In *Mazibuko* this Court stated that socio-economic rights litigation fosters a form of participative democracy that holds government accountable and requires it to account between elections for specific aspects of its policy.[53] That goal is served when government respondents take steps in response to litigation to ensure that the measures they adopt are reasonable, within the meaning of the Constitution.[54] The socio-economic rights entrenched in our Constitution in this way contribute to the deepening of democracy.

33. The applicants in their founding papers explicitly invoked the duty to account set out in *Mazibuko* and required the City and Province to account to the Court in their answering affidavits.[55]

34. The nature of the applicants' claim, in requiring government to account for its conduct, has three important implications which the SCA did not fully engage with in its judgment. First, the role of a court in determining a reasonableness challenge: (i) starts with determining the extent of the positive obligation

[52] *Mogale*, at para 4.

[53] *Mazibuko*, at para 160.

[54] *Mazibuko*, at para 96.

[55] Supplementary founding affidavit (**SFA**) vol. 7, pp. 694 – 695, paras 18 – 19.

imposed by the socio-economic right under consideration;[56] and (ii) is restrained and focused, but it must *"require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation"*.[57]

35. Through its application of the doctrine of subsidiarity, the SCA skirted around the need to evaluate the reasonableness of the relevant governmental conduct.[58] *TAC* makes it clear that, when faced with a matter of this nature, a court is obliged to evaluate and determine the reasonableness of the measures taken by the State.

36. Second, key constitutional values implicated in this form of litigation are responsiveness, accountability and openness. Given the applicants' explicit reliance on the *Mazibuko* principles in their founding papers, the respondents could have been in no doubt that the applicants were exercising their right to hold government to account. It is within this context that the contents of their answering affidavits and their resistance to the granting of a supervisory order, stand to be evaluated.

37. Third, the applicants contend that the SCA erred in approaching this case as if it was conventional Bill of Rights litigation, in terms of which the applicant is required to demonstrate the infringement of a constitutional right, with the

[56] *Mazibuko*, at paras 46 – 49.

[57] *Minister of Health and others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) (**TAC**), at para 38.

[58] It is unnecessary for us to repeat the contents of the applicants' affidavit in this Court concerning: (i) their analysis of the SCA judgment (vol. 38, pp. 3867 – 3869, paras 48 – 49) and (ii) the nature of the context specific inquiry required by the reasonableness challenge (vol. 38, pp. 3871, para 54).

respondents bearing the onus to justify any infringement in terms of s 36 of the Constitution.[59] *Mazibuko* states that, when called upon to account in a socio-economic rights challenge, it is the government agency which bears the burden of proving the reasonableness of its policies (and the steps taken to implement them).[60]

38. The conclusion that the government respondents bear the burden of proof in litigation of this nature follows, in any event, from the application of the common law principles concerning the onus. In *Mabaso v Felix*[61] it was stated that although there is no *'universal working rule'* for determining the incidence of the onus of proof, it is *'a question of policy and fairness based on experience in the different situations'*. However, in delicts concerning the plaintiff's personality and bodily integrity, one of the reasons the *onus* of proving a justification, such as self-defence, should be placed on the defendant, is that usually the circumstances excusing the wrongdoing are peculiarly within the defendant's knowledge. In *Bogoshi*[62] the SCA applied these principles in defamation proceedings, reasoning that even if there was no presumption of unlawfulness (arising from the publication of a defamatory statement), *'considerations of policy, practice and fairness would require the defendant to prove the justificatory facts'*, noting that the facts upon which the defendants

[59] Founding affidavit leave to appeal, vol. 38, pp. 3872 – 3874, paras 59 – 62.

[60] *Mazibuko*, at para 162, where it is stated that not only must a government agency show why its policy is reasonable; it must show it is being reconsidered in light of the obligation to progressively realise the socio-economic right in question (emphasis added).

[61] 1981 (3) SA 865 (A) at pp. 873 – 874.

[62] *National Media Ltd and Others v Bogoshi* 1998 (4) SA 1196 (SCA) at p.1215B – F.

relied were peculiarly within their knowledge.

39. The same considerations apply to a challenge to the reasonableness of government's conduct in implementing socio-economic rights. The conclusion that the government agency should bear the burden of proof follows from the fact that in most (if not all) cases the party bringing the challenge would not have access to all the information necessary to show that the governmental conduct was unreasonable.

40. The nature of the litigation and onus of proof have important implications for this application, particularly in relation to: (i) the rights under consideration; (ii) the SCA's findings on subsidiarity; and (iii) the respondents' attack on the applicants' definition of central Cape Town, which we discuss below.

(ii) The rights

41. In the third part of these submissions (entitled *State Land*) we have contended that the dynamic, transformative approach to the property clause required by *FNB* has more far-reaching implications for the use of state land than for the rights of private property owners. However, the applicants' spatial justice claim is not based solely on the property clause - they rely on a cluster of legal relationships[63] between the Province, the City, and the residents of Cape Town, rooted in ss 25(5) and 26 of the Constitution and the legislative provisions enacted to give effect to these rights.[64]

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[63] See *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at paras 24 – 25 with regard to reliance on a cluster of rights.

[64] These rights and the manner in which they were pleaded in the applicants' founding affidavits in the High Court are described in the applicants' founding affidavit in the application for leave to appeal to this Court and are not repeated (see vol. 38, pp. 3859 – 3866, paras 36 – 46).

42. There is, however, a close relationship between the property rights in s 25 and the housing rights in s 26. In *Port Elizabeth Municipality*[65] it is stated that: (i) the Constitution recognises that these rights are *'closely intertwined'*; and (ii) ss 25 and 26 *'create a broad overlap between land rights and socio-economic rights, emphasising the duty on the State to seek to satisfy both…'*. As was noted in *Grootboom*, the ss 26(1) right of access to adequate housing encompasses (among other things) available land.[66]

43. Furthermore, we highlight that in *Thubakgale*,[67] Justice Majiedt (in a judgment concurred in by three other Judges of this Court):[68]

43.1. emphasised that in determining the content and scope of socio-economic rights, consideration must be given to their primary purpose *"which is to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid"*;[69]

43.2. held that ss 25 and 26 of the Constitution *"function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today"*;[70] [emphasis added]

43.3. found that in the context of South Africa's highly segregated urban

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[65] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 19.

[66] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (**Grootboom**) at para 35.

[67] *Thubakgale v Ekhurhuleni Metropolitan Municipality* 2022 (8) BCLR 985 (CC) (**Thubakgale**).

[68] The other judgments did not consider the issue.

[69] *Thubakgale*, at para 107.

[70] *Thubakgale*, at para 107.

areas and scarce resources, spatial justice must be considered when determining what constitutes *"adequate housing"*;[71] and

43.4. explicitly endorsed the finding in the High Court judgment that the Constitution imposes an obligation on the State to redress spatial apartheid.[72]

44. Given the close and *'intertwined'* nature of the ss 25 and 26 rights, we contend that the transformative approach to the property clause is equally applicable to the cluster of rights which underpin this spatial justice challenge.[73]

Subsidiarity

45. The reasons why the applicants contend that the SCA erred in its application of the principle of subsidiarity have been set out at paragraphs 66 to 96 of their affidavit in support of the application for leave to appeal.[74] In summary, the applicants' case is that:

45.1. Their claim is based on a 'cluster of rights' rooted in ss 25(5) and 26 of the Constitution and the legislation enacted to give effect to these rights. The SCA mischaracterised the claim as being based on s 26 of the Constitution; and failed to take into account s 25(5), which is

[71] *Thubakgale*, at para 111. This is in the context of the right of access to *"adequate housing"* entrenched in s 26(1) of the Constitution.

[72] *Thubakgale*, at paras 108 - 109. Majiedt J quoted, and approved, Gamble J's description (in the High Court Judgment: vol. 33, p. 3421, para 75) of the obligation to address spatial apartheid.

[73] We do not repeat the contentions set out in the applicants' affidavit in support of this application for leave to appeal, that the SCA Judgment: (i) asked the wrong question (vol. 38, pp. 3870 – 3872, para's 51 – 58) and (ii) provided the wrong answer to the (wrong) question it posed (vol.38, pp. 3874 – 3875, paras 63 – 65).

[74] Founding affidavit leave to appeal, vol.38, pp. 3877 - 3878, paras 72 – 73.

one of the primary pillars of the claim;[75]

45.2. This Court has yet to determine whether the principle of subsidiarity applies to cases involving legislation that does not give effect to a constitutional right or cover the field on a given subject;[76]

45.3. In the absence of a statute giving effect to ss 25(5) of the Constitution, there is no single statute, or even a set of statutes, *"giving effect to"* ss 25(5) and 26 of the Constitution and the obligation to redress spatial injustice. Given the SCA's finding that the claim was based on s 26 of the Constitution, it failed to consider how subsidiarity could apply where there is no legislation which 'covers the field';[77]

45.4. Even leaving ss 25(5) out of account, where a number of statutes have been enacted to give effect to a constitutional right, it would be impractical to expect a litigant to have to challenge all the different enactments, each covering different subject matter for a different purpose; [78]

45.5. The main thrust of the applicants' challenge was to the manner in which the Province and City had implemented their policies.[79] It is difficult to envisage how the principle of subsidiarity could defeat a

[75] Founding affidavit leave to appeal, vol.38, pp.3879, para 75.1.

[76] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* 2023 (5) BCLR 527 (CC) (**Eskom**) at paras 243 – 244.

[77] Founding affidavit leave to appeal, vol.38, p.3879, para 75.2.

[78] Founding affidavit leave to appeal, vol.38, p.3879, para 75.3.

[79] Founding affidavit leave to appeal, vol.38, p.3883, para 86.

challenge based on the failure to implement policies and legislation (as opposed to the legislation and policies themselves); and

45.6. The primary right relied upon (in the spatial justice challenge) is the duty to account, which is only applicable to socio-economic rights and has not been enacted into legislation. [80]

46. The application of the principle of subsidiarity has given rise to considerable academic criticism and debate. While it is not necessary to explore all the details and nuances of this debate, we note that it has been argued that: (i) the principle is *'of dubious merit'* in relation to socio-economic rights as the question that will arise is whether the legislative framework adopted exhausts the measures the state is required to take to realise the right in a reasonable manner – a failure to provide services will inevitably lead to a claim that the measure is not required by the applicable legislative/policy framework or that the framework does not adequately reflect all the measures the state is required to take in order to realise the constitutional right;[81] and (ii) subsequent to *Grootboom*, this Court has invoked subsidiarity type reasoning to avoid pursuing the overlaps between the right to housing and constitutional obligations in relation to municipal service delivery.[82]

47. In the present case, we submit that the nature of the litigation and the

[80] Founding affidavit leave to appeal, vol.38, p.3886, para 91.

[81] D Bilchitz, *'Is the Constitutional Court wasting away the rights of the poor: Nokotyana v Ekurhuleni Metropolitan Municipality'* (2010) 27(4) *SALJ* 591, p. 595.

[82] M Pieterse, *'Towards a Right to the City? The Slow Convergence of Rights to Housing and Land in South African Constitutional Jurisprudence'* (2022) 11 *International Human Rights Law Review*, 36, pp. 46 - 47.

incidence of the onus are decisive for purposes of the subsidiarity question. We say this for two reasons. First, subsidiarity entails that where legislation has been enacted to give effect to a right in the Bill of Rights, a litigant who seeks to enforce that right must rely on the legislation, or challenge the legislation as being inconsistent with the Constitution, rather than invoking the Constitution directly.[83] We have submitted already that this is not a typical Bill of Rights case in which the applicant is required to establish the infringement of a constitutional right. We contend that subsidiarity, as applied by the SCA, *'dilutes and waters down the scope and transformative promise'* of the cluster of rights in issue, and the transformative approach to the property clause.[84] Given that the right relied upon by the applicants, namely, to call upon government to account for the steps taken to advance socio-economic rights, has not been enacted in legislation and, in any event, only applies to socio-economic rights, it follows that subsidiarity is not applicable. Second, once an inquiry has been triggered into the reasonableness of steps taken or policies adopted by government, it is the organ of state that bears the onus to demonstrate the reasonableness of its conduct: the requirement that a litigant who seeks to enforce a constitutional right that has been enacted into legislation must rely on the legislation (or challenge its constitutionality), falls away.

[83] *Mazibuko*, para 73, read with *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (5) SA 380 (CC) (**My Vote Counts**) *at* paras 53 - 54.

[84] Gideon Barnett Basson, 'Towards Transformative Subsidiarity Principles under the Constitutional Non-Discrimination Right and Equality Act' (forthcoming, 2024) 14 Constitutional Court Review 2, p. 6.

Have Province and the City taken reasonable measures to redress spatial apartheid in central Cape Town?

(i) The context, use of state land, and the need for a co-ordinated comprehensive plan to redress spatial injustice

48. The core issue to be determined is whether the respondents have taken reasonable measures to redress spatial apartheid in central Cape Town.[85] This requires a context specific inquiry,[86] based on an examination of the purpose to be achieved.[87] The applicants have summarised[88] the immediate context against which they launched their application as being one in which: (i) poor residents were increasingly being forced out of the centre of the city;[89] (ii) no affordable housing had been developed in central Cape Town since 1994;[90] (iii) Province had for several years been intent on selling off state-owned land that is indispensable for redressing spatial injustice; and (iv) there

[85] The applicants' challenge was directed primarily at the failure to implement the relevant policies, but also encompassed policy formulation (see founding affidavit, vol. 1, pp. 70 – 71, paras 142 - 143.2 and supplementary founding affidavit, vol. 7, pp. 694 – 695, paras 18 – 19).

[86] The context against which the application is to be determined is set out in some detail in the applicants' affidavit in this Court: see vol. 38, pp. 3853 – 3857, paras 19 – 30.

[87] *Rahube v Rahube* 2019 (2) SA 54 (CC) at para 50.

[88] See applicants' affidavit in this Court: vol. 38, p. 3857, para 30.

[89] Although the Province now attempts to dispute this issue in this Court vol.39, p.3937, para 39.2 and footnote 53, the allegations were uncontested in the High Court affidavits: FA vol.1, p.73, para 144.4; McCarthy vol. 6, p.599, para 30; Parnell, vol. 7, p.640, para 7; Gooch vol.14, p.1368, paras 573 – 575; vol. 14 pp. 1393 – 1394, paras 691 – 693.

[90] There is a dispute over what constitutes *'central Cape Town'*, which we address below. However, the critical issue, which is not contested, is Mr McCarthy's statement that none of the social housing developments undertaken in Cape Town were in the inner-city or near inner-city sites (save for a project in Woodstock, where the City had recently made four sites available for development by social housing institutions): Mr McCarthy's affidavit, vol 6, pp. 598 – 599, paras 28 and 31. There is no suggestion in the evidence that the respondents have developed any other form of affordable housing, apart from social housing, in or near the inner-city.

is no coherent, overarching strategy in place to deal with the situation. It is apparent from this context that the ss 25(5) right of access to land, together with the concomitant state obligation to foster conditions which enable citizens to gain access to land on an equitable basis, lie at the heart of the case.

49. The High Court found that: (i) Province's policies with regard to the use of available land are haphazard, reactive and ultimately irrational;[91] (ii) Province did not comply with its obligation to account openly and transparently to the Court concerning its policies (and, in particular, the abandonment of its previous land use policy);[92] (iii) for 25 years the City had been providing social housing, but this had been focused on the periphery: while the lack of reasonably priced land had been its achilles heel, there were instances where its land could be used for affordable housing and it did not take much to achieve this;[93] (iv) following pressure from activist organisations the City radically changed its affordable housing policy in 2017, but following the departure of the architects of the City's new policy, the Court wished to be assured that it acted in accordance with the new policy;[94] and (v) taken together with the need for extensive consultations between the different levels of government, the only feasible way to achieve a constitutionally compliant, integrated and consolidated social housing policy, is through a structural interdict coupled with a *mandamus*: in this way the City and the Province will be required to co-operate in their planning decisions (and for the Province to

[91] High Court Judgment, vol.34, pp.3584 – 3585, para 481.

[92] High Court Judgment, vol.34, p.3587.

[93] High Court Judgment, vol.34, p.3589, paras 495 - 6.

[94] High Court Judgment, vol.34, pp. 3589 - 3590, paras 497 - 8.

conduct necessary consultations with national government departments).[95]

50. We support and adopt the High Court's findings for the reasons which have been set out at paragraphs 80 to 111 of the applicants' affidavit in this Court,[96] but make three further submissions.

51. First, what sets this matter apart from other socio-economic rights cases is the urgent need for a comprehensive plan to be formulated concerning the development of state land in central Cape Town for affordable housing. The City Manager points out in his evidence that the City cannot afford to pay market related prices for property in central Cape Town (for purposes of affordable housing).[97] The undisputed statement in the applicants' founding affidavit that suitable land for affordable housing in the central and inner-city areas of Cape Town is extremely scarce and will only become more so in the future, was accepted by the High Court.[98] This means that state land suitable for affordable housing in central Cape Town is the key to the transformation of the city.

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[95] High Court Judgment, vol. 34, p. 3588, paras 492 - 3 and para 3590, para 498.

[96] Vol. 38, pp. 3881 – 3893. Pieterse comments at pp. 57 – 58 that the High Court viewed state-owned land as a crucial and scarce public resource to be applied towards the progressive realisation of the "jointly read" rights of access to housing and equitable use of and equitable access to land; (ii) cuts across jurisprudential silos between housing and land rights, between subsidiarity legal frameworks set up respectively by housing and spatial planning legislation, and (iii) employs a *Grootboom* reasonableness analysis as a substantive, context infused obligation requiring deliberate steps aimed at achieving the objects of reasonable measures adopted in pursuit of progressively fulfilling constitutional obligations; and (iv) views state-owned land as a public resource to be applied in the first instance towards the public benefit, and in so doing elevates the social function and use value of property beyond the defensive limitation-of-property rights paradigm in which it had thus far been employed, thereby turning it into an essential and unassailable feature of publicly-owned property.

[97] Mr Mbandazayo, vol. 22, p. 2339, para 162. This is also accepted by Province in its evidence.

[98] High Court Judgment, vol. 33, p.3409, para 42.

52. Province's approach is that redressing imbalances caused by South Africa's discriminatory history is a long-term objective which is to be realised progressively and which *"it is generally anticipated … will take a period of many years to achieve"*.[99] This fails to take into account that state land is an extremely scarce, finite resource. While affordable housing projects can be implemented over a period of many years, the immediate priority is for all suitable state land to be identified and for steps to be taken to ensure that the land which is earmarked for this purpose can be developed for affordable housing in the future. If this does not happen, the City and Province will develop affordable housing in an *ad hoc* fashion that is almost certain to have little impact.

53. Second, this application required the Court to determine whether the respondents had complied with their constitutional and statutory obligations on the basis of the facts as they stood at the time that the High Court proceedings were launched in May 2017.[100] *Grootboom* makes it clear that the formulation of policies and programmes is not enough. They must also be reasonably implemented and an otherwise reasonable policy which is not reasonably implemented does not constitute compliance with the state's obligations.[101] The SCA failed to consider the measures taken – or more pertinently, not taken - by the respondents in the 23 years between 1994 and 2017. For the respondents to have failed to have provided affordable housing

[99] Ms Gooch, vol. 12, para 210.

[100] *Grootboom*, at para 69; *TAC*, at paras 90, 92 and 116; *Mazibuko,* at paras 38 – 41.

[101] *Grootboom*, at para 42.

in or near the inner city over this period constitutes a failure to comply with their obligations to progressively realise the rights in ss 25(5) and 26 of the Constitution.

54. Third, *Grootboom* states that: (i) housing programmes must be comprehensive and formulated by all three spheres of government in consultation with each other;[102] and (ii) the principles of co-operative government impose an obligation on all three spheres of government to co-operate in discharging their s 26 duties.[103] The evidence in this case reflects the polar opposite of the co-ordinated, integrated and effective housing programmes required to address spatial injustice in central Cape Town.

55. The *impasse* that has developed between Province and the City presents an insuperable obstacle to either level of government developing and implementing a reasonable and effective programme to redress the injustices of spatial apartheid. Province's decision to dispose of the Tafelberg property lies at the heart of the breakdown. Province's answering affidavit glosses over these issues, but the City did not attempt to disguise the rift that developed between it and the Province, particularly in relation to the disposal of Tafelberg. As Mr Molapo delicately phrased it in his affidavit on behalf of the City, cooperation among the role players has "*largely dissipated'*.[104]

56. In addition to the breakdown between Province and the City, it is apparent

[102] *Grootboom*, at para 40.

[103] *Blue Moonlight*, at para 42.

[104] Mr Molapo, vol. 26, p. 2698, para 47. Mr Molapo describes the breakdown in relations between the City and Province over the Tafelberg property at paras 48 to 67 of his affidavit (vol. 26, pp. 2698 – 2704.

from the papers in the review application launched by the national Minister of Human Settlements that the national Department of Human Settlements was not consulted prior to the decision to sell Tafelberg. The national minister was sufficiently aggrieved by Province's decision to launch court proceedings to have it set aside, with a view to the development of affordable housing.

57. *Grootboom* states that the plan developed by the organs of state to meet their obligations must be ***'comprehensive and workable'*** and coordinated by the spheres of government in consultation with each other.[105] Given the serious breakdown in relations between the various levels of government that has taken place, there is little prospect of a co-ordinated and comprehensive affordable housing programme for central Cape Town being developed. It is for this reason that the applicants submit that a structural interdict is required to ensure that the necessary comprehensive and co-ordinated plan is formulated and implemented.

(ii) The attack on the applicants' definition of central Cape Town

58. The applicants' founding affidavit clearly sets out that Province's Central City Regeneration Programme was the policy in terms of which Province sought to sell the Tafelberg property and other properties it owns in and around central Cape Town.[106] It was on this basis that the applicants formulated the relief they sought in relation to the *'failure to redress spatial apartheid in central Cape Town'*. On reviewing the Rule 53 record, it became apparent that the

[105] *Grootboom,* at paras 38 and 40.

[106] FA, vol.1, p. 27, para 49.

term *"central Cape Town"* was not defined in any documents in the record.[107] The term 'central Cape Town' is also not used in the City or Province's planning policies.[108] In Dr Nancy Odendaal's expert affidavit, meaning was given to the words "central Cape Town" for purposes of the application,[109] it being necessary to do so because in the absence of such a definition, the respondents would have contended that the declaratory relief is vague and undefined.[110]

59. Dr Odendaal's definition of *"central Cape Town"* was accepted by the High Court on the grounds that there was no basis to reject the opinion of NU's experts.[111]

60. The City mischaracterises one of the criteria applied by Odendaal and places emphasis on "pockets" of the Zonnebloem Area, at least below Chapel Street, and "parts" of Woodstock, Salt River, Walmer Estate and University Estate not having been designated as whites only areas.[112] First, the relevant criterion

[107] SFA, vol. 8, p. 813, para 313.

[108] SFA, vol. 8, pp.813 - 814, para 313.

[109] SFA vol.8, p.814, para 313, Dr Odendaal affidavit Vol.10, p.1016, para 3; pp. 1022 – 1035, paras 12 – 29. The starting point is the Central Business District (**CBD**) itself which is the dominant economic node. Spatial planning characteristics are then applied for purposes of considering which surrounding suburbs also fall within "*central Cape Town*". Those characteristics are: (i) Physical and relational proximity to the CBD; (ii) Historical urban development; (iii) Presence of diversified economic activity and mixture of land uses; as well as access to employment opportunities, services; amenities and transport; and (iv) Dense urban development in the context of building form, not population. Based on those criteria, which are motivated and developed in the affidavit with reference to applicable maps and data, Dr Odendaal concludes that "*central Cape Town*" means the area comprising "*central Cape Town*" depicted in yellow on the map used in Dr Odendaal's affidavit and which is annexed to the amended Notice of Motion.

[110] Vol. 28, p.2971, para 483.1.

[111] High Court Judgment, vol. 34, p.3595, para 518.

[112] City AA vol.22, p.2301, para 37.

was "historic urban development of the suburbs".[113] Second, the City's complaint that parts of certain suburbs were not designated 'whites only' does not avail it. The City's "Woodstock, Salt River and Inner City Precinct Affordable Housing Prospectus"[114] adopts a precinct development approach for "Woodstock, Salt River and surrounds,"[115] expressly acknowledges that parts (but not all) of Woodstock and Salt River were declared whites only areas, due to resistance,[116] but - even so – the City clearly accepts in the prospectus that the affordable housing contemplated in the prospectus is to redress spatial apartheid. Province relies on the Woodstock Hospital project being part of the Regeneration Programme. It follows that it falls within central Cape Town. It cannot seriously be contended that the areas referred to by the City as only falling partially within the Group Areas Act do not fall within central Cape Town and the inner City.

61. There are three further points to be made in response to the attack on the applicants' definition of central Cape Town. First, in *S v Lawrence*,[117] Chaskalson P pointed to the distinction between *'adjudicative'* facts (concerning the immediate parties to the litigation: who did what, when and with what motive) and *'legislative'* facts (which are of a more general nature, concerning the broader social / economic milieu giving rise to the litigation) and noted that the latter kind of facts *'do not have to be proved as strictly as*

[113] Dr Odendaal's affidavit accompanying the replying affidavit vol.30, p. 3089, para 7.

[114] "JG 40" vol.18, p.1777.

[115] "JG 40" vol.18, p.1789, section 2.2.

[116] "JG 40" vol.18, p.1783, section 1.1.

[117] *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC) para 52.

adjudicative facts'. The precise boundaries of central Cape Town fall into the category of *'legislative'* facts, which do not have to be proved as rigorously as *'adjudicative'* facts. Second, the applicants' definition was based on sound, clearly motivated, planning principles which were accepted by the High Court.[118] As has been contended above, the respondents bore the onus to establish the reasonableness of the measures taken by them and neither the City nor the Province put forward any expert evidence to contradict the planning principles (or the application of those principles) on which Dr Odendaal's definition was based. Third, as Justice O' Regan remarked in *Metrorail*,[119] it was clear from the evidence in that case that crime on the trains in the Western Cape was not as severe in the Western Cape as it was in other parts of South Africa, but there was no reason why the determination of the respondents' legal responsibilities and constitutional issues should turn on the issue. In the same way, the critical issue in this matter is Mr McCarthy's undisputed evidence[120] that no social housing developments have been undertaken in the inner-city of Cape Town or near the inner-city[121] rather than the precise boundaries of 'central Cape Town'.

(iii) Budgetary arguments

62. Province and the City raise budgetary arguments as defences to the

[118] High Court Judgment, vol. 34, p.3595, para 518.

[119] *Rail Commuters Action Group v Transnet Group t/a Metrorail* 2005 (2) 359 (CC) at para 59.

[120] Mr McCarthy's affidavit, vol. 6, pp. 598 – 599, paras 28 and 31.

[121] No evidence was advanced that any other affordable housing (apart from social housing) has been developed in or near the inner-city.

reasonableness challenge.[122] The arguments suggest that it is not the role of a court to instruct Province and the City to re-arrange their housing budgets. Province contends that in this context, 'available resources' means resources that were earmarked for realisation of the s 26 rights, which would equate to its annual human settlement budget, citing *Electoral Commission v Mhlophe and Others* as authority.[123]

63. The approach to consideration of "available resources" in the context of the reasonableness enquiry in socio-economic rights reasonableness challenges is dealt with in *Grootboom*, *TAC,* and *Mazibuko.*[124] Where courts make orders that have budgetary implications, those orders are envisaged by the Constitution, and government is obliged to give effect to them and to make resources available to do so.[125]

64. In *TAC*[126] it was held that: (i) a court's primary duty is to the Constitution and the law; (ii) when state policy is challenged as being inconsistent with the Constitution, a court must consider *"whether in formulating and implementing such policy the State has given effect to its constitutional obligations"*; (iii) if it holds that the state has failed in this regard, *"it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the*

[122] Province affidavit before this Court vol. 39, p.3921, paras 7 – 8 and p.3931, para 31; City affidavit before this Court vol. 39, p.3974, para 28, p.3975, para 31, p. 3983, para 55.

[123] 2016 (5) SA 1 (CC) at para 152.

[124] The principles are distilled in Nick Ferreira "*Feasibility Constraints and the South African Bill of Rights: Fulfilling the Constitution's Promise in Conditions of Scarce Resources*" (2012) 129 The South African Law Journal ("**Ferreira**").

[125] Ferreira, p.22, citing *Grootboom,* at para 94 and *TAC,* at para 99.

[126] *TAC***,** at para 99. *TAC* should be read together with the First Certification judgment, *Ex Parte Chairperson of the Constitutional Assembly In Re: Certification of the Constitution of the Republic of*

executive, that is an intrusion mandated by the Constitution itself;" and (iv) there is no merit in the argument that a distinction should be drawn between declaratory and mandatory orders against government, as even simple declaratory orders against government *"can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so."*[127]

65. Any programme for the progressive realisation of a socio-economic right which fails to make appropriate resources available is unreasonable.[128] "A reasonable programme therefore must …ensure that the appropriate financial and human resources are available."[129] An issue that arises is at which level resource allocation are to be scrutinised, including at which level of government allocation and even within a sector, for example, within a provincial health care budget.

66. As Ferreira points out, courts cannot substitute their own judgments about the best policies and budget allocations, but they are required by the Constitution to assess the adequacy of the state's compliance with the Bill of Rights and, in order to do so, they necessarily give orders that have implications for budgets, and they are required by the Constitution to assess whether certain allocations of resources constitute a reasonable attempt to realise the right

[127] Some court orders have far-reaching budgetary implications, for example, *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) at paras 58 - 62.

[128] Ferreira p.278, *Grootboom,* at para 39.

[129] *Grootboom*, at para 46.

concerned.[130] "Available resources" may mean resources that a department has budgeted, but it may also mean resources that the state can marshal to protect the right.[131] In *Soobramoney*,[132] this Court did employ the narrowest sense of available resources" treating the allocation to the relevant health department as given.[133] In *Blue Moonlight*, "*the legitimacy of judicial scrutiny of budgets has been made absolutely clear by this Court*".[134] This Court found that:[135]

> "The City provided information related specifically to its housing budget, but did not provide information relating to the budget in general. We do not know exactly what the City's overall financial position is. This Court's determination of the reasonableness of measures within available resources cannot be restricted to budgetary and other decisions that may well have resulted from a mistaken understanding of constitutional or budgetary applications. In other words it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.

67. Province's reliance on *Electoral Commission v Mhlophe and Others* is misplaced. That case dealt with addresses on the voters' roll. The paragraph relied upon is in the minority judgment and states as follows*: "The reading of both Soobramoney and Grootboom shows that "available resources" must be taken to mean resources in the state's possession and which were earmarked for realisation of the relevant rights. In section 16(3) the words "available addresses" must be assigned a similar meaning, namely addresses in the*

[130] Ferreira p.293.

[131] Ferreira p.294, referring to a commentary by Moellendorf on *Soobramoney.*

[132] *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 765 (CC) (**Soobramoney**).

[133] Ferreira p.204.

[134] Ferreira pp.294 – 295.

[135] Para 74.

Commission's possession." The Electoral Commission case is not authority for available resources in this case to mean the provincial Human Settlement department's budget.

68. It is not good enough for the state to say that it has not budgeted for something, if it should have planned and budgeted for it in the fulfilment of its obligations.[136]

69. It is not answer to the failure to fulfil obligations to redress spatial apartheid in central Cape Town to say that it is cheaper to build affordable housing elsewhere.

70. In assessing Province and the City's budgetary arguments, a relevant consideration is that land owned by the Province and the City is an available resource for purposes of realising the rights relied upon by the applicants. The relief sought granted by the High Court was a declaratory order and a structural interdict, with Province and the City to co-ordinate plans for affordable housing to achieve the progressive realisation of the rights.

[136] *Blue Moonlight,* at para 74. In *Madzozo v Minister of Basic Education* 2014 (3) SA 441 (ECM) the state had failed to budget for school furniture, where it was constitutionally obliged to do so. The court quoted *Blue Moonlight*, to dismiss an argument that the Department could not go beyond its budgeted amount, as the respondents had been well aware for a considerable time that proactive steps need to be taken to address the shortage of furniture. In *Minister of Basic Education and Others v Basic Education for All and Others* 2016 (4) SA 63 SCA, the Department relied on budgetary constraints as a justification and invoked the doctrine of separation of powers in respect of provision of textbooks. On the facts, the court held that - amongst other aspects – the Department had a three-year implementation period and could have conducted proper budgetary planning, and that the reliance on budgetary considerations and the separation of powers doctrine was fallacious and contrived. Although these cases are distinguishable to the extent that they concern the right to basic education which is not qualified by "available resources" as part of the reasonableness enquiry, they are relevant to the extent that they refer to the need for proactive planning to fulfil a constitutional and obligation and budgeting in accordance with or for that planning.

[136] *Blue Moonlight,* at para 74.

Remedy

71. Sections 38 and 172(1) of the Constitution confer the power to grant "*appropriate*" and "*just and equitable*" relief,[137] which must be effective.[138] The Court is not confined to the relief which the claimant originally sought or the manner in which it was presented or argued.[139]

72. A court's obligation to ensure that its orders are implemented is heightened when those who will suffer are the vulnerable and the marginalised.[140] Supervisory relief has been imposed where there is no easy or immediate solution to cure the unconstitutionality, and full compliance will take time, and where there is a need to revisit and change existing practices, and then design and implement new, constitutionally-compliant practices. Supervisory relief is not intended to punish or undermine the state. It recognises that "*courts and government are not at odds about fulfilling the aspirations of the Constitution.*"[141] The judiciary and the executive share a "*common goal*" and are "*engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.*"[142]

[137] In *Electoral Commission v Mhlope and Others* [2016] ZACC 15; 2016 (8) BCLR 987 (CC); 2016 (5) SA 1 (CC) it was stated that "*whatever considerations of justice and equity point to as the appropriate solution for a particular problem, may justifiably be used to remedy that problem*" at para 32.

[138] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para 69.

[139] *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at para 18.

[140] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC) (Mwelase) at para 49.

[141] *Mwelase,* at para 46.

[142] Ibid.

73. Given that state-owned land is indispensable in addressing spatial injustice in central Cape Town, the scarcity (and diminishing nature) of this resource and the impasse that has developed between Province and the other levels of government, the key to an effective remedy lies in developing a co-ordinated approach to the use of state land for affordable housing in central Cape Town.

74. We submit that an effective remedy must ensure that (i) a comprehensive audit is conducted to establish the full extent of state-owned land which could be made available for affordable housing in central Cape Town (ii) the City and Province must formulate a co-ordinated programme – rather than working in silos - to determine how much of this land should be used for affordable housing and what can be released for other purposes; and (iii) a timetable should be drawn-up (taking into account that it might take some time to develop affordable housing on all of the designated land) and implemented.[143]

V GIAMA

75. The next issue to be considered concerns the SCA's findings in respect of GIAMA. The SCA held that: (i) Province was implementing the provisions of GIAMA in an incremental fashion;[144] (ii) the WCLAA is the only source of Province's power to acquire and dispose of provincial immovable property;[145] (iii) the High Court failed to identify any provision which required the Province to inquire into whether the property could be of use at national government

[143] These submissions are reflected in the draft order attached to the applicants' practice note.

[144] SCA judgment, vol. 37, p. 3818, para 56.

[145] SCA judgment, vol. 37, pp. 3818 - 3819, paras 58 and 61.

level as well as to a provincial department;[146] and (iv) the Tafelberg property became surplus when the remedial school vacated it in 2010,[147] (effectively upholding Province's argument that it became surplus by operation of law).[148] These findings raise issues of considerable public importance that inevitably will impact future disposals of state-owned land and warrant the attention of this Court.[149]

76. In this part of our submissions we shall consider the SCA findings with regard to: (i) the source of Province's power to dispose of land; (ii) the requirements of GIAMA in relation to asset management plans; and (iii) when immovable assets becomes 'surplus'.

The source of Province's power to dispose of land

77. Province relies on ss 104(4) of the Constitution, and argues that it is to the provincial acts, such as the WCLAA, and to the Constitution, that reference must be had in determining whether an acquisition or disposal has been lawful.[150]

78. Section 104(4) of the Constitution must be read with ss 104(1)(b)(i). The

[146] SCA judgment, vol. 37, pp. 3818 - 3819, para 62.

[147] SCA judgment, vol. 37, p. 3820, para 64.

[148] High Court Judgment, vol. 34, pp. 3503 - 3504, para 282.

[149] This is the basis upon which Province sought, and was granted, leave to appeal by the SCA against these findings by the High Court; Province application for leave to appeal to the SCA, vol. 36, pp. 3711 – 3719, paras 13 – 37; Although the SCA might well not have had jurisdiction to entertain the GIAMA appeal, we submit that its judgment, which will bind all High Courts and Magistrates' Courts, does not give effect to the transformative principles required by the property clause and that it is in the interests of justice that this Court entertains the GIAMA appeal: see NU application for leave to appeal to this Court vol. 38; p.3894 para 112, footnote 104.

[150] Province affidavit opposing leave to appeal vol. 39. pp.3946 – 3947, paras 73 – 76.

provincial legislature has the power to pass legislation for its province with regard to any matter within a functional area listed in Schedule 4. That Schedule lists functional areas of concurrent national and provincial legislative competence in Part A.[151] In terms of ss 104(4), provincial legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any Schedule 4 matter, is legislation with regard to a matter listed in Schedule 4.

79. In terms of s 44(1)(a)(ii) of the Constitution "*the national vested authority as vested in Parliament - confers on the National Assembly the power – to pass legislation with regard to any matter, including a matter within a functional area listed in Schedule 4, but excluding, subject to subsection 44(2), a matter within a functional area listed in Schedule 5*."[152]

80. The preamble to the WCLAA makes it clear that it was enacted because it was reasonably necessary for, or incidental to, the exercise of (other) powers concerning matters listed in Schedule 4. The disposal of state land is accordingly a matter which falls within Parliament's legislative domain in respect of which national legislation enjoys precedence.[153] To the extent that *"land*", *"state land"* and/or management of immovable assets may not be regarded as falling within matters reasonably incidental to or reasonably

[151] Part B of Schedule 4 lists local government matters to the extent set out in section 155(6)(a) and (7) of the Constitution. Schedule 5 Part A lists functional areas of exclusive provincial legislative competence.

[152] In terms of ss 44(3) legislation with regard to a matter that is reasonably necessary for, or incidental to, the effective exercise of a power concerning any matter listed in Schedule 4, is for all purposes, legislation with regard to a matter listed in Schedule 4.

[153] *Premier Limpopo Province v Speaker of the Limpopo Provincial Government and Others* 2011 (6) SA 396 (CC) at paras 20 – 24.

necessary for the effective exercise of a power concerning any matter listed in Schedule 4, and are not listed in Schedule 5, the implication of s 44(1)(a)(ii) of the Constitution is that legislative competence over functional areas or matters not enumerated in either Schedule 4 or 5 are *"residual matters outside the scope of the functional areas in Schedules 4 and 5 are the preserve of the national legislature"*.[154] They would then fall under Parliament's plenary legislative powers.[155]

81. The effect of Province's argument is that (on its version) GIAMA is constitutionally invalid. In the absence of a direct frontal challenge to the constitutionality of GIAMA, Province is not entitled to any relief that effectively flows from the unconstitutionality of GIAMA that has not been declared by a Court.[156]

82. The powers allocated by the Constitution to the three spheres of government are not contained in hermetically sealed compartments and sometimes overlap. Laws within each sphere can serve different purposes for the level of government charged with responsibility for administering them. When this happens, each sphere is exercising powers within its own area of legislative competence. In terms of the *"Macsand principle"* such laws must be read, as

[154] See V Bronstein "Conflicts" in S Woolman, & M Bishop (eds) Constitutional Law of South Africa (2nd Edition, RS5, January 2013) Chapter 16 at 9.

[155] The WCLAA itself provides that *"Unless otherwise expressly provided for in any other law, the Premier may acquire immovable property,"* (WCLAA, ss 2(1)); "[u]*nless otherwise expressly provided for in any other law, the Premier may dispose of provincial state land on such conditions as are deemed fit…"*; (WCLAA, ss 3(1)); and the Premier must co-ordinate the provincial government's actions regarding the administration of provincial state land with the national and local sphere of government (WCLAA, ss 4(1)).

[156] *Public Protector v Commissioner for the South African Revenue Service and Others* (CCT 63/20) [2020] ZACC 28; 2021 (5) BCLR 522 (CC) at paras 25 - 27.

far as possible, in consonance with each other, allowing each statute to be interpreted in a manner that serves its underlying purpose. It is within this context that s 41 of the Constitution obliges theses spheres of government to cooperate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another.[157] Applying the *Macsand* principle, Province has to comply with the requirements of both GIAMA and the WCLAA in order to dispose of property lawfully.[158]

83. On Province's argument that the provincial legislation should enjoy precedence, it would have to establish that a conflict exists between national legislation (GIAMA) and provincial legislation (the WCLAA). Section 146 of the Constitution[159] (which deals with conflicts between national and provincial legislation failing within a functional areas listed in Schedule 4) has the effect that national legislation prevails if the substantive requirements of at least one of the override clauses are met.[160] It is difficult to reconcile how the provincial legislation, the WCLAA, would enjoy legislative competence when national legislation, GIAMA, specifically sets out to "provide for a uniform framework for the management of an immovable asset that is held or used by a national

[157] *Macsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) at paras 43 and 47, read together with *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC) at para 106.

[158] This principle is reinforced by the strong statutory presumption that laws must be read together, unless there is a clear conflict, in which case the later enactment (in this case GIAMA) will take precedence: *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para 67.

[159] The provision reads as follows: "*146(2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met… (b) the national legislation deals with a matter that, to be dealt with effectively requires uniformity across the nation, and the national legislation provides that uniformity by establishing –(i) norms and standards; (ii) frameworks; or (iii) national policies."*

[160] J Klaaren "Federalism" in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) Constitutional Law of South Africa (1st Edition, OS, 1996) 5-12.

or provincial department"[161] as contemplated by ss 146(2) of the Constitution regarding uniform, framework legislation.

84. Even if the specific empowering provision for Province to dispose of provincial state land is only ss 3(1) of the WCLAA (and not an empowering provision in GIAMA), that does not mean that it is only to the WCLAA that reference must be had in determining whether a particular disposal by Province is lawful.

85. GIAMA is national legislation that applies to the national and provincial governments and organs of state.[162] The language used throughout GIAMA consistently reflects the distinction between binding requirements, introduced by the peremptory *"must"*,[163] in contradistinction to discretionary or non-binding functions which are introduced by the word *"may"*.[164] On the SCA's reading of the statute, national and provincial departments would be able to pick and choose whether the needed to comply with the careful system of safeguards put in place by Parliament, when disposing of state land.[165] Such an interpretation would defeat the purpose of the Act.

U-AMPs and C-AMPs

86. GIAMA, read together with the Guidelines for User and Custodian Immovable

[161] GIAMA, preamble and ss 3(a).

[162] Section 2.

[163] See, for example, ss 4(4), 5(1)(a),(b), (c),(d),(e),(f), 6(1)(a),(b), 6(2) and contrast with ss 19(1)(a), (c) and 19(2).

[164] A number of provisions state explicitly that they are imposing peremptory requirements. See ss 10(b) (a U-AMP *"binds the user in the exercise of its executive authority"*), 11 (a user *"must give effect to"* its U-AMP) and 16 of GIAMA (*"A standard issued by the Minister in terms of this Act is compulsory"*).

[165] High Court Judgment, vol. 34, p. 3508, para 296.

Asset Management in National and Provincial Government published on 20 October 2008, prescribes in detail the requirements for both user and custodian immovable asset management plans.

87. A U-AMP is the principal immovable asset strategic planning instrument which guides and informs all immovable asset management decisions and binds the user in the exercise of its executive authority.[166] A user is required to give effect to its U-AMP and conduct its immovable asset management in a manner which is consistent with the U-AMP and GIAMA.[167] The process of compiling a U-AMP is integral to a user's strategic planning process as the availability of immovable assets facilitates the achievement of its service delivery objectives.[168] The U-AMP is required to integrate immovable asset planning into the department's strategic planning process. A user's accounting officer must prepare a U-AMP in relation to immovable assets which the user uses or intends to use,[169] and ensure that the U-AMP (i) meets the objects of GIAMA; and (ii) adheres to the principles in section 5 of GIAMA and applicable standards and regulations.[170] A custodian must prepare a C-AMP in relation to all the immovable assets which are in its custody.[171] Section 7(f) states in what are clearly mandatory terms that the C-AMP must consist of at least

[166] GIAMA, section 10.

[167] GIAMA, section 11.

[168] User Guidelines, section 8.

[169] GIAMA, section 6(1)(b).

[170] These requirements also apply to C-AMPs: GIAMA section 6(2).

[171] GIAMA, section 6(1)(a).

(among other things) *'a disposal strategy and management plan'*.[172]

88. In addition to finding that the requirements of GIAMA were being implemented incrementally by all organs of state under the GIAMA Implementation Technical Committee (**GITC**),[173] the SCA held that: (i) the absence of Province having a custodian management plan in 2010 must be viewed in the context that GIAMA became effective on 30 April 2009;[174] (ii) the Tafelberg property had not been in use since 2013 and that from 2010 its disposal had been under consideration;[175] and (iii) it is in the context of the legislation primarily being intended to introduce a uniform framework for government immovable assets that the inclusion of immovable asset disposal strategy in the management plan must be viewed.[176]

89. GIAMA was assented to by Parliament on 22 November 2007. The C-AMP Guidelines are dated 20 October 2008.[177] The date of commencement of the majority of the provisions of GIAMA was 30 April 2009, to provide a period of grace to enable government departments to prepare and plan for its commencement.[178] GIAMA sets out the course that must be followed to deal

[172] GIAMA, section 7.

[173] SCA Judgment, vol.37, p.3818, para 56.

[174] SCA Judgment, vol.37, p.3819, para 61.

[175] SCA Judgment, vol.37, p.3819, para 60.

[176] SCA Judgment, vol.37, p.3819, para 61.

[177] SFA, vol.7, p.718, para 80; Annexure TA 57 vol.10, pp.934 – 979.

[178] RA vol. 28, pp.2925 - 2926; para 345.2. The date of commencement of several of its provisions (including ss 6, 10, 11, 12, 13 and 14) was 30 April 2009 for any custodian or user which is a national department and 1 April 2010 for any custodian or user which is a provincial department.

with any transitional issues or difficulties in implementing the Act.[179]

90. Province had a C-AMP in place when the decision not to resile from the sale of the Tafelberg Properties was taken but it did not include the Tafelberg property.[180] Province does not say why they were not included (other than that they had *"simply not yet been included"*)[181] and failed to explain why it did not prioritise including the Tafelberg property in a C-AMP, particularly in the light of the Regeneration Programme embarked upon in 2010.

91. Province relied on the U-AMP and C-AMP requirements being *'implemented incrementally by all organs of state'* under the guidance of the GITC coordinated by the national Department of Public Works, *'with the knowledge and concurrence of National Treasury and all the provincial treasuries'*.[182] No documentary evidence was provided in support of this claim. Given that s 15 of GIAMA provides that the Minister of Public Works may, by notice in the *Government Gazette*, exempt any organ of state or part thereof from any provision of GIAMA for a specified period, the suggestion by the Province that the failure to comply with its provisions may be condoned by the GITC or the national and provincial treasury is untenable: if this was the case, there would have been no purpose in Parliament enacting s 15.

92. The decision to dispose of the Tafelberg property, given the scarcity of state-owned land suitable for affordable housing in central Cape Town would have

[179] Section 15 (exemptions) and section 22 (transitional provisions).

[180] High Court Judgment, vol. 34 p.3512, para 310 ; Gooch, vol. 13, p.1333 ; para 454.7.

[181] High Court Judgment, vol. 34, pp.3512 – 3513; para 312; Gooch, vol. 14, p.1463; para 983.

[182] Ms Gooch, vol.13, pp. 1327 – 1328, para 449.

been – if not set aside - irreversible. In the absence of compliance with the minimum contents of a custodian immovable asset management plan, as provided for in s 7 of GIAMA, and in particular a disposal strategy and management plan, developed in the context of a broader, overarching plan to redress the consequences of spatial apartheid, the *ad hoc* decision to dispose of the Tafelberg property is, in our submission, not justifiable. This conclusion is supported by a purposive interpretation of ss 5(1)(f) of GIAMA, which requires a custodian to consider whether land could be used for broader social objectives, including land reform, before disposing of it.

"Surplus" land

93. It is only if an immovable asset is "surplus" to a user, and surrendered to the custodian by the user, that the custodian may dispose of it.[183] Even if an immovable asset is surplus to a user, before disposing of a property, the custodian must consider whether the immovable asset can be used (i) by another user or jointly by different users (ii) in relation to social development objectives of government; and (iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and redistribution of wealth.[184]

94. A contextually sensitive and purposive reading of GIAMA - together with s 4 of the WCLAA[185] - requires two important steps be taken before a disposal

[183] Sections 5(1)(a) and (f), read with the definition of "surplus". In terms of ss 5(1)(a) an immovable asset becomes surplus to a user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level.

[184] Sections 5(1)(f) and 13(3)(a).

[185] Section 4(1) of the WCLAA provides that the Premier must co-ordinate the provincial government's actions regarding the administration of provincial state land with the national and local sphere of

decision can be made: (i) the user must decide that the property does not support the user's service delivery objectives at an efficient level (and cannot be upgraded to such a level of efficiency): this means that the property becomes surplus to that user; and (ii) it is necessary for the custodian to conduct a rigorous inquiry into whether an immovable asset can be used by another department for social development purposes before it can be sold. This interpretation would defeat Province's claim[186] - which was effectively upheld by the SCA[187] - that the Tafelberg property became surplus *'by operation of law'* in June 2010, without the need for a decision on its part on whether the property supports the users service delivery objectives.

95. The above interpretation: (i) renders GIAMA compliant with ss 25(5) of the Constitution; (ii) best promotes the purport and objects of the Bill of Rights (and, in particular, the need to redress the unequal distribution of land); (iii) advances the objects of both GIAMA and the WCLAA; and (iv) is generous to the beneficiaries of socio-economic rights.

VI THE WCLAA REGULATIONS

96. The WCLAA stipulates a specific procedure for the publication of notices of any "*proposed disposal"* calling upon interested parties to submit any written representations which they wish to make regarding such disposals.[188] In

government and that the co-ordination will, among other things, be with a view to realising the nation's commitment to land reform and the other reforms required to bring about equitable access to all South Africa's natural resources.

[186] Ms Adonisi, founding affidavit, vol.1, p. 45, para 91, read with "TA21", vol. 5, p. 433, para 2.

[187] SCA judgment, vol. 37, p. 3820, para 64.

[188] WCLAA, ss 3(2).

terms of Regulation 4(6), 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 ss 3(2) to (4) of the WCLAA. The High Court declared that Regulation 4(6) and the proviso in sub-regulation 4(1) of the WCLAA regulations to be unconstitutional and invalid.[189] Its reasoning was as follows:

96.1. the purpose of the public participation process provided for in the WCLAA is to further the constitutional concept of participatory democracy and to ensure that members of the community have a meaningful opportunity to participate in decisions concerning the disposal of provincial state land;[190]

96.2. having regard to the constitutional imperative to redress historical injustices in relation to access to land, effective public participation in the process of disposing of state land is crucial;[191]

96.3. "*proposed*" means "*put forward for consideration or action*": the Legislature's use of *"proposed disposal"* in ss 3(2) of the WCLAA signifies an intention to conclude a written contract of sale and that it contemplated that the public would be afforded the opportunity to

[189] High Court Judgment, vol. 34, p. 3602, para 10.

[190] High Court Judgment, vol. 33, pp.3484 – 3487, paras 240 - 243.

[191] High Court Judgment, vol. 33, p.3497, para 265.

comment before a decision was finally taken;[192] and

96.4. the procedure followed with regard to the Tafelberg property did not allow for a fair opportunity to make representations: a fair procedure would allow for objections at the outset / an early stage of the process (and before the selection of the approved purchaser and the conclusion of the deed of sale), providing a clean slate for the evaluation of competing views.[193]

97. The SCA interpreted ss 3(2) to (4) of the WCLAA, when read with regulation 4(1) and the proviso in 4(6), as meaning that (i) while the Province solicits and considers written representations, the transaction remains a proposal,[194] (ii) the transaction is only completed and becomes a disposal once Province, after consideration of the representations provided for in Regulation 4(1)(b), makes a decision whether to resile from the proposed disposal or not.[195] It held that: (i) when read in isolation from the rest of the Regulation, the offer and acceptance process in Regulation 4(1) may appear complete, final and have an external effect;[196] (ii) however, the provisions of Regulation 4 must be read and interpreted comprehensively, and harmoniously;[197] and (iii) in Regulation 4(6) providing that a signed written offer *shall be a proposed disposal*, the

[192] High Court Judgment, vol. 33, p.3490 – 3491, paras 247 - 250, read together with para 264, p.3497.

[193] High Court Judgment, vol. 33, pp. 3492 – 3493, paras 251 - 257.

[194] SCA Judgment, vol. 3, p. 3837, para 101.

[195] SCA Judgment, vol. 37, p.3837, para 101.

[196] Within the meaning of the definition of *"administrative action"* in section 1 of the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**): p. 3835, para 98.

[197] SCA Judgment, vol .37, p.3835, para 98.

transaction remains a proposed disposal *"until the Minister has complied with the requirements of s 3(2), (3), and (4) of the WCLAA – the notice and comment procedure."*[198]

98. We support the High Court's findings and submit that the SCA judgment should be reversed on the grounds that: (i) it defeats the purpose of the public participation process provided for in ss 3(2) of the WCLAA; and (ii) the procedure provided for in Regulation 4 is inconsistent with the words *'proposed disposal'* in ss 3(2) of the WCLAA.

The purpose of public participation

99. The nub of the SCA's reasoning is that the transaction remains a proposal and is only completed after consideration of the representations made in the public participation process and that *'it is difficult to imagine a more fair and balanced procedure in terms of which an intended disposal of State land can be conducted'*.[199] These findings are inconsistent with both our common law procedural fairness jurisprudence and the purpose of the public participation process.

100. In *R v Ngwevela*,[200] Centlivres CJ stated a principle which has been upheld in many judicial decisions, namely, that when a public official is empowered by a statute to make a decision which prejudicially affects the property or liberty of an individual, the person has a right to be heard before action is taken

[198] SCA Judgment, vol. 37, p. 3836, para 99.

[199] SCA Judgment, vol. 37, p.3837, paras 101 and 102.

[200] 1954 (1) SA 123 (A) at p.127.

'unless the statute expressly or by necessary implication indicates the contrary'. This is reinforced by the decisions in *Blom*[201] and *Nortje*[202] (which are relied upon in the High Court judgment)[203] to the effect that: (i) a right to be heard after a decision has been taken is no adequate substitute for the right to be heard beforehand, given the natural inclination to adhere to a decision already taken; and (ii) taking a decision before giving an interested party a hearing should be the exception rather than the rule.

101. The High Court found support for the above principles in the purpose of the ss 3(2) public participation process provided for in the WCLAA. It held that this purpose is to further participatory democracy by ensuring that members of the public have a meaningful opportunity to participate in decisions concerning the disposal of state land.[204] This finding is consistent with a judgment, concurred in by four of the members of this Court, which recognised that: (i) the importance of participation in decisions affecting the rights and interests of people is a general theme that runs throughout the Constitution;[205] (ii) the understanding of the inherent value of participation and engagement underlies many of the decisions of this Court;[206] and (iii) many provisions of the Constitution require the substantive involvement and engagement of people

[201] *Attorney-General, Eastern Cape v Blom and others* 1988 (4) SA 645 (A) at 668D-F.

[202] *Nortje en 'n ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA (HHA) para 19.

[203] High Court Judgment, vol.33, p. 3492, paras 252 – 253.

[204] High Court Judgment, vol.33, pp.3484 – 3487, paras 240 - 243.

[205] *Head of Department, Department of Education, Free State Province v Welkom High School and Others* 2014 (2) SA 228 (CC) (**Welkom**) at para 137.

[206] *Welkom* para 139 and footnote 120 citing *Schubert Park Residents' Association and Others v City of Tshwane Metropolitan Municipality and Another* 2013 (1) SA 323 (CC).

in decisions that may affect their lives.[207] These principles have been applied to (among other things) the right just administrative action[208] and socio-economic rights,[209] including the right to adequate housing.[210]

102. General Comment 26 on Land and Economic, Social and Cultural Rights highlights that participation, consultation and transparency are key principles applicable to the implementation of obligations in respect to the right to land. The General Comment states that: (i) communities and individuals should be properly informed about, and allowed to meaningfully participate in, decision-making processes that may affect their enjoyment of rights in land-related contexts; and (ii) equal access to sufficient and transparent information for all those involved in decision-making is key for human rights-based participation in decision-making.[211]

103. When the WCLAA and WCLAA Regulations are applied where socio-economic rights to land and housing are implicated, public participation is particularly important. Understanding the realisation of such rights under the Constitution through a "*participation frame*" emphasises the need to have "*opportunities to shape the meaning of rights in ways which are responsive to*

[207] *Welkom,* para 139 and footnote 121, citing Liebenberg 'Engaging the paradoxes of the universal and the particular in human rights adjudication : The possibilities and pitfalls of meaningful engagement' (2012) 12 (1) African Human Rights Law Journal 1.

[208] *Welkom,* para 139 footnote 124, citing *TAC* para 113.

[209] *Welkom,* para 139 footnote 127.

[210] *Welkom,* para 139 footnote 128, as above.

[211] UN Committee on Economic, Social and Cultural Rights, 'General Comment 26 on Land and Economic, Social and Cultural Rights' adopted by the Committee at its seventy-second session (26 September–14 October 2022) (2022) UN Doc E/C.12/GC/26, at para 20.

their lived experiences of poverty."[212]

104. The High Court judgment found that the facts of this case illustrate the unfairness of the procedure provided for in the Regulation: a protracted preliminary procedure eventually resulted in a binding contract of sale being concluded pursuant to a process which *'patently lacks transparency'*.[213] The Court noted that: (i) the applicants were bound by a process which did not give them a fair opportunity to make representations before a deed of sale had been concluded and which only allowed comments at a point where Province had to be persuaded to resile from an otherwise binding contract, making it difficult to persuade the decision-maker not to sell; and (ii) a fair procedure would allow for objections at an early stage in the process, so that there would be a clean slate upon which all competing views could be evaluated.[214]

105. The point made by the High Court concerning the exhaustive nature of the disposal process which took place before the public was given an opportunity to comment[215] is graphically illustrated by the November 2015 Cabinet minute which authorised the sale.[216] The Cabinet minute shows that: (i) in 2011 an Urban Design Report (**UDR**) was commissioned in terms of the Regeneration Programme;[217] (ii) in March 2015 a decision was made to dispose of the

[212] Sandra Liebenberg 'Social Rights and transformation in South Africa: Three frames' (2015) 31 *South African Journal on Human Rights* 446 at 466.

[213] High Court Judgment, vol. 33, p.3493, para 254.

[214] High Court Judgment, vol. 33, pp. 3493 - 3494, para 257.

[215] The public comment process took place over the December 2015 holiday period (High Court Judgment vol. 33, p.3493, para 255).

[216] Annexure "JG107' vol. 20, pp. 2028 – 2041.

[217] Annexure "JG107' vol. 20, p. 2030, para 8.

property on the open market in order to achieve the objectives of the UDR;[218] (iii) between May and June 2015 a tender process took place, in terms of which offers to purchases the property were invited from interested parties through the media and evaluated in terms of Province's procurement procedures;[219] (iv) in July 2015 the Provincial Property Committee issued a recommendation in terms of Regulation 4(5) to approve the disposal;[220] (v) the proposal was presented to the Provincial Cabinet which authorised the sale in November 2015; and (vi) the deed of sale was then signed on behalf of the Province.

106. This was not a case of public participation happening immediately after a decision had been taken. The public participation process took place nine months after the decision to dispose of the property, after that decision had already been implemented by means of a comprehensive procurement process, which culminated in a decision by the Provincial cabinet to authorise the sale. The public participation process was then tagged-on to this decision, at a point where it amounted to little more than going through the motions.

107. Province persists in an approach which focuses on commercial considerations of securing the most advantageous *"deal"*, which effectively negates any meaningful public participation in respect of the disposal of provincially owned land for purposes of advancing the rights in ss 25(5) and 26 rights of the

[218] Annexure "JG107' vol. 20, p. 2030, para 10 (Province was unable to provide any documentary record of this decision or even disclose by which person or body it was taken).

[219] Annexure "JG107' vol. 20, pp. 2030 - 2033, paras 11 - 21.

[220] Annexure "JG107' vol. 20, p. 2034, para 30.

Constitution.[221]

Regulation 4 is inconsistent with the WCLAA

108. The High Court considered the dictionary definition of "*proposed*", which means "*put forward for consideration or action*" and, applying this definition, held that: (i) the Legislature's use of *"proposed disposal"* in ss 3(2) of the WCLAA signifies an intention to conclude a written contract of sale; and (ii) the Act contemplated that the public would be afforded the opportunity to comment before a decision was finally taken.[222]

109. The WCLAA Regulations cannot change the meaning of *"proposed disposal"* in the WCLAA. The applicable principles have been stated by this Court in *Afribusiness*:[223] (i) an Act provides the framework for the subject matter legislated upon, while regulations furnish the sort of detail that is best left to functionaries; (ii) the intention of the legislature as indicated in the legislation must be the prime guide to the making of delegated legislation; and (iii) the delegated legislation is strictly ancillary and *'will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out* or *to depart from or vary the plan which the Legislature has adopted to attain its ends'*. [emphasis added]

110. Regulation 4(6) is inconsistent with the principles stated in *Afribusiness* in that

[221] For these reasons we support the High Court's finding that Regulation 4 is inconsistent with s 4 of PAJA. See further: High Court Judgment vol. 33, pp. 3494 - 3496, paras 258 - 262.

[222] High Court Judgment, vol. 33, p.3490 – 3491, paras 247 - 250, read together with para 264. P.3497.

[223] *Minister of Finance v Afribusiness NPC (Rule of Law Project and another as amici curiae) (Fidelity Services Group (Pty) Limited and another intervening)* 2022 (9) BCLR 1108 (CC) at paras 103 and 121.

it departs from the framework set out in the WCLAA by introducing a new and different meaning for the words *'proposed disposal'*.[224]

111. As was found by the High Court, ss 3(2) of the WCLAA signifies an intention that the public should be afforded the opportunity to comment on a disposal that is being "*put forward for consideration or action*".[225] The effect of Regulation 4(6) is to curtail the rights of members of the public to participate in the decision-making process by permitting their comments to be sought only after: (i) a disposal decision has been taken; (ii) that decision has been implemented through a comprehensive tender process; and (iii) a sale agreement has been concluded pursuant to a decision taken by the Provincial Cabinet. In short, the public forfeits the right to comment on a disposal that is being put forward for consideration and, in its place, only gets to comment on a decision that has already been acted upon.

[224] This is reflected in Province's submissions to the SCA, where it was contended that there was no inconsistency between ss 3(2) and the Regulations, on the basis that a *'proposed disposal'* means *'an agreement to dispose which is subject to a resolutive condition subject to public participation'*. This is a far cry from the ordinary meaning of the words.

[225] High Court Judgment, vol. 33, p.3490 – 3491, paras 247 - 250, read together with para 264. P.3497.

VII CONCLUSION

112. We submit that leave to appeal should be granted, and that the appeal should be upheld (both orders with costs including the costs of two counsel). A proposed draft order is annexed to the applicants' practice note.

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14 October 2024