CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 126/24

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 OF HUMAN SETTLEMENTS, WESTERN CAPE	Fourth Respondent
CITY OF CAPE TOWN	Fifth Respondent

and

SOCIO-ECONOMIC RIGHTS INSTITUTE

OF SOUTH AFRICA Amicus Curiae

Case CCT 128/24

In the matter between:

MINISTER OF HUMAN SETTLEMENTS First Applicant

NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS Second Applicant

and

MINISTER FOR TRANSPORT AND PUBLIC WORKS, WESTERN CAPE First Respondent

PREMIER OF THE WESTERN CAPE Second Respondent

PROVINCIAL GOVERNMENT OF THE WESTERN CAPE Third Respondent

MINISTER OF HUMAN SETTLEMENTS, WESTERN CAPE Fourth Respondent

CITY OF CAPE TOWN Fifth Respondent

Neutral citation: *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others; Minister of Human Settlements and Another v Minister for Transport and Public Works, Western Cape and Others* [2026] ZACC 29

Coram: Madlanga ADCJ, Goosen AJ, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Theron J and Tshiqi J

Judgment: Mhlantla J (unanimous)

Heard on: 11 February 2025

Decided on: 2 July 2026

Summary: Section 26 of the Constitution — right to have access to adequate housing — progressive realisation — reasonable legislative and other measures — section 25(5) of the Constitution — equitable access to land — constitutional subsidiarity — reasonableness review — spatial justice — social housing — GIAMA — disposal of state land — surplus land — WCLAA — notice-and-comment process requirements — IGRFA — intergovernmental co-ordination.

ORDER

In Case CCT 126/24 *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside and is replaced with the following:
3. It is declared that the obligations of the Provincial Government of the Western Cape (Province) and the City of Cape Town (City) in terms of sections 25(5), 26(1) and 26(2) of the Constitution, and the legislation enacted to give effect to these rights, require that, in taking reasonable legislative steps and other measures, within their available resources, to progressively realise the right to adequate housing:
   (a) the location of housing must be treated as a relevant factor in determining what constitutes adequate housing and equitable access to land, having regard to the constitutional imperative to redress the spatial injustice inherited from apartheid; and
   (b) reasonable measures to fulfil these obligations must include the provision of affordable housing falling within the area of the formerly defined restructuring zone "CBD and surrounds (Salt

River, Woodstock and Observatory)" and, to the extent that it did not fall within the restructuring zone as so defined, Sea Point (collectively Cape Town CBD and Sea Point).

4. It is declared that the Province and the City have failed to comply with their obligations declared in paragraph 3 above in the implementation and completion of their respective social housing programmes, policies and projects in the Cape Town CBD and Sea Point.

5. The Province must submit to the High Court of South Africa, Western Cape Division, Cape Town (High Court), and serve on all parties, a report under oath, within three months of the date of this order, setting out—

   (a) the Province's current policies and programmes for the provision of affordable housing in the CBD, including the steps taken to give effect to the obligations declared in paragraph 3;

   (b) a schedule of affordable housing projects in the areas in the CBD that—

      (i) have been completed since the commencement of these proceedings in the High Court;

      (ii) are currently under construction; and

      (iii) are under consideration;

   (c) the budgetary resources allocated and expended on affordable housing in the CBD, and the extent to which the national social housing funding has been applied for within these areas;

   (d) the steps taken by the Province to co-ordinate with the City and the national sphere of government in respect of the planning and implementation of affordable housing in the CBD; and

   (e) the further steps the Province intends to take and the projected timelines for such steps.

6. The report contemplated in paragraph 5 must also include, separately from the details in paragraph 5, similar information in respect of any policies, programmes and projects which involve social housing in areas sufficiently close to the CBD that should, in the Province's opinion, be

taken into account in assessing compliance with the obligation in paragraph 3 above.

7. The City must, within three months of the date of this order, submit to the High Court and serve on all other parties a report in accordance with paragraphs 5 and 6 above, subject to any changes necessitated by the context.

8. The applicants may serve and file affidavits, if any, responding to the contents of the reports referred to in paragraphs 5, 6 and 7 above, within three weeks of the service and filing of the aforesaid reports.

9. The Province and the City may serve and file affidavits, replying to the contents of the affidavits referred to in paragraph 8 above, if any, within two weeks of the service and filing of the aforesaid affidavits.

10. Any of the parties may thereafter request the High Court's Registrar to enrol the matter for hearing, and the High Court may thereupon make any further order or determination, as may be necessary or appropriate with a view to finalising the matter.

11. It is declared that the Province failed to meaningfully engage with the public and hold a meaningful public participation process in relation to the disposal of the Tafelberg property, namely the property comprising Erven 1[...] and 1[...] Sea Point, situated at 3[...] M[...] Road, Sea Point.

12. Regulation 4(6) and the proviso in regulation 4(1) (impugned regulations) of the Regulations made under section 10 of the Western Cape Land Administration Act 6 of 1998 (WCLAA) by Provincial Notice No 595, published in Provincial Gazette No 5296 on 16 October 1998 are declared to be unconstitutional and invalid in that, contrary to section 3 of the WCLAA, the impugned regulations provide for public participation to take place only after a disposal contract has been concluded.

13. The declaration of invalidity referred to in paragraph 12 above is suspended for 12 months from the date of this judgment to allow for the defect to be remedied.

14. The Province must pay the applicants' costs, including the costs of two counsel, in the High Court, Supreme Court of Appeal and this Court.

In Case CCT 128/24 *National Minister of Human Settlements and Another v Minister for Transport and Public Works, Western Cape and Others*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld, and the order of the Supreme Court of Appeal is set aside and is replaced with the following:
3. It is declared that the failure of the Provincial Government of the Western Cape (Province) to inform and consult with the National Minister of Human Settlements regarding its intention to dispose of the Tafelberg property, namely the property comprising Erven 1[...] and 1[...] Sea Point, situated at 3[...] M[...] Road, Sea Point, was a contravention of the Province's obligations of co-operative governance in terms of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.
4. It is declared that regulation 4(6) and the proviso in regulation 4(1) of the Regulations (impugned regulations) made under section 10 of the Western Cape Land Administration Act 6 of 1998 (WCLAA) by Provincial Notice No 595, published in Provincial Gazette No 5296 on 16 October 1998, are unconstitutional and invalid in that, contrary to section 3 of the WCLAA, the impugned regulations provide for public participation to take place only after a disposal contract has been concluded.
5. The declaration of invalidity referred to in paragraph 4 above is suspended for 12 months from the date of this judgment to allow for the defect to be remedied.
6. The parties must bear their own costs in this Court, the High Court and the Supreme Court of Appeal.

JUDGMENT

MHLANTLA J (Madlanga ADCJ, Goosen AJ, Kollapen J, Majiedt J, Opperman AJ, Rogers J, Theron J and Tshiqi J concurring):

Introduction

[1] At its core, this case raises a fundamental constitutional question: how do we, as a society, in a free, democratic dispensation, address the enduring legacy of spatial apartheid? The submissions in these matters have highlighted the crucial distinction between merely distributing resources and ensuring that those resources are distributed in a manner that actively dismantles historical inequalities shaped by race and class along geographical lines.

[2] A city's architecture tells the story of its soul. In Cape Town, as in most, if not all, South African cities, that story remains one of division – where the echoes of apartheid's spatial planning continue to reverberate through its streets and suburbs. Every morning, thousands of Cape Town's workers board buses, taxis and trains in the pre-dawn darkness, travelling for hours from the city's periphery to its centre. Their daily journey is not just a commute – it is a living testament to the enduring legacy of spatial injustice that this case glaringly exposes before this Court. The main question in this matter is whether the State, as custodian of public land, has a legal obligation to address spatial divisions within Cape Town, or whether, through its actions, it is perpetuating divisions without breaching any legal duty.

[3] The applicants in the two applications seek leave to appeal against a judgment and order of the Supreme Court of Appeal, which overturned the order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). In the first matter,

the first to sixth applicants are Ms Thozama Angela Adonisi, the late Ms Phumza Ntutela, Ms Sharone Daniels, Ms Selina La Hane, Reclaim the City and the Trustees of the Ndifuna Ukwazi Trust (collectively referred to as the NU Trust). The Socio-Economic Rights Institute of South Africa (SERI) was admitted as an amicus curiae (friend of the court) in the first matter. In the second matter, the first and second applicants are the National Minister of Human Settlements and the National Department of Human Settlements (collectively referred to as the National Minister). The respondents in both matters are the Western Cape Minister for Transport and Public Works (TPW Minister), the Premier of the Western Cape (Premier), the Provincial Government of Western Cape and the Western Cape Minister of Human Settlements (collectively referred to as the Province) and the City of Cape Town (City). The Province opposes both applications, while the City only opposes the first application.

[4] Before setting out the background and litigation history of these matters, it is necessary to briefly explain the concept of social housing and how it differs from housing under the Reconstruction and Development Programme (RDP housing).

[5] RDP houses differ from social housing in that they are owned, rather than rented, by beneficiaries, with strict conditions related to leasing and occupation. The RDP policy was aligned with the White Paper on Housing (1994), which served as the primary, overarching national housing policy aimed at addressing the housing needs of South Africans post-apartheid. The RDP housing scheme has an updated plan, now referred to as the Breaking New Ground - Comprehensive Plan for the Development of Sustainable Human Settlements (BNG). This policy framework was expanded with the introduction of the BNG in 2004. Social housing is one of the housing programmes developed within the context of these overarching policy frameworks.

[6] Social housing is provided in terms of the Social Housing Act[1] (SHA). It refers to a rental or co-operative housing scheme for low-to medium-income households,

[1] 16 of 2008.

generally families who earn a combined income of between R1 850 and R22 000 per month.[2] These housing developments require institutionalised management and are provided by social housing institutions (SHIs) or other service delivery agents in approved projects. The houses are situated in designated restructuring zones that benefit from public funding, as contemplated in the SHA.[3]

[7] The aim of the SHA is to promote access to housing in urban areas and to assist with restructuring cities, ensuring greater racial, social and economic integration in more compact residential areas. Therefore, the needs of low- to medium-income households must be prioritised with respect to social housing development. Importantly, all three spheres of government are required to assist with the creation of dignified living environments that promote social, economic and physical integration of housing development into the existing inner-city.

[8] To achieve this end, social housing programmes, as implemented under the SHA, must be responsive to local housing demands, prioritising women, children, child-headed households, the elderly and persons with disabilities.[4] These housing programmes are designed to support economic development by providing housing close to work, transport and markets and by stimulating job opportunities for emerging entrepreneurs in the housing services and construction industries.

[9] Architecturally, these houses comprise sets of residential units similar to townhouses or blocks of flats, erected and managed by SHIs as provided for under section 1 of the SHA. The purpose of these institutions is to provide co-operative housing options for low- to medium-income households on an affordable basis. Unlike RDP houses, social housing units cannot be privately owned.

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[2] GroundUp Staff "Everything you need to know about government housing" *GroundUp* (20 July 2017) available at https://www.groundup.org.za/article/everything-you-need-know-about-government-housing/. These income bands have changed over time.

[3] Id.

[4] Section 2 of the SHA.

[10] The need for social housing is further underscored by the fact that our country is one of the most unequal in the world. The apartheid system ingrained geographic segregation, imposing poverty and exclusion from areas of economic progress and social opportunity upon the majority of the country. At the same time, it inordinately privileged a minority that was situated, by law, in areas receiving a host of benefits by virtue of location, such as social services and infrastructure, public investment, economic activity and employment opportunities.[5] This pervasive spatial inequality could only be combatted by housing schemes seeking to ensure that access to areas of opportunity is more evenly distributed across the population so as to cure the deep geographical divides. This includes subsidising people's occupation in areas they were previously excluded from, thereby fostering integration and improving the prospects of occupants.[6] Government could bring this about by acquiring, developing, converting or upgrading buildings for integrated housing schemes.[7]

[11] By placing segments of the population closer to economic opportunities and social services, social housing is exactly such a scheme. It strives to ensure that well-located, affordable and quality rental homes are made available to segments of the public in locations that enable them to benefit from greater proximity to economic opportunities and to health and educational facilities and social amenities.[8] The importance of social housing, therefore, cannot be understated.

Background

[12] The Tafelberg property (as it is colloquially known) and its use are at the centre of this dispute. The Tafelberg property is situated at 3[...] M[...] Road in Sea Point, a well-located seaside suburb in Cape Town, close to educational facilities, health facilities, transport nodes and social amenities. The proximity of the suburb to

[5] Ngema et al "Assessing the Impact of Social Housing on Urban Regeneration in South African Cities" (2025) 7 *Sustainable Cities* 1 at 2-3.

[6] Visagie et al "Social Housing and Upward Mobility in South Africa: An Assessment of Household Outcomes" (2024) 35 *Urban Forum* at 382.

[7] Section 1 of the SHA.

[8] See Ngema et al above n 5 at 3.

infrastructure and opportunity is not coincidental. Sea Point was the location of some of the earliest forced removals enforced by the apartheid government to further its segregationist vision for Cape Town. The Group Areas Act of 1950, the Housing Act of 1920 and the Natives (Urban Areas) Act of 1923 were used as a cudgel to dispossess the majority of the population through a cruel system of confiscation of title and tenure. They entitled the government to ignore the human suffering of the dispossessed to construct a society where the white population was allocated prime property without having paid fair value for their acquisition. Conversely, the black population of Cape Town, including in Sea Point, was cast out of the city areas[9] and enjoined by unjust law to live in cramped conditions dominated by shack-settlements, where the levels of development were lower and the building of more secure housing was more or less forbidden without government authorisation.[10]

[13] Over the years, the operation of these laws enforcing segregation and spatial injustice produced a city that is characterised by the present-day spatial division between the population groups. Sea Point itself benefitted from public investment. Its white community was emplaced to receive quality social and economic services, being situated close to economic hubs. With the passage of time, apartheid laws entrenched the link between its proximity to urban development and the race of its occupants.[11] It is through this historical prism that this matter must be viewed.

[14] The Tafelberg property comprises two adjacent erven, namely, Erf 1[...] and Erf 1[...]. These two erven are registered in the name of the Province. Erf 1[...] housed the Tafelberg Remedial School until June 2010, when it was relocated. Erf 1[...] housed a block of rental housing units known as Wynyard Mansions until the last tenant was evicted in May 2014.[12] Since then, the Tafelberg property has stood empty. At the time

[9] Mesthrie "The Tramway Road Removals, 1959-61" (1994) 21 *Kronos: South African Histories* at 64.

[10] South African History Online "Cape Town the Segregated City" *South African History Online* (30 March 2011), available at www.sahistory.org.za/article/cape-town-segregated-city.

[11] Turok et al "Social Inequality and Spatial Segregation in Cape Town" in Van Ham et al (eds) *Urban Socio-Economic Segregation and Income Inequality* (Springer, Cham 2021) at 71-2.

[12] Wynyard Mansions has been vacant since then.

the school closed, the Western Cape Provincial Department of Transport and Public Works (TPW Department) was the custodian of the property, in terms of section 1 of the Government Immovable Asset Management Act[13] (GIAMA). The provincial Department of Education (DoE) and the provincial Department of Human Settlements (DHS) were the users of the property, being users of the school premises and Wynyard Mansions, respectively.

[15] In 2010, the Province adopted (a) the Cape Town Central City Regeneration Programme Framework (Regeneration Programme), in terms of which the Province conducts investigations into the feasibility of social housing on certain land within the city and (b) the Western Cape Property Development Process (Development Process), which the Province follows in the event that it intends to sell public land. Thereafter, the DHS began investigating social housing options at various sites in the city, including the Tafelberg property. In the course of these investigations, the Province engaged with the National Association of Social Housing Organisations (NASHO), the Social Housing Regulatory Authority (SHRA) and the City. Each of these bodies, along with the DHS, expressed interest in the potential use of the Tafelberg property for social housing. However, by March 2015, after the land had been declared surplus, the Premier, acting together with other members of the Provincial Cabinet, had resolved to sell the Tafelberg property to fund an anticipated shortfall in a DoE office park development.[14]

[16] The members of the NU Trust and the Social Justice Coalition (SJC) objected to the sale of the Tafelberg property as part of the Regeneration Programme on the grounds that the Province, particularly the Premier and the TPW Minister, should first consult with the local and national government before making the decision to sell the Tafelberg

[13] 19 of 2007.

[14] Prior to this decision, the submission of the DHS regarding the proposed sale was still pending consideration.

property. The TPW Department dismissed these objections, as well as significant proposals from other objectors.[15]

[17] After the TPW Department obtained a valuation of the property at R107.3 million, the property was put to tender.[16] The Phyllis Jowell Jewish Day School (Day School) was the successful bidder with a price of R135 million. On 3 July 2015, the TPW Department recommended to the Provincial Property Committee that the property be sold to the Day School. In respect of GIAMA, the TPW Department submitted that the Tafelberg property was neither used nor required for government purposes and could be disposed of. The DHS was informed of the decision and reluctantly withdrew its request to use the property for social housing. However, the DHS maintained its concerns about how "surplus" land is interpreted under GIAMA.[17] The Provincial Cabinet approved the proposal and, on 11 November 2015, formally approved the sale. On 20 November 2015, the TPW Minister accepted and signed the offer by the Day School.

[18] In December 2015, the Province, acting in terms of section 3 of the Western Cape Land Administration Act[18] (WCLAA) and regulation 4 of the Regulations promulgated under the WCLAA[19] (WCLAA Regulations), published notices of the disposal in local newspapers and the Provincial Gazette, inviting public comment as to whether it should resile from the sale. There were no objections. In January 2016, the Province notified the Day School of the confirmation of the sale and called for payment of the deposit. In March 2016, the NU Trust requested the Province, in terms of

[15] Communicare, a social housing institution, proposed a mixed social and market-related housing project, which was also rejected.

[16] The tender used a 90:10 scoring system for price versus Broad-Based Black Economic Empowerment (BBBEE). Of five offers received, only two were above market valuation.

[17] The DHS expressed frustration with what it considered an incorrect interpretation of section 5(1)(a) of GIAMA by TPW Department officials regarding the definition of "surplus" land.

[18] 6 of 1998.

[19] Regulations made under section 10 of the Western Cape Land Administration Act 6 of 1998, PN 595, *Provincial Gazette* 5296, 16 October 1998.

section 5 of the Promotion of Administrative Justice Act[20] (PAJA), to give reasons for declaring the Tafelberg property "surplus" in terms of GIAMA.[21] The Province responded to the request on 1 April 2016, claiming that the Tafelberg property became "surplus" during June 2010 by operation of law and accordingly PAJA did not apply.

[19] Later that month, the NU Trust launched its first application in the High Court, challenging the lawfulness of the sale. They contended, amongst other things, that there had been non-compliance with the procedural and substantive requirements prescribed in section 3 of the WCLAA. This was because the notice of the intended sale by the Province was not published in an isiXhosa newspaper circulating in the Province before the notice and comment process. The challenge was upheld, and the High Court granted an order setting aside the notices and directing that the notice-and-comment process be reopened after the re-publication of the notices in terms of section 3 of the WCLAA and regulation 4 of the WCLAA Regulations. As a result, the Province published fresh notices in May 2016, inviting comments from the public on whether it should resile from the sale.

[20] This time, about 5000 submissions were received, many of which focused on the possibility of using the site for affordable housing. Due to the extensive public response, the Provincial Cabinet requested the TPW Department to secure the preparation and presentation of a financial model for possible social housing options for the property. The TPW Departments's model concluded that the cost of providing social housing on the property exceeded the cost of developing comparable schemes. In November 2016, the TPW Department invited public comments on the financial model. After receiving 37 comments from the public, the TPW Department recommended to the Provincial Cabinet that the Province proceed with the sale. On 22 March 2017, the Provincial Cabinet so resolved, and its decision not to resile from the sale was published on its website the same day. One of the considerations that the

[20] 3 of 2000.

[21] Section 1 of GIAMA provides that "'surplus' in relation to an immovable asset, means that the immovable asset no longer supports the service delivery objectives of a use".

Province weighed in reaching this conclusion was its view that the Tafelberg property was not situated in a "restructuring zone" (RZ) as defined in the SHA.[22] Reconstruction grants (RCGs) from the national government for social housing developments, necessary for approved projects, were only available if the property was situated in an RZ.

[21] On 30 March 2017, the National Minister wrote to the Province, declaring a dispute over the sale and stating her intention to pursue the development of social housing on the Tafelberg property.

Litigation history

High Court

[22] On 5 May 2017, the NU Trust launched another application in the High Court (NU Trust application), challenging the decision to sell the Tafelberg property. They took issue with the Province's prioritisation of financial factors in selling the property over its suitability for social housing, particularly for residents working and living in Sea Point, and challenged the reasonableness of this conduct. They also challenged the classification of the property in June 2010 as "surplus" under GIAMA. Moreover, they contested the constitutionality of regulations 4(6) and 4(1) of the WCLAA Regulations in permitting the notice-and-comment public participation process to take place only after the conclusion of the contract with a proviso that the Provincial Cabinet can resile from the contract.[23] They sought a declarator that the City, the Province and its relevant departments had not complied with their constitutional and statutory obligations and that the decisions regarding the Tafelberg property sale should be set aside. They also

[22] Section 1 of the SHA defines a restructuring zone as—

> "a geographic area which has been—
>
> (a) identified by the municipality, with the concurrence of the provincial government, for the purposes of social housing; and
>
> (b) designated by the Minister in the *Gazette* for approved projects."

[23] Ms Adonisi and Ndifuna Ukwazi had objected to the sale during the notice-and-comment period: *Adonisi v Minister for Transport and Public Works Western Cape; Minister of Human Settlements v Premier of the Western Cape Province* [2020] ZAWCHC 87; [2021] 4 All SA 69 (WCC) (High Court judgment) at para 6.

sought a structural interdict to hold the Province and the City to account for the alleged failure to comply with their constitutional and statutory obligations. The application was opposed by the respondents.

[23] A second application was filed two months later by the National Minister and the SHRA (National Minister's application). They sought an order reviewing the decision to sell the property on the basis that the Province had failed to consult in terms of the Intergovernmental Relations Framework Act[24] (IGRFA) before the disposal of the government-owned land. The Province opposed the application.

[24] The two applications were consolidated and heard together. The High Court held that as early as 2013, both the TPW Minister and officials in the Province, including from the TPW Department and the DHS, were aware of the interest of the public in using the site for affordable housing.[25] The Court held that affordable housing, in whatever form, was very much on the table for negotiation but was ignored by the Province before its November 2015 decision to sell the property to the Day School.[26]

[25] The High Court held that, to the extent that the National Minister could have addressed the concerns raised by the Province on behalf of her Department, she ought to have been consulted. The SHA requires both the National Minister and the Province to act in the best interests of the involved parties, as stipulated in section 5(b) and (c) of the IGRFA.[27] The Court held that the Province had made insufficient attempts to engage with the City and to obtain clarity on whether the Tafelberg property was located within an RZ and, consequently, the availability of any RCGs for social housing.[28] Had the Province adhered to its co-operative obligations under section 41(1) of the

[24] 13 of 2005.

[25] High Court judgment above n 23 at para 400.

[26] Id.

[27] Id at para 404.

[28] Id at para 415.

Constitution,[29] it likely would have learned from the City or the DHS that the Tafelberg property was part of an area which could be regarded as falling within an existing RZ, namely the RZ constituted by the Cape Town Central Business District (CBD) and its surrounds.[30] Moreover, if all three levels of government had collaborated as mandated by the Constitution, the problem might have been resolved by approaching the National Minister to amend the RZ designations to explicitly include Sea Point, the area where the Tafelberg property is situated, thus facilitating RCG funding to alleviate the Province's financial burden.[31]

[26] In determining whether the Tafelberg property was surplus for the purposes of GIAMA, the High Court held that, in accordance with section 4(1) of that Act, national and provincial government departments serve as both "custodians" and "users" of immovable assets that belong to them.[32] National Government Ministers assume a "caretaker" role over immovable assets vested in the national government, unless specific custodial duties are assigned to other ministers through particular legislation. Likewise, Premiers of provinces or Members of Executive Council appointed by Premiers hold a similar responsibility for immovable assets that are vested in provincial governments.[33]

[27] The High Court held that the Province had failed to consider the requirements of GIAMA in that the disposal of the property was made without the required User Asset Management Plans (U-AMPs) or Custodian Asset Management Plans (C-AMPs) being in place. These are the necessary tools required to make an informed decision under section 5(1)(a) of GIAMA, when determining whether properties support their service

[29] Section 4(1) sets out the principles of co-operative government and intergovernmental relations. It requires all spheres of government and organs of State to work together in a way that preserves peace, unity and accountability, while respecting each other's constitutional powers.

[30] This was one of five proclaimed RZs in respect of Cape Town, and was defined as "CBD and surrounds (Salt River, Woodstock and Observatory)". See Provisional Restructuring Zones, GN 848 *GG* 34788, 2 December 2011, read with Correction Notice, GN 900, *GG* 34839, 15 December 2011.

[31] High Court judgment above n 23 at para 415.

[32] Id at paras 116 and 125-7.

[33] Id at para 117.

delivery objectives efficiently or are capable of being upgraded to the required level.[34] The High Court held that if the Province's interpretation were adopted, it could pick and choose whether to comply with the safeguards provided for by GIAMA. This would result in the Province selling off valuable land and then incurring expenditure at market-related prices to buy land. Instead, GIAMA is the overarching legislation which gives effect to the controls imposed on the disposal of State land, whereas the WCLAA prescribes the procedural mechanisms to be adhered to.[35]

[28] The High Court held that the WCLAA is the legislation created to facilitate the effective exercise of authority concerning matters listed in Schedule 4 of the Constitution, functional areas of concurrent national and provincial legislative competence.[36] In terms of section 3(1) of the WCLAA, the Premier has the authority to dispose of provincial State land under terms the Premier considers appropriate. Therefore, the WCLAA serves as the legal basis for the acquisition and disposal of immovable property by the Province.

[29] The High Court emphasised that the purpose of the public participation process in terms of section 3(2)-(4) of the WCLAA is to facilitate public participation in accordance with the concept of participatory democracy. This is crucial with regard to the disposal of State land, which is intimately tied to the constitutional imperative to redress historical injustices in relation to access to land. The Court held that the term "proposed disposal" in section 3(2) of the WCLAA must be understood as an intention to conclude a disposal contract, not one that has already been concluded.

[30] The High Court held that the public consultation process was procedurally unfair, as it restricted the public's ability to make meaningful representations to the Province prior to the conclusion of the sale agreement with the Day School.[37] In

[34] Id at para 286.

[35] Id at para 297.

[36] Id at para 384.

[37] Id at paras 257-8.

offering objectors an opportunity to have their say *after* the event, regulation 4 of the WCLAA Regulations created a situation in which the Province must be persuaded to resile from an otherwise binding contract for the sale of land after the decision to sell had been made.[38] This makes it difficult for an objector, as the objector bears the burden of persuading the Province not to sell at all, as opposed to raising an objection to the terms of the sale itself.[39] The Court held that this prescribed procedure "quite plainly puts the proverbial cart before the horse".[40]

[31] Therefore, the High Court held that the impugned regulations did not pass constitutional muster when measured against the relevant provisions of the Constitution and PAJA.[41] As such, regulation 4(6) and the proviso in regulation 4(1) were declared unconstitutional and invalid, to the extent that such declaration would not, however, affect any rights which at the date of judgment had accrued to any person or entity that was not a party to the proceedings.[42]

[32] Regarding the question whether Sea Point was part of the CBD RZ, the High Court held that an examination of the aerial view of the city centre revealed that the Sea Point region is closer to the CBD than, for instance, Observatory, and was within the CBD RZ.[43] The Court found that it was a "conundrum" whether: (a) what the City intended to convey by the use of the term "surrounds" in relation to the CBD, when it submitted the RZ designations to the Province for approval in 2010 and (b) what the Province intended the phrase to mean when it presented the designation to the National Minister for gazetting at the end of 2011.[44] Upon analysis, the Court concluded that it

[38] Id.

[39] Id.

[40] Id at para 263.

[41] Id at para 267.

[42] Id at para 11 of the order in Case No 7908/2017.

[43] Id at para 329.

[44] Id at para 331.

had been established that the Tafelberg site fell within an RZ as contemplated by the SHA.[45]

[33] The High Court held that when regard is had to the application of section 13(3) of GIAMA, the Tafelberg property could only be sold in the open market after it had been determined as "surplus" under the Act.[46] Therefore, the sale of the property and the entire disposal process from 2011 onwards were unlawful.[47]

[34] In the result, the High Court declared that the Province and the City had not complied with their constitutional obligations to foster conditions which would enable citizens to gain access to land on an equitable basis and to achieve the progressive realisation of the right to adequate housing. Further, they had also failed to comply with national legislation regulating these constitutional obligations, namely the Housing Act[48] and the SHA, and had failed to take adequate steps to redress spatial apartheid in "central Cape Town".

[35] The High Court ordered the Province and the City to comply with their obligations and to file a joint comprehensive report under oath detailing the steps already taken and those to be taken in the future to comply with their constitutional and statutory obligations. It declared that the Province had violated Chapter 3 of the Constitution and the IGRFA by not consulting the national government.[49] The High Court declared regulation 4(6) and the proviso in regulation 4(1) of the WCLAA Regulations, unconstitutional,[50] and declared that the suburb known as Sea Point is within the CBD RZ.[51] Finally, the Court set aside the Province's decision to sell in

[45] Id at para 346.

[46] Id at para 298.

[47] Id.

[48] 107 of 1997.

[49] High Court judgment above n 23 at para 418.

[50] Id at para 268.

[51] Id at para 504.

2015 and decision not to resile in 2017,[52] and declared the Tafelberg property deed of sale void.[53]

[36] On costs, the Court ordered the Province and the City, jointly and severally, to pay the applicants' costs in the NU Trust application. It also ordered the Province to pay the applicants' costs in the National Minister's application.

Supreme Court of Appeal

[37] The High Court granted the Province and the City leave to appeal to the Supreme Court of Appeal on only some of the grounds advanced by those parties. On petition, the Supreme Court of Appeal granted the Province and the City leave to appeal on the remaining grounds. After the order of the High Court, the Day School resiled from the sale. Although the Day School cancelled the sale, all parties agreed that the issues regarding social housing and the role of the various spheres of government required clarification and that the appeal should proceed.

[38] The Supreme Court of Appeal considered several key issues regarding the Tafelberg property. On the GIAMA issue, the Court held that GIAMA's provisions must be interpreted harmoniously with section 3 of the WCLAA, which empowers the Province to dispose of State land. The Supreme Court of Appeal held that the absence of a C-AMP in 2010 should be considered in light of the fact that GIAMA only came into effect on 30 April 2009.[54] In addition, as indicated in the preamble, this legislation was only intended to introduce a uniform framework for the management of government immovable assets, and is not the empowering legislation in respect of the disposal and acquisition of immovable assets by provinces.[55] It is within this context

[52] Id at paras 7 and 8 of the order in Case No 7908/2017.

[53] Id at para 2 of the order in Case No 12327/2017.

[54] *Minister for Transport and Public Works, WC v Adonisi* [2024] ZASCA 47; [2024] 3 All SA 49 (SCA); 2024 (4) SA 499 (SCA); 2024 (11) BCLR 1411 (SCA) (SCA judgment) at para 61.

[55] Id.

that references in GIAMA to the inclusion of an immovable asset disposal strategy in the C-AMP should be viewed.[56]

[39] The Supreme Court of Appeal further held that the High Court had failed to identify a specific provision under GIAMA and the WCLAA obliging the Province to inquire into whether the property could be of use to another department, either within the Province or at national government level.[57] Further, the Supreme Court of Appeal held that the High Court did not identify any provision requiring the Province to consider the disposal of the property only in exceptional circumstances, and even then, in order to meet social needs.[58]

[40] The Supreme Court of Appeal further found that, on the facts, the TPW Department had complied with the requirements set out in section 5(f) of GIAMA and had correctly declared that the property was "surplus" to the DoE when the remedial school was vacated in 2010.[59] The impending event (the departure of the tenants at Wynyard Mansions), which was completed in 2014, would likely have been known to the TPW Department ahead of time. The Province would have been aware that Wynyard Mansions' tenants were in the process of leaving the property well before the last tenant departed. Therefore, the TPW Department complied with the requirements set out in section 5(f).[60]

[41] The Supreme Court of Appeal held that the suburb of Sea Point was not listed in the notices published by the National Department of Human Settlements on RZs.[61] While the City argued that "CBD and surrounds" was meant to be illustrative rather

[56] Id.

[57] Id at para 62.

[58] Id.

[59] Id at para 64.

[60] Id.

[61] Id at para 68.

than exhaustive,[62] the Court rejected both this interpretation and the notion that the notice was merely provisional or for public information.[63] The Court held that including Sea Point as falling within the Cape Town CBD RZ based on the wording of the notice lacked support, failing to consider the context and purpose of clearly defining the designated area.[64]

[42] The Supreme Court of Appeal held that the argument that the Province should have consulted the National Minister when interpreting the RZ notice was misplaced. The Province could interpret the notice and make decisions accordingly, and seeking legal advice (which it did) was reasonable.[65]

[43] While the National Minister argued for an obligation to consult before property disposals, during the hearing at the Supreme Court of Appeal, counsel clarified that the Minister's claim was not that consultation was required for *every* disposal. This, so the Court noted, left ambiguity about which disposals are purportedly subject to consultation.[66] The Supreme Court of Appeal held that section 4(1) of the WCLAA did not establish a duty to inform and consult with the national government.[67] The Court held that the WCLAA Regulations adequately provided for meaningful public participation through a comprehensive notice-and-comment process before final disposal.[68]

[44] The Supreme Court of Appeal emphasised that procedural fairness should be assessed flexibly on a case-by-case basis. In this context, interested parties had been afforded an opportunity to comment on a comprehensive proposal. This had included

[62] Id at para 71.

[63] Id at para 72.

[64] Id at paras 78-80.

[65] Id at para 81.

[66] Id at para 89.

[67] Id.

[68] Id at paras 98-102.

a description of the property intended to be disposed of; the identity of the prospective purchaser; the value of the land; its current and intended uses; the reasons why the offer has been accepted; and the proposed purchase price, amongst other details. Procedural fairness is balanced with the ability of the government to execute its responsibilities in relation to the land efficiently, transparently and cost effectively. The Court rejected the contention that the procedure was *ultra vires* (beyond the power) of the Province or inconsistent with the requirements of section 4 of PAJA.[69]

[45] In relation to the constitutional issue of spatial injustice, the Supreme Court of Appeal held that the principle of subsidiarity ought to have been applied to the current statutory regime governing the realisation of the rights in section 26 of the Constitution. Furthermore, the Court held that no obligation to provide social housing in a specific location can be inferred from that comprehensive statutory regime.[70]

[46] The Supreme Court of Appeal thus upheld the appeal. It set aside the orders of the High Court and replaced them with an order dismissing the applications, with no orders as to costs in the High Court or the Supreme Court of Appeal.[71]

In this Court

Issues

[47] This Court must determine the following issues:

(a) Whether this Court's jurisdiction is engaged;

(b) if jurisdiction is engaged, whether leave to appeal should be granted and the related question of mootness;

(c) if leave to appeal is granted, whether the Province and the City failed to fulfil their constitutional obligations to combat spatial apartheid through a lack of those policies or concrete implementation of these policies;

[69] Id at para 102.

[70] Id at para 50.

[71] Id at para 103.

(d) whether the Province was entitled in 2017 to sell the Tafelberg property in the absence of a C-AMP or a U-AMP prescribed in section 13 of GIAMA;

(e) whether the TPW Minister had a duty to consult the National Minister and the National Department of Human Settlements in terms of the IGRFA before disposing of the Tafelberg property;

(f) whether regulation 4(6) and the proviso in 4(1) of the WCLAA Regulations are constitutional; and

(g) the appropriate remedy.

Jurisdiction

[48] There is no doubt that these matters raise constitutional issues concerning the right to have access to adequate housing as outlined in section 26(1) of the Constitution; the State's duty to take reasonable measures to progressively achieve its realisation in section 26(2); and, relatedly, the State's obligations to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis as outlined in section 25(5). The matters concern issues relating to spatial injustice in urban areas and encompass various issues, including the State's obligations to provide access to well-located affordable housing, the disposal of State land, procedural fairness in such disposals and intergovernmental relations during these processes.

[49] The issue of spatial apartheid in Cape Town is central to this case. The constitutional rights of access to land and adequate housing must be considered in light of the racial and class-aligned patterns of segregated residential settlement and socio-economic exclusion in the landscape of urban areas in South Africa that still derive from apartheid.[72] The objective of the Constitution is, among others, to recognise the injustices of our past and to improve the quality of life of the citizens. In this sense,

[72] *Commando v City of Cape Town* [2024] ZACC 27; 2025 (3) SA 1 (CC); 2025 (3) BCLR 243 (CC) (*Commando*) at paras 74-5.

this matter reaches to the core of the Constitution's vision. Therefore, the jurisdiction of this Court is engaged.

Leave to appeal and mootness

[50] Despite the cancellation of the sale of the Tafelberg property, the applicants submit that the matter is not moot as key aspects remain live issues. They contend that the Province and the City deny any obligation to redress spatial injustice in central Cape Town. Moreover, the issues concerning GIAMA and the WCLAA remain matters of considerable public importance that will impact future disposals of State land. This position, they say, finds support in *Pridwin*,[73] where this Court granted leave despite mootness due to the important and complex legal questions at stake.

[51] During the hearing, counsel for the applicants submitted that although the Tafelberg sale had fallen through, the future use and possible disposal of the property are still contested issues. They submitted that addressing the issue of GIAMA would provide important prospective guidance, given the dearth of jurisprudence on that Act. They submit that the Supreme Court of Appeal erred in its reasoning and that this Court has a duty to correct it. Additionally, they submitted that the interpretation of sections 25 and 26 of the Constitution remains a live issue.

[52] The applicants submit that even though the Tafelberg sale did not proceed, a judgment of this Court would have significant practical effects by clarifying GIAMA's application to provincial disposals of property and the obligations of provincial governments to the national government where the latter's material interests are affected by such disposals. Moreover, this case represents the first judicial consideration of the proper interpretation of GIAMA. The different conclusions reached by the High Court and the Supreme Court of Appeal warrant this Court's attention.

[73] *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at paras 112 and 116.

[53] The City submits that the application lacks prospects of success and, as such, leave should not be granted. The City argues that the relief sought against it is academic and moot since: (a) the sale of the Tafelberg property has been cancelled; (b) the City was not involved in the decision to sell the Tafelberg land; (c) the City was willing to develop the Tafelberg land for social housing, but was unable to pay for such land at market-related prices; (d) there is no dispute that spatial apartheid requires redress, and the City continues to seek to address it within its available budget as required by the Spatial Planning and Land Use Management Act[74] (SPLUMA), the constitutionality of which is not under attack; and (e) the High Court accepted that it might have conflated the obligations of the City and the Province and that its order in that regard might well be set aside, as the Supreme Court of Appeal indeed did.

[54] It is trite that a matter will be moot when it no longer presents an existing or live controversy, and a court should avoid questions that are abstract, hypothetical, academic or advisory. However, notwithstanding mootness, a court may still hear a matter and grant leave to appeal where it is in the interests of justice to do so.[75] When determining whether it is in the interests of justice to hear a matter, a court must consider, among others, the following: whether the order will have a practical effect either on the parties or the general public, the nature and extent of that practical effect, the complexity and importance of the issue, the fullness of the arguments involved and whether the court is required to resolve the dispute(s) between different courts.[76]

[55] I agree with the applicants that the issue concerning the interpretation of GIAMA cannot be moot, as the matter before us transcends the sale of the Tafelberg property. The issue of the relevant duties prescribed by GIAMA does not exist in the abstract.

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[74] 16 of 2013.

[75] *Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exportation and Exploitation (SOC) Ltd* [2020] ZACC 5; 2020 (4) SA 409 (CC); 2020 (6) BCLR 748 (CC) at para 48.

[76] *Centre for Child Law v The Governing Body of Hoërskool Fochville* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) at para 11 and *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC) at para 11. See also *Agribee Beef Fund Ltd v Eastern Cape Rural Development Agency* [2023] ZACC 6; 2023 (5) BCLR 489 (CC); 2023 (6) SA 639 (CC) at para 24 and *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21 (CC); 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at para 32.

Rather, GIAMA standardises the disposal of all government immovable assets, which is not limited to land. There are relevant questions raised by the issue of the Tafelberg property's sale, which are in the interests of justice to answer, even with the concrete case of the sale having become moot due to the Day School resiling from it.

[56] These questions are crucial to government transparency and accountability, and this Court must clarify the scope of the duties prescribed by GIAMA in this context. This will ensure that due process is followed in a rational manner when disposing of State property and meeting service delivery objectives. It is clear from the issues for determination that these matters concern issues that will continue to arise in future sales, particularly in light of ongoing efforts to combat spatial apartheid and, more broadly, the State's duties in terms of sections 25(5) and 26 of the Constitution. Therefore, despite the inquiry on the lawfulness of the Tafelberg sale having become moot due to the cancellation of the sale, I will still decide the question of whether the Tafelberg sale was lawful and the extent of the Province and the City's obligations in relation to sections 25 and 26. Consequently, leave to appeal should be granted.

Principle of constitutional subsidiarity and reasonableness review

[57] I turn now to the merits. The Supreme Court of Appeal held that the applicants should have relied on the provisions of SPLUMA, the Housing Act and the SHA (collectively referred to as the housing legislation) and not directly on the Constitution. The Supreme Court of Appeal held that these statutory regimes, rather than the Constitution directly, should be the source of rights and obligations.

The parties' submissions

[58] The applicants submit that the Supreme Court of Appeal erred in its application of the principle of subsidiarity, as their claim is based on a "cluster of rights" rooted in sections 25(5) and 26 of the Constitution, which are not given effect to in legislation. Furthermore, the Supreme Court of Appeal failed, they say, to take into account the provisions of section 25(5), as it mischaracterised the claim as based solely on

section 26. In addition, the applicants submit that their challenge concerned the implementation of the Province's and the City's policies, and the principle of subsidiarity would not defeat such a challenge. The applicants further submit that the principle of subsidiarity does not arise as their case is about the respondents' failure to comply with their constitutional obligations to address spatial inequality.

[59] The City submits that the High Court failed to identify specific SPLUMA violations by the City. Instead, the order on non-compliance with the Housing Act, the SHA and sections 25(5) and 26 of the Constitution failed to specify which provisions were breached. According to the City, the High Court also failed to provide a basis for finding that the City violated the *Grootboom* reasonableness principle[77] and did not take into account that land is under the control of the national government, which makes it difficult for the City to access vacant land. The City claims that the housing legislation does not establish location-specific social housing rights, and the applicants cannot allege that there has been a violation of constitutional obligations without a supporting legal framework. This, the City submits, attempts to impose non-existent statutory obligations on the City. Furthermore, the City argues that the High Court overlooked its broader definition of the CBD development precinct, which includes areas with access to public transport.

[60] The City argues that the concept of constitutional subsidiarity has been considered and ventilated in this Court, particularly with reference to socio-economic rights jurisprudence. Thus, the Supreme Court of Appeal cannot be criticised for failing to repeat what is trite. The Supreme Court of Appeal took into account section 25(5) of the Constitution and acknowledged that it has been given effect to by SPLUMA. The applicants had the Housing Act, SHA and SPLUMA to rely on to hold the City accountable for the alleged failures or to seek relief. The applicants should have challenged the constitutionality of these statutes if, in their view, the statutes failed to properly address the plight facing them and other persons in their positions. The City

[77] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2000 (11) BCLR 1169 (CC); 2001 (1) SA 46 (CC) at para 41.

argues that the applicants instead impermissibly relied directly on sections 25(5) and 26 of the Constitution.

[61] The City disagrees with the contention that the principle of subsidiarity plays no role just because no legislation gives full effect to the rights conferred by section 25(5) of the Constitution. It submits that if legislation does not fully give effect to that right, then it must be challenged for its under-inclusivity before any direct reliance on the Constitution. This principle plays a significant role in ensuring that the separation of powers is maintained by the courts, and that the public either relies on legislation or challenges the statutes passed by duly elected representatives, who are supposed to give effect to the Constitution's promises.

[62] The City submits that the applicants' allegation regarding access to land under section 25(5) of the Constitution differs from the case that the City had to meet in the High Court, and that no unconstitutionality was pleaded in that Court. While constitutional complaints may be raised for the first time in this Court in exceptional cases, the City contends that the relief now sought in the applicants' practice note differs materially from the relief sought in the High Court and Supreme Court of Appeal. The City submits that, after years of litigation, this change constitutes an impermissible ambush, depriving the City and the Province of the opportunity to present relevant evidence. Therefore, the City submits that the applicants must stand or fall by their pleadings.

Analysis

[63] The relevant legislation explicitly acknowledges constitutional housing rights. The preamble of the Housing Act references section 26 of the Constitution, while establishing principles for housing development across government spheres.[78] The SHA similarly recognises section 26 rights while promoting sustainable social

[78] Preamble of the Housing Act.

housing.[79] SPLUMA acknowledges multiple constitutional rights, including sections 24, 25, 26 and 27(1)(b).

[64] The question whether the existing housing legislation precludes direct constitutional challenges centres on the principle of subsidiarity. As a broad legal concept—

> "[s]ubsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail."[80]

While there are varied applications of this concept within our legal system, "the most frequent invocation of subsidiarity has been to describe the principle that limits the way in which litigants may invoke the Constitution to secure enforcement of a right".[81] This principle is known as the principle of constitutional subsidiarity.

[65] This Court has held that "a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right".[82]

[66] The rights in the Bill of Rights are not all cast in the same terms, nor do they operate in the same manner. The distinctions emerge when one identifies their corresponding obligations and duty-bearers as well as the content of the duty to be discharged.[83] When these elements are examined across the Bill of Rights, a textual distinction emerges that may determine the reach of the principle of constitutional

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[79] Preamble of the SHA.

[80] *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31; 2015 (12) BCLR 1407 (CC); 2016 (1) SA 132 (CC) (*My Vote Counts*) at para 46.

[81] Id at para 50.

[82] Id at para 53 and *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (*Mazibuko*) at para 73.

[83] See *Mazibuko* id at para 46.

subsidiarity. For instance, in certain sections of the Bill of Rights, the Constitution prescribes that "national legislation must be enacted" to give effect to a particular right: sections 9(4), 25(9), 32(2) and 25(9).[84] These provisions mandate the enactment of legislation as an express minimum and identify the subject matter that the required legislation must address.[85] It is in relation to these rights that the principle of constitutional subsidiarity operates with its fullest force, because the Constitution itself designates national legislation as the primary vehicle through which the right is to be given effect.

[67] The textual composition of the socio-economic rights enshrined in sections 26 and 27 of the Constitution reveals a different structure. Subsection (1) of each section confers the substantive right and subsection (2) then defines the State's corresponding positive obligation[86] but it does so in terms that are materially distinct from the abovementioned category of rights. Subsection (2) provides that "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of the corresponding substantive right.

[68] Sections 26 and 27 do not prescribe legislation as the exclusive vehicle for the realisation of the rights they enshrine. Instead, they place a positive obligation on the State that is broader than the legislative function alone.[87] The conjunction "and other measures" signals that legislation is one component of a composite obligation that extends equally to policies, programmes, plans and other executive action. The content of rights in sections 26 and 27 therefore encompass the full range of measures - legislative and non-legislative – that the State must deploy in pursuit of their progressive enjoyment.

[84] *My Vote Counts* above n 80 at para 27.

[85] Id at para 28.

[86] *Mazibuko* above n 82 at para 48.

[87] *Grootboom* above n 77 at para 42.

[69] In *Mazibuko* this Court considered, but declined to determine, the possible application of the principle of constitutional subsidiarity in the context of section 27(2),[88] a provision effectively identical to section 26(2). This Court posed the question directly: does the subsidiarity principle apply where national legislation has been enacted to give effect to a socio-economic right, but the impugned conduct consists of measures taken by another sphere of government?[89] This Court then answered in terms that left the question open, saying only: "It may not".[90] The constitutional obligation in section 27(2), this Court observed, includes the taking of reasonable legislative "and other measures" to achieve the realisation of the right, and the existence of national legislation does not, on its own, immunise the non-legislative measures adopted by other spheres of government from constitutional scrutiny. However, this Court left open the question whether subsidiarity bars a litigant from challenging the other measures taken by government where legislation dealing with the subject matter has already been enacted. In doing so, this Court proceeded to interrogate the reasonableness of the City of Johannesburg's Free Basic Water Policy, notwithstanding that the litigants had abandoned their challenge to the national regulation that underpinned it.[91]

[70] As established in *Mazibuko*, courts will enforce the positive obligations imposed by socio-economic rights in at least the following ways: if the State takes no steps to realise the rights, the courts will require it to act; if the State's measures are unreasonable, the courts will require that they be reviewed to meet the constitutional standard; if a policy contains unreasonable limitations or exclusions, the court may order their removal; and the obligation of progressive realisation imposes a continuing duty on the State to review its policies.[92]

[88] *Mazibuko* above n 82 at para 74.

[89] Id.

[90] Id.

[91] Id at para 77.

[92] Id at para 67.

[71] In *Grootboom*, this Court held that measures must "establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means" and that these measures "must be capable of facilitating the realisation of the right".[93]

[72] Therefore, the principle of constitutional subsidiarity, while requiring litigants to rely primarily on national legislation rather than directly on constitutional provisions, does not eliminate the courts' duty to apply the reasonableness review established in *Grootboom* when examining matters relating to housing rights. This is especially so where the court has also been called upon to examine the State's conduct measured against the constitutional obligation in section 26. This should be done where the merits of each case and the interests of justice so demand. *Grootboom* establishes key elements against which reasonableness must be assessed, including: clear allocation of responsibilities across government spheres, coupled with the making available of appropriate financial and human resources; national government's responsibility for adequate laws and policies; flexible measures capable of progressively realising rights in a coherent way; reasonable implementation; and compatibility with human dignity, freedom and equality.[94]

[73] There is no merit in the NU Trust's submission that because their claim is rooted in section 25(5) and other rights, they are entitled to avoid reliance on the housing legislation. However, it is also correct that the principle of constitutional subsidiarity does not preclude this Court from embarking upon a reasonableness review. When a claim concerns the conduct of government to give effect to such a right, the principle of subsidiarity does not bar a court from assessing the impugned measures taken by the State against constitutional standards. Rather than a question of statutory compliance, the reasonableness test concerns a question of constitutional compliance.[95] I agree with

[93] *Grootboom* above n 77 at para 41.

[94] Id at paras 39-44.

[95] See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC) (*Thubelisha Homes*) at para 260. In the context of relocation to temporary

the applicants that in cases where the issue relates to an allegation of a failure to implement constitutional obligations, the principle of subsidiarity is not the only consideration.

[74] While the principle of constitutional subsidiarity requires primary reliance on legislation before directly invoking constitutional rights, this does not prevent courts from conducting a reasonableness review of the State's conduct. Scholarly criticism[96] has also cautioned that overreliance on subsidiarity without thorough reasonableness testing could discourage future socio-economic rights litigation.[97] Where comprehensive housing legislation exists, such as the SHA, SPLUMA and the Housing Act, these statutes serve as the primary vehicle for enforcing constitutional rights. However, courts must still evaluate whether the application of these laws meets constitutional standards of reasonableness tested against the content of the right.[98] It follows from the above analysis that section 26 does not treat legislation as the sole or self-sufficient means to which the right is realised. As such, one of the questions to be determined in this matter is whether the City and the Province have complied with their obligations to progressively realise the right to have access to adequate housing, particularly in the areas near or within the inner-city, in line with their obligations to redress spatial injustice.

[75] The answer ultimately lies in applying the reasonableness test to the contents of the right, which examines whether government actions and explanations adequately serve constitutional transformation goals while balancing competing public needs and

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accommodation, Ngcobo J, in his minority judgment described the arrangement of temporary accommodation as "the government . . . fulfilling its constitutional obligation to facilitate the right of access to adequate housing".

[96] Pieterse-Spies "Reasonableness, Subsidiarity and Service Delivery: A Case Discussion" (2011) 26 *Southern African Public Law* 329 at 336; Bilchitz "Is the Constitutional Court Wasting Away the Rights of the Poor? Nokotyana v Ekurhuleni Metropolitan Municipality" (2010) 127 *SALJ* 591 at 597; Currie "Judicious Avoidance" (1999) 15 *SAJHR* 138 at 146; and Wilson and Dugard "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" (2011) 22 *Stell LR* 664 at 670.

[97] *Pieterse-Spies* id at 337.

[98] See *Mazibuko* above n 82 at paras 161-2 and *Grootboom* above n 77 at para 41.

resource constraints. This requires careful case-by-case analysis rather than blanket rules for land-use prioritisation. I proceed to consider that question.

Did the City and the Province comply with their constitutional obligations?

[76] In order to determine whether the City and the Province complied with their constitutional obligations to progressively realise the right to have access to adequate housing in central Cape Town, this judgment proceeds as follows. First, I summarise the parties' submissions on compliance. Second, I set out the constitutional framework governing the right to have access to adequate housing, including the content of section 26 of the Constitution, the concepts of spatial justice and the doctrine of non-retrogression. Third, I assess, in turn, the conduct of the City and the Province against that framework. Fourth, I provide an overall analysis on whether the City and the Province have fulfilled their obligations under section 26 of the Constitution.

Parties' submissions on compliance

[77] The Supreme Court of Appeal held that the Province and the City have in place policies that are consistent with the principles of social housing under the relevant statutory framework. In addition, they were in the process of implementing social housing in their areas of jurisdiction through the pipeline programme.[99] To this extent, the Province was recognised by the national government in 2013 and 2015 as the leading province for the delivery of social housing. Furthermore, in 2016 and 2017, the Province wrote to the National Department of Public Works requesting the release by the national government of properties identified in various areas, including Bellville, Constantia and Somerset West, for social housing development. However, these letters went unanswered. Consequently, the Supreme Court of Appeal rejected the contention that the Province and the City, in general, have not met their constitutional obligations regarding social housing delivery.

[99] A pipeline programme is a plan of action or a strategy for housing delivery, and in that sense a government policy.

[78] On the issue of spatial justice, the NU Trust submit that the Province and the City failed to meet their constitutional obligations to address spatial apartheid in central Cape Town. This argument rests on several pillars: (a) the requirement for reasonable measures to redress spatial apartheid; (b) the duty to account for steps taken to realise socio-economic rights; (c) the obligation to properly resource and co-ordinate such measures across government spheres, taking into account the decision in *Blue Moonlight*[100] that budgetary constraints cannot excuse constitutional non-compliance; (d) the need for a co-ordinated plan for the use of State land in central Cape Town, particularly given its scarcity as a resource; and (e) the requirement for meaningful public participation in decisions affecting spatial justice, drawing from the constitutional values of responsiveness, accountability and openness.

[79] The NU Trust submit that the matter is primarily concerned with the manner in which the City and the Province have implemented their housing policies, plans and programmes. They submit that the Province's approach to addressing spatial injustice is that they require a long-term programme to be implemented incrementally over a long period. The NU Trust further argue that there is no comprehensive plan for State land in the city, and that achieving one would be difficult due to a substantial breakdown in the relationship between the Province and the national government, as evidenced by the Tafelberg property sale. According to the NU Trust, it is apparent from the decision to release the Helen Bowden and Woodstock Hospital sites in March 2017 that the respondents make ad hoc decisions without a coherent plan governing the pipeline.[101]

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[100] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC).

[101] The Helen Bowden site, part of the Somerset/Old Hospital Precinct, is located in Green Point near amenities, including a bus station. The Somerset Precinct was considered to be some of the most valuable land owned by the Province, located in the Cape Town CBD. The Woodstock Hospital site, also located in the Cape Town CBD, was another valuable site owned by the Province. Both properties went through years of uncertainty over the future of their development. The Helen Bowden site was initially proposed for rezoning and development in 1982. Following years of failed development proposals, the TPW Department contracted professionals to revisit the development proposals for the Precinct under the auspices of the Regeneration Programme in 2010. Under the Regeneration Programme, the Helen Bowden site was slated to be developed as a mixed-use development not including housing. Following an occupation of the Helen Bowden site, protesting the lack of affordable housing in Cape Town, on 22 March 2017 the Provincial Cabinet determined that the Helen Bowden site was available for affordable housing provision, releasing the Helen Bowden site for the provision of 302 social housing units. The Hospital site was variously designated for schools, an open tender to raise money for the TPW Department,

Lastly, this approach is contrary to the adoption of a co-ordinated, comprehensive programme needed to address spatial apartheid.

[80] Regarding the duty to account, the NU Trust rely on *Mazibuko* to argue that socio-economic rights litigation fosters participatory democracy by holding the government accountable between elections.[102] This creates a specific burden of proof: when called upon to account in a socio-economic rights challenge, the government agency bears the burden of proving the reasonableness of its policies and implementation steps.[103]

[81] The NU Trust submit that it is insufficient for the State to merely claim that it has not budgeted for something if it should have planned and budgeted for it in the fulfilment of its constitutional obligations. Moreover, it is not an 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.

[82] On the need for a co-ordinated comprehensive plan, the NU Trust argue that this is particularly crucial, given the finite nature of State land in central Cape Town. Their argument emphasises several key points, namely that: (a) the City cannot afford to pay market-related prices for property in central Cape Town, making existing State land the key to transformation; (b) while affordable housing projects can be implemented over time, the immediate priority is identifying and preserving suitable State land; and (c) the impasse between the Province and the City which arose after the Province decided to dispose of the Tafelberg property presents an "insuperable obstacle" to developing and implementing reasonable and effective programmes.

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occupation by Cape Nature, a conservation organisation, and for affordable housing. The Province previously made an offer to sell the Hospital site to the City for social housing, but as the offer was at the market price of R30 million, the City could not afford to buy it. Following the occupation of the Hospital site by affordable housing advocates in 2017, the Province agreed in 2018 to sell it to the City for social housing development for R5 100 000.

[102] *Mazibuko* above n 82 at para 160.

[103] Id at para 161.

[83] The NU Trust's contention is not that the City and the Province have not, *in general*, met their constitutional obligations regarding the delivery of social housing. The contention is that they have not met this obligation in so far as it concerns the duty to enable citizens to gain access to land on an equitable basis, through the provision of social and affordable housing in central Cape Town and the resultant redress of spatial injustice.

[84] The Province submits that the relief sought must be grounded in a constitutional or legislative right. There must be a determination of the content and scope of the right, which will indicate whether the State has reasonably given effect to the right. The rights at issue are those under sections 25(5) and 26(1)-(2) of the Constitution. Section 26(2) requires the State to formulate a comprehensive and workable housing programme, and that the measures aimed at realising this right must be reasonable, balanced and flexible and must address short-, medium- and long-term housing crises. The rights must be realised progressively, but adequate housing must be more accessible to a wider range of individuals over time.

[85] However, the Province submits that this is subject to the available resources of the State. While acknowledging its section 25(5) obligation to enable equitable land access, the Province argues that this does not extend to providing social housing in locations chosen by rights-holders. This is because neither section 25 nor section 26 dictates which measures the State must take in giving effect to the right. Instead, these provisions require the measures to be reasonable. The reasonableness inquiry focuses not on whether better alternatives exist, but on whether the chosen measures are reasonable, recognising that public expenditure decisions must be deferred to the responsible State organ, not the courts.

[86] The City accepts that the legacy of apartheid requires redress across Cape Town, but argues that the applicants wrongly insist that this can be achieved by prioritising one specific area. The High Court recognised the broad impact of spatial apartheid and housing gaps beyond the CBD. Citing the High Court and Supreme Court of Appeal

judgments in *Commando*,[104] the City contends that demanding social housing at Tafelberg would create undue preference and ignore greater Cape Town's housing needs.[105] The High Court's judgment specifically addressed the Cape Town CBD, which differs from the applicants' definition of "central Cape Town"; these terms cannot be interchanged.

[87] Furthermore, the City notes that both Courts made favourable factual findings which the applicants minimise, namely that: the City took reasonable steps to provide social housing within its means; no legislation requires geographic-specific social housing; the City faces land limitations despite requesting State land release; and the High Court's structural interdict binds only the City and the Province, despite requiring wider governmental compliance for effectiveness.

[88] Moreover, the City submits that it was not the applicants' case that housing policies excluded the CBD, as incorrectly concluded by the High Court. Neither *Grootboom* nor *Mazibuko* establishes a right to determine housing location or type, nor do they create constitutional obligations in specific areas without considering overall

[104] For this Court's judgment in *Commando*, see above n 72. The High Court judgment is reported as *Commando v Woodstock Hub (Pty) Ltd* [2021] ZAWCHC 179; [2021] 4 All SA 408 (WCC) (*Commando HC*) and the Supreme Court of Appeal's judgment is reported as *City of Cape Town v Commando* [2023] ZASCA 7; [2023] 2 All SA 23 (SCA); 2023 (4) SA 465 (SCA) (*Commando SCA*).

[105] In *Commando HC* id, the High Court determined that progressively providing access to emergency housing is a constitutional obligation of the State under section 26 of the Constitution. Although there is not a right to emergency housing in a particular location, the Court held that Cape Town's emergency housing programme and its implementation were unconstitutional with reference to evictees in Salt River and Woodstock being placed in housing far from their former homes and communities. Cape Town's emergency housing programme was found to be unreasonable and arbitrary. The High Court rejected the City's contention that its implementation of social housing in Salt River and Woodstock was a justification for not providing emergency housing in those areas. In *Commando SCA* id, the Supreme Court of Appeal stated that the High Court's order was incorrect because it offended the doctrine of separation of powers by being overbroad. The Supreme Court of Appeal held that a court cannot dictate to a city where a particular housing programme is to be implemented, and that the City's determination that Salt River and Woodstock were most suitable for social housing should be respected. Thus, Cape Town's emergency housing programme was found not to be unreasonable and arbitrary. This Court found that, though there is no right to emergency housing in a particular place, location must still be considered when providing emergency housing. Particularly given the context of apartheid-era evictions in inner-city Cape Town on the basis of race, the City's emergency housing programme and its implementation were found to be unreasonable. The provision of social housing in Salt River and Woodstock was found not to reduce Cape Town's constitutional obligations concerning emergency housing.

housing obligations. The High Court noted that spatial justice obligations stem from SPLUMA, making them a recent development.[106]

[89] SERI submits that the stance of the City and the Province against affordable housing in central Cape Town contradicts the constitutional principle of non-retrogression, the negative obligation in relation to sections 25(5) and 26(2) of the Constitution, and perpetuates spatial inequality. In this regard, it refers to this Court's *Commando* judgment, which declared a similar policy regarding emergency accommodation unconstitutional.[107] SERI asserts that selling public housing stock in central areas perpetuates apartheid spatial patterns. This, SERI contends, undermines the transformative goals of the Constitution by excluding poor and marginalised communities from well-located urban areas.

[90] A key concern raised by SERI is the enduring "inertia" of spatial apartheid that continues to influence housing policy-making and delivery. It argues that it remains easier and more cost-effective for the City to develop housing on the urban periphery rather than in centrally located areas with access to amenities and opportunities. SERI proposes two counter-forces to this inertia: the principle of non-retrogression, which restrains the government's ability to sell public housing stock without proper justification;[108] and procedural rights of participation and engagement, which ensure affected communities are meaningfully involved in decisions impacting their housing rights.

[91] Using the Tafelberg property sale as a focal point, SERI presents a framework for evaluating the disposal of public housing stock, grounded in both constitutional and international law principles. It submits that such disposals are retrogressive and must

[106] High Court judgment above n 23 paras 51-5.

[107] *Commando* above n 72 at paras 110-16.

[108] On non-retrogression, SERI cites *Djazia and Bellili v Spain*, UN Committee on Economic, Social and Cultural Rights (CESCR), Communication No 5/2015, 20 June 2017, UN Doc E/C.12/61/D/5/2015 at paras 15.5 and 17.5-17.6, where the CESCR addressed the sale of public housing stock, concluding that such disposal constitutes a retrogressive measure requiring substantial justification.

be justified through specific criteria, including meaningful public participation, which SERI claims is lacking in the regulatory framework, particularly under the WCLAA Regulations. SERI submits that housing rights must be interpreted in a way that advances the transformative goals of the Constitution, as required by section 39(2). This includes both negative and positive obligations on the State under sections 25(5) and 26(1)-(2), which require the progressive realisation of access to housing. It also draws on South Africa's international obligations under the United Nations International Covenant on Economic, Social and Cultural Rights[109] (ICESCR) and the African Charter on Human and Peoples' Rights[110] (African Charter), which reinforce the need for careful justification where public housing stock is sold.

[92] SERI outlines several factors that must be considered when assessing whether a retrogressive measure is justified, including the purpose of the proposed disposal and its reasonable justification, the examination of alternatives, the genuine participation by affected groups and the impact on spatial justice. It submits that the principles of non-retrogression and participation must work together to dismantle the legacy of spatial apartheid and promote inclusive urban development. It concludes that this Court's interpretation of these principles will significantly shape cities across the country, determining who has access to central urban areas and whether the Constitution's promise of equality is realised.

Constitutional framework governing the right to adequate housing

[93] It must be borne in mind that the State at the national, provincial and municipal levels is a custodian holding public land on behalf of the people. National, provincial and municipal governments are also public entities with constitutional and legislative obligations to promote equitable access to a city for all their residents. While the Constitution does not create an explicit right to have State land used for housing, State

[109] International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (ratified by South Africa on 12 January 2015). The ICESCR entered into force 3 January 1976.

[110] African Charter on Human and Peoples' Rights 27 June 1981 (ratified by South Africa on 9 July 1996). The African Charter entered into force on 21 October 1986.

decisions about well-located public land that ignore or perpetuate spatial apartheid may be found to be unconstitutional where they fail the reasonableness test.[111] The test requires a careful consideration of historical context,[112] location-significance[113] and whether alternative uses better serve transformation goals.[114] This is particularly true in cases involving land in historically significant areas, such as city centres, where the State must demonstrate that its land-use decisions actively work to dismantle, rather than preserve, spatial inequality.[115]

[94] It is evident that the State's constitutional obligations in this matter are anchored in the right to housing under section 26 of the Constitution.[116] Accordingly, any assessment of the reasonableness of the State's decisions regarding well-located public land must be informed by this right.

[95] Section 26(1)'s standard of adequacy is assessed through the consideration of the two aspects arising from its text.[117] The first is the meaning of "access to" adequate housing. This Court held in *Grootboom* that "access to" adequate housing requires creating conditions that progressively expand access to adequate housing for people across all economic levels of society.[118] The second aspect of section 26(1) is the meaning of "adequate" housing. At present, even though the Constitution does not define "adequate housing", and even though the courts have not interpreted the term to have a fixed meaning, security of tenure is internationally regarded as a key component

[111] As outlined in [75] above.

[112] *Grootboom* above n 77 at para 22.

[113] *Commando* above n 72 at para 71(j) and (l).

[114] Id at para 71(o)

[115] See *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45; 2022 (8) BCLR 985 (CC) (*Thubakgale*) at para 110 (judgment of Majiedt J).

[116] Id at paras 104-7.

[117] Section 26(1) provides: "Everyone has the right to have access to adequate housing".

[118] *Grootboom* above n 77 at para 35. In these contexts, sections 25(5) and 26(1) function in tandem, expressing the need to jointly expand access to land and access to adequate housing in order to overcome spatial inequality.

of the right to adequate housing.[119] *Grootboom* also established that the right of access to adequate housing entails "more than bricks and mortar".[120] Importantly, this includes access to—

> "available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, [and] there must be a dwelling."[121]

[96] Section 26(2) operationalises the right to housing by imposing the obligation upon the State to take reasonable legislative and other measures to ensure the progressive realisation of this right within the State's available resources. Instead of establishing a minimum threshold for the progressive realisation of the right to adequate housing, this Court has recognised that the needs and opportunities for fulfilling the right are unique in every case.[122] These needs and opportunities must be identified when assessing the extent of the State's obligations. Income, unemployment and the availability of land have been identified as influencing factors which should be considered during such an analysis.[123] Notably, this Court has recognised that differences between city and rural communities will also be instructive when assessing the needs and opportunities for the fulfilment of the right to adequate housing.[124]

[97] As this Court held in *Grootboom*:

> "[S]ection 26 is not the only provision relevant to a decision as to whether State action at any particular level of government is reasonable and consistent with the Constitution. The proposition that rights are interrelated and are all equally important is not merely

[119] See, for example, Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 4 The Right to Adequate Housing (1991) U.N Doc E/1992/23 at para 8(a) (CESCR General Comment 4).

[120] *Grootboom* above n 77 at para 35.

[121] Id.

[122] Id at para 32.

[123] Id.

[124] Id.

> a theoretical postulate. The concept has immense human and practical significance in a society founded on human dignity, equality and freedom. It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings. The Constitution will be worth infinitely less than its paper if the reasonableness of State action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. Section 26, read in the context of the Bill of Rights as a whole, must mean that the respondents have a right to reasonable action by the State in all circumstances and with particular regard to human dignity. In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [State] must be seen."[125]

[98] There are few settings in which South Africa's endeavour for constitutional transformation is more vital than spatial inequality and its relationship to the right to adequate housing. The elaborate system of the Group Areas Act, influx control and forced removals was designed to create and entrench spatial segregation. Townships were established on the peripheries of "white" towns, separated from economic opportunities and services.[126] As Majiedt J observed in *Thubakgale*, offers of housing in distant locations are "troublingly reminiscent of apartheid spatial planning, in terms of which black people were shunted away to places far from their workplaces, schools and medical facilities".[127] The constitutional project is inherently about reversing this spatial injustice. As the minority judgment stated in *Thubakgale*:

> "It follows then, that when this Court determines the content and scope of socio-economic rights, it must consider their primary purpose, which is to promote substantive equality and human dignity, and also to undo the racialised system of poverty inherited from apartheid. The right to adequate housing enshrined in section 26 is one such right, which must therefore serve a purpose that is both remedial and transformative. . . . Together, these rights function to overturn the many spatial injustices created under apartheid and colonialism, and perpetuated today. They would

[125] Id at para 83. See also *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC) (*Olivia Road*) at para 10.

[126] Muller and Viljoen *Property in Housing* (Juta & Co Ltd, Cape Town 2021) at 127-130.

[127] *Thubakgale* above n 115 at para 104.

> ring hollow – and could not achieve their central aims – if actions to fulfil housing and land rights did not include a consideration of spatial apartheid."[128]

[99] Without deliberate and sustained restorative State action, spatial inequality is likely to deepen rather than diminish over time. In urban areas, this inequality is visible and permeates numerous aspects of the daily lives of South Africans living there. If social and affordable housing is developed only on the urban periphery, those who depend on it will face significant structural barriers to accessing the city's economic opportunities, healthcare, education and concentration of cultural and political life. These considerations distil into questions of adequacy. Has the State implemented reasonable measures, within its available resources, to progressively realise the right to have access to adequate housing in a manner that meaningfully extends access across all economic groups within the city?

[100] Spatial justice theory and the concept of "the right to the city" were introduced into section 26 jurisprudence by *Thubakgale*[129] and *Commando*.[130] As enunciated in the minority judgment in *Thubakgale*:

> "The concept of the right to the city, first conceived by Lefebvre, is composed of claims to habitation (to live in the city), appropriation (to make use of the city) and participation (to help create the city), all of which are curtailed by spatial injustice. This is a useful lens through which the applicants' housing needs may be viewed."[131]

[101] The right to the city is a concept arising out of the intersection of a bundle of fundamental rights related to urban living. Most importantly, the concept shapes the right to adequate housing, moving it beyond merely access to shelter. It challenges traditional notions of urban development, calling for a transformative approach to spatial justice and a recognition of the lived experiences of marginalised communities.

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[128] Id at para 107.

[129] Id at para 105.

[130] *Commando* above n 72 at para 75.

[131] *Thubakgale* above n 115 at para 105.

[102] The city is a space of political engagement above all, and the right to the city entails a claim both to resist exclusion and displacement from urban centrality, and to participate, as inhabitants and as political forces, in the collective shaping of urban life.[132]

[103] An element that ought to be taken into consideration is location. It is a relevant factor, because the right to the city recognises that rights are usually realised or denied in particular geographical contexts. In the context of a city, a conception of reasonableness that is attentive to location requires measures capable of securing meaningful access to urban space and opportunity.

[104] The strategic use of public land may in many cases form an important part of the meaningful provision of affordable housing within the city, but it does not follow that reasonable State action is exhausted by that measure alone. Depending on the context, a range of policy instruments may be capable of meeting this standard, provided that they are directed towards securing affordable housing in well-located urban areas.

[105] Many fundamental rights in the Constitution, which inform the meaning of the right to adequate housing, are implicated. Given that the city is a space of political engagement and participation, the rights to freedom of expression, assembly, and association and other political rights are affected by the availability of opportunities for meaningful access to adequate housing within the city. If the legacy of apartheid relegates people to the periphery of the city based on economic circumstances, many South Africans will perpetually face structural barriers inhibiting their ability to access the city, consequently hindering their ability to participate in the collaborative democratic political process envisaged by our Constitution.

[132] Lefebvre *Writings on Cities* Trans:(translated and edited by Kofman and Lebas) (Blackwell Publishing, Oxford and Malden 1996) at 19-20 and 173-4.

[106] One's ability to take advantage of the city's economic opportunities also implicates the right to freedom of trade, occupation and profession. Cities are a direct result of the concentration of commerce. Where people live directly influences their ability to access this commerce and certain careers and professions. Spatial inequality has burdened many South Africans with tremendously lengthy commutes requiring hours of travel each day, often before dawn. In *Blue Moonlight*, this Court acknowledged that the location of a building is crucial to occupiers' income and that transportation costs would be unaffordable for them if they had to live elsewhere.[133] The city is the economic lifeline for many South Africans, and spatial inequality hinders transformation by placing constant, immense strain on their daily lives. Therefore, such economic rights are clearly woven into the concept of the right to the city, demonstrating the consequences of such spatial inequality, its pervasive nature and the consequences of insufficient access to adequate housing.

[107] Finally, the concept of habitation implicates rights such as the right to have access to housing, healthcare and education. Where people live influences their ability to access vital institutions and facilities that coalesce around urban centres. For instance, basic educational institutions are facilities essential to fundamental rights, yet they are geographically fixed. To enjoy these services, a person must be able to live within sufficient proximity to these institutions, and remedial action against spatial inequality is a direct intervention that contributes to the progressive realisation of these rights. In *Thubakgale*, the minority judgment stated explicitly:

> "For present purposes, the permanent accommodation to be provided by the Municipality must be more than 'four walls'. It must include ensuring continued access to schools, jobs, social networks and other resources which the applicants in this case enjoy where they currently stay, and which they will lose if displaced. This interpretation is in line with spatial justice and the right to the city, and therefore also

[133] *Blue Moonlight* above n 100 at para 6.

> in line with the remedial and transformative purposes of socio-economic rights and the Constitution more broadly."[134]

[108] Each of these features – habitation, appropriation and participation – helps define the meaning of the right to have access to adequate housing in the context of a city. Access to adequate housing sets in motion a ripple effect that implicates a penumbra of rights. This constellation of rights, captured by the concept of the right to the city, defines what access to adequate housing truly means in an urban context. Given the State's duty to progressively realise this right – and to remedy the spatial and social scars of apartheid – this assessment of adequacy is central to evaluating the extent of the State's obligation and whether the State has met the requirements of such obligation.

[109] Section 39(1)(b) of the Constitution requires that when courts interpret the Bill of Rights, they must consider international law. Where a principle of international law is binding on South Africa, it may be directly applicable to the interpretation of the implicated rights within the Constitution.[135] Once an international legal instrument is ratified under section 231(2) of the Constitution, the instrument becomes binding in South African law, and that instrument carries interpretive significance when interpreting rights in the Bill of Rights.[136]

[110] The right to adequate housing is an internationally recognised human right. In the Universal Declaration of Human Rights, the right to adequate housing is recognised in Article 25, which establishes the right to an adequate standard of living.[137] The right is further solidified in Article 11(1) of the ICESCR.[138] This Covenant obliges Member

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[134] *Thubakgale* above n 115 at para 110.

[135] *Grootboom* above n 77 at para 26 states:

> "The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable."

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

[137] Universal Declaration of Human Rights, GA Res 217 A, 10 December 1948.

[138] ICESCR above n 109.

States, such as South Africa, to take appropriate steps to recognise the right of everyone to enjoy the right to adequate housing through the right to an adequate standard of living. The Covenant further requires States to recognise the need to continuously improve living conditions to ensure the realisation of these rights.

[111] In 2015, South Africa ratified the ICESCR, binding itself to the mechanisms established therein for the interpretation and enforcement of the Covenant. The United Nations Economic and Social Council established the Committee on Economic, Social and Cultural Rights (CESCR), which develops the content of the obligations in the ICESCR through the drafting of General Comments. Although not directly binding, the CESCR's approach is accorded considerable weight in determining the meaning of a relevant right.[139] Particularly, the CESCR's General Comment 3[140] and General Comment 4[141] articulate States' obligations to progressively realise the right to housing, to adopt non-retrogressive measures and to consider locality within the right to housing.

[112] CESCR General Comment 4 outlines seven dimensions of adequacy: legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, cultural adequacy and *location*.[142] Specific to the dimension of location, CESCR General Comment 4 states:

> "Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor

[139] International Law Association International Human Rights Law and Practice Committee "Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies" (conference paper presented at the International Law Association Berlin Conference, 2004) at para 175. The International Court of Justice confirmed this approach in *Ahmadou Sadio Diallo* (*Republic of Guinea v Democratic Republic of Congo*), Merits, Judgment, 2010 ICJ Reports 639 at para 66.

[140] CESCR General Comment No 3 The Nature of States Parties' Obligations (1990) UN Doc E/1991/23 (CESCR General Comment 3) at para 1.

[141] CESCR General Comment 4 above n 119.

[142] Id at para 8(f).

> households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants."[143]

[113] Given section 39(1)(b) of the Constitution and the ratification of the ICESCR, these interpretations must be given serious attention, and they provide essential guidance for ascertaining the role of location in the content of the right to adequate housing under section 26 of the Constitution. In one example, the Supreme Court of Appeal in *Occupiers, Farm Randjesfontein* directly invoked General Comment 4, citing the location requirement in full.[144] The Court concluded that the City of Johannesburg had acted unreasonably when attempting to relocate a group of residents by ignoring locational factors that prevented the residents from earning a living at the temporary emergency accommodation which the City of Johannesburg sought to provide.[145]

[114] As mentioned above, section 26(1)'s dual structure comprises the elements of access and adequacy. The concept of the right to the city marries these two elements of section 26(1) by recognising that the adequacy of urban housing is inextricably linked to equitable access to housing situated in well-located areas, within sufficient proximity to the city. Only by bringing together the two components of "access to" and "adequacy" can the section 26 right to housing fulfil its transformative mandate to dismantle spatial inequities. Linking these two concepts recognises that adequacy is not merely concerned with the quality of one's shelter but also involves considerations of locality that connect one's housing to society at large. Location is not merely one factor among many to be weighed in a discretionary balancing exercise; it is a necessary consideration in any reasonableness assessment. As this Court held in *Commando*:

> "The issue of location is one that cannot be ignored when assessing reasonableness. In *Blue Moonlight*, the court dealt with the exclusion of persons evicted from private

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[143] Id.

[144] *Johannesburg City v Occupiers, Farm Randjesfontein No 405* [2025] ZASCA 47; [2025] 3 All SA 1 (SCA); 2025 (5) SA 86 (SCA) at para 31.

[145] Id at paras 32-3.

> property. It found that such exclusion was unconstitutional and instructed the municipality to provide alternative accommodation as near as possible to the area where the property was located. *Thubelisha Homes* further held that 'in deciding locality, the government must have regard to the relationship between the location of the residents and their places of employment'. The case made it unequivocally clear that it is not the responsibility of the municipality to make temporary emergency housing available at a specific location. However, *Blue Moonlight* established that alternative accommodation should be 'as near as possible to' the existing lives of the people affected."[146]

[115] A housing system that only considers providing social and affordable housing on the periphery of urban centres falls short of the obligation to progressively realise the right to adequate housing. Such a system of peripheral housing would deny people meaningful access to the city, leaving them with limited and inadequate options.

[116] In the urban context, the concept of the right to the city demonstrates that adequacy necessarily includes a consideration of the location of social and affordable housing within the city. Against this backdrop, the right to housing should be understood as a collective right over urban space within a larger struggle to transform antiquated, repressive social and economic relations and concentrated power structures.

Duty to adopt non-retrogressive measures

[117] This Court in *Mazibuko* established crucial principles regarding government accountability, requiring authorities to explain a policy's reasonableness and to demonstrate ongoing policy review.[147] In the Tafelberg context, the Province and the City are bound by the doctrine of non-retrogression. In *Commando*, this Court explained the requirements of the doctrine as follows:

> "[T]he doctrine of non-retrogression has two elements: the first requires asking whether there has been a retrogression from existing programmes or policies. In assessing the

[146] *Commando* above n 72 at para 90.

[147] *Mazibuko* above n 82 at paras 61, 67 and 71.

> first element, courts must have regard not only to detrimental changes in law, regulations or government policy but also consider substantively the concrete effects and impact of those changes on the ability of individuals to enjoy their rights. In assessing retrogression, courts must be particularly attentive to the experience of individuals—as attested to in court papers—affected by these changes in law, regulations or policy. The focus at this stage is on the detrimental impact of law, regulations or policy on the rights of an individual or community rather than on whether the state intended the retrogressive effect to occur."[148] (Footnotes omitted.)

[118] If a particular policy or decision results in a retrogressive impact, the State is required to justify that course of action and show that its decision-making aligns with constitutional transformation goals. This suggests that while the Constitution does not automatically require the prioritisation of State land for housing, courts may find the failure to consider such use unreasonable in specific cases, particularly where other explanations for land disposal appear inadequate when weighed against transformation imperatives.

[119] South Africa's international obligations reinforce this duty to avoid retrogressive measures in the realisation of the right to adequate housing. The ICESCR, the CESCR General Comments and the African Charter all affirm the doctrine of non-retrogression. The CESCR General Comment 3 recognises that the duty of progressive realisation—

> "imposes an obligation to move as expeditiously and effectively as possible towards [the full realisation of the rights recognised in the Covenant]. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[149]

[120] The African Commission on Human and Peoples' Rights also recognises the doctrine and has drawn on the approach of the CESCR. This doctrine is reflected in

[148] *Commando* above n 72 at para 154.

[149] CESCR General Comment 3 above n 140. Approved of in *Grootboom* above n 77 at para 45.

clause 20 of its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights[150] (AU Guidelines), headed "Presumption against Retrogressive Measures". This clause states that "[m]easures that reduce the enjoyment of economic, social and cultural rights by individuals or peoples are prima facie in violation of the African Charter" and that such measures "must be justified in the light of the totality of the rights provided for in the African Charter and in the context of the full use of the maximum available resources".

[121] In alignment with these principles and South Africa's international obligations, this Court has adopted the doctrine of non-retrogression.[151] This Court's temporary and emergency housing jurisprudence serves as a key reference point for understanding this retrogressive analysis. In *Commando*, this Court held that a failure to provide a temporary emergency housing programme within the Cape Town inner-city was a retrogressive measure which forced the most vulnerable out of the city.[152] The Court recognised that for people who live in circumstances of extreme vulnerability, location may be an important or essential component of adequate housing.[153] In *Blue Moonlight*, this Court affirmed that the City of Johannesburg had a duty to provide temporary housing "in a location as near as possible" to the property from which people were being displaced.[154]

[122] Thus, location is an essential consideration in assessing retrogressive measures. These cases recognise that, without this consideration, displaced communities will be denied their most basic needs as they will not be able to access the city's employment,

[150] Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted on 24 October 2011.

[151] *Grootboom* above n 77 at para 45.

[152] *Commando* above n 72 at para 103.

[153] Id.

[154] *Blue Moonlight* above n 100 at para 104.

healthcare and education for their children.[155] These considerations apply with equal force to the State's obligation to progressively realise the right to adequate housing.

Cape Town's spatial inequality context

[123] The assessment of the City and the Province's compliance with their constitutional obligations cannot be divorced from the spatial realities of Cape Town. It remains one of the most spatially divided and unequal cities in the world, with residential settlement patterns segregated along race and class lines.[156] Before turning to the specific housing policies, plans, programmes and projects of the City and the Province, it is therefore necessary to outline the historical and contemporary patterns of spatial inequality in Cape Town.

[124] The entrenched spatial inequality in South African cities and towns is based on the structural resistance to redistributing land, including public land, for purposes that would directly address the legacies of colonial and apartheid era planning. Cape Town continues to grapple with undoing the legacy of an "urban economic logic that systematically favoured white urban areas at the cost of black urban and peri-urban areas".[157]

[125] The concept of an inner-city and its immediate surrounds defies a conclusive and comprehensive definition because a city is often formed around a dominant economic centre (usually the CBD), with several secondary economic nodes (usually suburban hubs, for instance, as is the case in Cape Town, Claremont, Century City or Tyger Valley) and a wide range of residential neighbourhoods. Significant economic centres or business districts usually tend to accommodate many retail, educational, healthcare and social facilities, such as hospitals, libraries, training centres, hotels and

[155] *Commando* above n 72 at para 103.

[156] Turok et al (2021) above n 11 at 71.

[157] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17; 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) at para 122.

restaurants.[158] These suburbs and their inhabitants enjoy greater access to healthcare facilities, schools with amenities, access to transport infrastructure and, importantly, access to employment opportunities in the economy.[159]

[126] There is no fixed definition of the core or periphery of a city because they are relative concepts. A city and its outer limits are constantly shifting and expanding, and the population is constantly evolving to react to the ever-changing opportunity and development of city infrastructure, which makes a rigid demarcation unworkable. The relative importance of different economic centres can also change over time (some CBDs are in decline), and the outward growth of cities can alter the relative position of some neighbourhoods. Instead, factors to consider in determining adequate location when progressively realising the right under section 26(1) would include (a) physical proximity to the CBD and other significant economic centres; (b) the nature, efficiency and cost of the transport connections between the location and the nearest significant economic centres; and (c) the quality and affordability of the residential environment in terms of liveability, safety, public services, amenities and the housing stock.

[127] There is no one-size-fits-all configuration; in some cities, the inner-city is the neglected space from which capital has fled, while in others, such as Cape Town, it may function as an economic hub that attracts investment and attention. What is constant, however, is that the poor and working-class, predominantly black communities, are systematically kept at a distance from areas with access to amenities, services and employment opportunities.[160] The transformative objectives of our constitutional democracy demand redress through inclusion and equality of access. This means creating opportunities to access affordable housing in areas that are well-located in relation to significant economic centres. It is within this context that access to adequate housing, spatial justice and the disposal of State property should be understood.

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[158] Turok et al (2022) "Can Social Housing Help to Integrate Divided Cities?" (2022) 15 *Cambridge Journal of Regions, Economy and Society* 93 at 103 and 105.

[159] See id at 94 and 111 and see Turok et al (2021) above n 11 at 74.

[160] Turok et al (2022) above n 158 at 112.

[128] Although in Cape Town, more affluent black people have begun moving into predominantly white, affluent suburbs, these suburbs remain predominantly white. It is so that some of the traditionally black and poorer suburbs like Gugulethu and Salt River are closer to the CBD than Constantia and Tokai, which are predominantly white and affluent. However, the argument about the precise proximity of certain suburbs to the CBD is misplaced. This case is about the full participation in the city and its life, not narrowly about economic activity, and the city's CBD and Sea Point are the primary front-facing centres of the city, from which underprivileged groups remain excluded.

[129] Cape Town's stark spatial inequality provides crucial context. The High Court[161] recognised that this was not accidental but resulted from intentional historical dispossession.[162] The disparate allocation of municipal resources is evident in the marked difference between the degraded infrastructure and limited public amenities in Gugulethu and Langa compared to the well-maintained facilities and responsive service delivery in Sea Point and the surrounding affluent areas.

[130] To determine the question whether the City and the Province have been progressively realising the right to adequate and affordable social housing, particularly in the Cape Town CBD, in line with their obligations and undertakings to redress spatial injustice, it is necessary to consider their housing policies, plans and programmes. This involves identifying what they undertook to do, when those undertakings were made and whether there has been tangible progress. This requires an analysis of the work done by the City and the Province. In determining this issue, I consider the plans and programmes of the City and the Province when the litigation between the parties commenced in 2017, as reflected in the pleadings and in the parties' submissions.

[161] High Court judgment above n 23 at paras 96-8.

[162] The most glaring example in Cape Town is the removal of thousands of residents from District Six to barren, wind-swept areas on the Cape Flats. To this day, the barren area below the slopes of Devil's Peak that used to be District Six stands as a stark reminder of what spatial apartheid has wrought.

Assessment of City's compliance with their section 26 obligations

City's housing policies, plans and programmes

[131] The City has a number of plans and frameworks, namely, the Spatial Development Framework,[163] the Built Environment Performance Plan,[164] the Integrated Human Settlement Framework[165] and the Transit-Oriented Development Strategic Framework.[166]

[132] Regarding the Integrated Human Settlement Framework, the City says that the projected delivery is not meeting demand and has been hampered by resistance within communities, causing delays or forcing certain projects to be abandoned. Additionally, the slow release of suitable State land for housing development, the cost of acquiring privately owned land and the increasingly diverse housing needs of various communities have contributed to the challenges. The City also states that it has limited land available to build social housing in and around central Cape Town. It approached

[163] The Spatial Development Framework calls for the transformation of the apartheid city by using State-owned infill sites to reconfigure the distribution of land use. It aims to increase the access of low-income earners to affordable housing located in close proximity to the city's economic opportunities. The framework focuses on several key areas of the city's development, particularly managing growth and land use changes in the city and ensuring that urban growth occurs in a sustainable, integrated and equitable manner.

[164] The Built Environment Performance Plan articulates the City's investment rationale and institutional arrangements to address spatial and sectoral integration. As a planning tool, it is aimed towards aligning existing instruments such as public investment programmes and regulatory reforms, by focusing on measurable improvements to urban productivity, inclusivity and sustainability by restructuring the urban built environment through public investment programmes and regulatory reforms. Its aim is to reduce poverty and inequality and reflects the City's commitment to inner-city human settlement in the Cape Town CBD and other smaller inner cities.

[165] The Integrated Human Settlement Framework aims to deliver housing opportunities in line with a five-year Integrated Housing Plan. The plan is to provide equitable community facilities and services throughout the City and enhance housing delivery with the ultimate target of 652 000 housing opportunities. The framework outlines how housing delivery needs would be addressed until 2031 and aims to enhance existing living environments while creating new ones through measures such as upgrading informal settlements and developing new housing areas.

[166] The Transit-Oriented Development Strategic Framework was adopted in March 2016 and prescribes how new developments in the City should address spatial inequality. It seeks to leverage the City's assets to drive economic and social development and stimulate job creation. This framework aims to challenge the inherited spatial form and function of Cape Town, which remain grossly inefficient and costly due to spatial disparities and access constraints. This framework is said to be a primary informant of all the City's strategic built environment plans and a continuation of the work to build an inclusive city, as building integrated communities goes hand-in-hand with the spatial transformation of Cape Town and improved efficiencies. The framework further aims to revitalise many parts of the city to benefit lower income households, enabling them to be closer to economic opportunities and spend less of their income on transport. The aim is to see Cape Town become more connected and integrated, where residents have greater access to economic opportunities and affordable residential options.

the provincial and national governments to release land ideally suited for affordable housing, but its requests went unanswered.

[133] In response to criticism of its performance, the City submits that it is in the process of developing various sites in the city centre, Salt River and Woodstock for social housing, and the plans for such development are in place. Additionally, the City has released land in Woodstock for potential development, including the Woodstock Hospital and Helen Bowden sites. The City is developing a strategy for social housing in all economic nodes, including identifying suitable land and buildings within the CBDs that can be developed or converted into affordable rental accommodation. The proposed development of two erven along Pine Road and six erven along Dillon Lane is intended to yield 240 social housing units with State-subsidised rentals for households with a monthly income less than R15 000. The development of the Salt River Market is intended to provide 476 affordable housing opportunities, from social housing to GAP rental housing.

City's commitments and undertakings

[134] On 28 March 2017, the City announced its intention to declare the entire city of Cape Town an RZ to accelerate the provision of affordable housing opportunities in line with its commitment to address and reverse the spatial legacy of apartheid spatial planning.[167] The City indicated that this initiative would be implemented through its Spatial Development Framework, Integrated Human Settlement Framework and Built Environment Performance Plan processes. The City emphasised that it had always considered all centrally located areas to be RZs that are eligible for affordable housing.

[135] On 18 July 2017, the City's Mayoral Committee Member for Transport and Urban Development delivered a speech at the Affordable Housing Africa conference,

[167] Additional Restructuring Zones in terms of the Social Housing Policy, the Guidelines and Social Housing Act, 2008 (Act No 16 of 2008), GN 3902 *GG* 49325, 22 September 2023. As per this government notice, the expanded designations for Cape Town were only promulgated by the National Department of Human Settlements on 22 September 2023.

where he announced the City's plans to expedite the delivery of housing opportunities. This was described as the City's first step in creating affordable, well-located housing opportunities for its residents to reverse the spatial impacts of apartheid. The City estimated that 650 000 families earning less than R13 000 monthly would rely on it for housing assistance between 2017 and 2032.

[136] The City also highlighted its obligation to ensure that the inner-city and other CBDs are accessible and affordable to those who live on the periphery. This obligation stemmed from the commitment to make Cape Town an inclusive and liveable space where there is room for everyone and where people share equal access to opportunities regardless of race or income. The City had undertaken to leverage its property and land to achieve spatial transformation and committed itself to expedite new housing developments that are inclusive and to ensure that housing opportunities for lower-income households are situated on well-located land, close to places of employment.

[137] Further, the City had identified ten sites in the city centre, Salt River and Woodstock to be used for affordable housing opportunities and confirmed that three of these sites have been allocated to social housing institutions, with statutory land-use applications underway. The City also indicated that it was developing a strategy for providing social housing opportunities in all CBDs, including smaller inner cities such as Bellville, Parow, Khayelitsha, Claremont, Mitchell's Plain, Wynberg and Plumstead. Additionally, it was not only identifying suitable land but also buildings within the CBDs that could be developed or converted into affordable rental accommodation.

[138] The City stated that the proposed development of the Salt River site is only the first and that there are more transitional housing projects in the pipeline in other areas in Cape Town. Furthermore, the City indicated that it is conducting an audit of City-owned land in Goodwood and Bellville, and will confirm the locations once it establishes that the potential sites are suitable to include transitional housing.

[139] On 25 July 2017, the City's Mayoral Committee approved the City's first inner-city transitional or semi-permanent housing project for those who were displaced or evicted from their homes due to rapid development. The project was to be located in Salt River, less than five kilometres from the CBD. The estimated cost was R11.1 million to develop a facility with 42 rooms and 85 beds, as well as communal kitchens and bathrooms.

[140] On 13 September 2017, the City confirmed that 4 000 households would benefit from affordable housing developments on well-located City-owned land. Five City-owned sites would be available to the private sector for the development of affordable and social housing: Erf 1[...] P[...] Road in Salt River; the Woodstock Hospital Site; the Woodstock Hospital Park; Erf 1[...] N[...] M[...] Street in Woodstock; and Erf 5[...] C[...] Street in the inner-city. Additionally, two City-owned sites in the Woodstock area, Upper Coventry Road and Pine Road, as well as eight erven along Upper Canterbury Street in Gardens, would be available for development at a later stage.

City's completed housing projects

[141] The City says that during the period of 2010 to 2017, it provided and improved housing opportunities such as: (a) two large integrated housing development projects, which include subsidised, affordable and open-market rental housing units, in Pelican Park (3 300 units) and Scottsdene (2 200 units); (b) social housing projects in Steenberg, Brooklyn, Bothasig, Maitland and Scottsdene; (c) land for service delivery to informal areas such as Doornbach and Hangberg; (d) upgrading rental units (flats) in Connaught, Kewtown, Ottery, Hanover Park, Scottsville, Scottsdene, Woodlands, Uitsig and the Range; (e) Subsidy and People's Housing Process (PHP) housing opportunities in Happy Valley; (f) the Hague housing project in Delft; (g) subsidised housing in various locations around the city such as Wallacedene, Brown's Farm and Witsand; (h) upgrading informal settlements in areas such as Bardale, Fairdale and Du Noon; (i) social and rental housing projects in Masiphumelele; (j) the Khayelitsha institutional housing project; (k) GAP housing opportunities in Scottsdene and

Ilitha Park; (l) re-designating vacant residential erven in Delft to create more opportunities; (m) emergency housing projects at the OR Tambo Temporary Relocation Area (TRA), the Barney Molokwana section of Khayelitsha, the Masonwabe TRA in Gugulethu, the Shukushukuma TRA in Mfuleni, the Du Noon TRA, the Enkanini informal settlement in Khayelitsha, the Fisantekraal TRA, the Masiphumelele TRA, the Mshini Wam, the Sweet Home farm settlement, the False Bay Integrated Development Area (IDA), the Tambo Square IDA, the Agste Laan Valhalla Park and Ravensmead Park; (n) the Sir Lowry's Pass Village IDA for flood-affected households; (o) the Delft Symphony Way TRA and the IDA at Wolwerivier; (p) the Busasa (Mfuleni) IDA and the Belhar CBD social housing project; (q) the Block, Glenhaven (Bellville) for social housing units, GAP rental units and open-marker GAP ownership; (r) re-blocking of households in Kosovo (Gugulethu) and Community Residential Units in Manenberg, Langa Hanover Park, Heideveld and Marble Flats; (s) the Fisantekraal Garden Cities housing and the Fisantekraal TRA; (t) hostel transformation programmes in Langa; and (u) the provision of tenure certificates to people in Monwabisi Park as part of the incremental upgrade.

[142] The TRAs and IDAs exist to implement the Emergency Housing Programme in the National Housing Code. Because the City does not receive additional funding for emergency housing, its duty to provide emergency housing inevitably impacts negatively on its ability to implement other projects, including social housing.

Evaluation

[143] It must be borne in mind that the relief sought by the NU Trust relates to the question whether the City has developed any social or affordable housing projects in the central city, or near other economic nodes. The City's submissions refer extensively to its various programmes set out above. I agree with the applicants that no reliance can be placed on these programmes when assessing the conduct of the City.

[144] As at mid-2018, when the answering affidavits in the High Court were filed, no social or affordable housing projects had been implemented by the City in or near the

central city. This is despite their acceptance of the obligation to foster conditions that enable citizens to gain access to land on an equitable basis and thus progressively redress spatial injustice.

[145] The City states that its policies are not geographically specific. These completed projects do not meet the social and affordable housing needs claimed in this case, which aim to integrate low-income earners in the city and redress spatial injustice. This is despite the fact that most of the areas in which the developments listed by the City have been undertaken are less than 20 kilometres from the city centre. The completed projects are located in townships or on the peripheries of the city and do not fall within well-established areas. The physical distance alone is not the defining factor in spatial injustice. The lack of access to infrastructure, economic opportunities, social and cultural sites and transport may make those distances and differences much more difficult to overcome.

[146] It is worth noting here that the UN Special Rapporteur on the right to adequate housing's Guidelines for the Implementation of the Right to Adequate Housing (Guidelines) warn that upgrading schemes too often relocate residents to housing that is "inadequate, distant from their original homes, isolated from employment opportunities or community life and without access to adequate transportation".[168] The Guidelines' characterisation of such housing as "inadequate" is revealing. The substance of the inadequacy lies in not just distance but also in what it produces: isolation from employment opportunities, separation from community life and lack of access to adequate transportation.

[147] There is insufficient evidence of interventions, such as BNG housing or the implementation of rental regulation, that could address affordable housing demands within central Cape Town and nearby economic nodes. Most completed housing

[168] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, "Guidelines for the Implementation of the Right to Adequate Housing" UN Doc A/HRC/43/43 (26 December 2019) at Guideline 7 at para 40.

projects are located in township areas, some relatively close to the CBD, while others are situated further afield, near the city's international airport and beyond. Some of these townships include Gugulethu, Masiphumelele and Khayelitsha, where residents often face long daily commutes to the inner-city for work. This is despite there being no compelling justification for excluding areas such as Sea Point from consideration for social housing and affordable housing. As a well-located and amenity-rich suburb, it remains largely inaccessible to lower-income communities. The apparent reluctance to develop social housing there seems rooted in a desire to preserve the area's character for its affluent, predominantly white, residents. This pattern reflects broader spatial inequality in which housing developments perpetuate historic divisions.

[148] The City acknowledges the need to promote a mix of housing opportunities, differing in size, type and cost on well-located land with good access to economic opportunities, public transport and social amenities. The respondents all argue that land has either been released or that developments are in the pipeline. In my view, the NU Trust are correct that there is no satisfactory evidence that these plans will materialise in the near future. It would appear that many of the parcels of land that the respondents say were released have since been recalled or are no longer in the pipeline, and those that are in the pipeline have been stuck there for over a decade.[169]

[149] Cape Town's post-apartheid housing policy appears to have prioritised the provision of State-subsidised housing through the development of large-scale housing projects in peripheral areas where land usually costs significantly less than in areas close to economic nodes. It has also reproduced spatial inequality and social exclusion by creating poverty traps on the city's outskirts, far from economic opportunities and social amenities.

[150] In my view, it is not sufficient for the City to "wipe its hands" and claim that the scarcity and market value of land make the provision of housing difficult. The City

[169] This is the position as at mid-2018 when the answering affidavits were filed.

cannot rely on land scarcity when it has a positive constitutional duty to address that very scarcity. The scarcity of well-located land and its high market value are the direct legacies of apartheid spatial planning. A State that accepts market-determined land distribution as a given fails to engage its transformative constitutional obligations.

Assessment of the Province's compliance with its section 26 obligations

The Province's housing policies, plans and programmes

[151] The Province identified various programmes, namely, the Individual Housing Subsidy Programme,[170] the Emergency Housing Programme,[171] the Upgrading of Informal Settlements Programme,[172] the Community Residential Units Programme,[173] the Finance Linked Subsidy Programme,[174] the Provincial Spatial Design Framework[175]

[170] The Individual Housing Subsidy Programme aims to provide State assistance to qualifying individuals in acquiring either a house or a serviced stand through a credit-linked subsidy or entirely from the subsidy amount if they cannot afford a mortgage loan. To qualify for an individual housing subsidy, the applicant must not earn more than R3 500 monthly, not have previously owned fixed residential property and not have benefited from a State-assisted housing measure.

[171] The Emergency Housing Programme aims to address the needs of households that, due to reasons beyond their control (such as shelter destruction or damage, eviction, etc.), find themselves in an emergency housing situation. The objective is to provide temporary relief to people in urban and rural areas facing such emergencies.

[172] The Upgrading of Informal Settlements Programme aims to facilitate the upgrading of informal settlements in a structured manner. It is intended to benefit households and individuals living in informal settlements who qualify for assistance according to the applicable criteria. The project seeks, among other things, to maximise the impact of the programme by reaching as many households as possible to achieve the national goal of upgrading all informal settlements; primarily focusing on settlements located in areas posing a threat to health and safety; and promoting the objective of spatial restructuring and integration.

[173] The Community Residential Units Programme replaced the national Hostels Redevelopment Programme and provides rental accommodation to low-income households. The programme targets (a) public hostels that are owned by the Province and municipalities; (b) grey hostels, which are hostels that, for historical reasons, have both a public and private ownership component; (c) public housing stock that forms part of the Enhanced Extended Discount Benefit Scheme; (d) post-1994, newly-developed public residential accommodation owned by the Province and municipalities; and (e) existing dysfunctional, abandoned and/or distressed buildings in inner-city or township areas that have been taken over by a municipality and funded from housing funds.

[174] The Finance Linked Subsidy Programme aims to provide first-time home-ownership opportunities for South African citizens earning between R3 501 and R15 000 per month. The programme's objective is to reduce the initial mortgage loan amount so that monthly loan repayments are affordable for qualifying individuals over the loan term.

[175] The Provincial Spatial Design Framework addresses the relationship between planning for future land use and affordable housing strategies, with one of its guiding principles being that past spatial and other development imbalances should be redressed through improved access to and use of land by disadvantaged communities.

and the Cape Town Central City Regeneration Programme Strategic Framework (Regeneration Programme).[176]

[152] Regarding the Provincial Spatial Design Framework, the Province admits that "[e]xclusionary land markets militate against spatial integration of socio-economic groups and limit affordable housing to well-located land. At the same time, government sits on well-located under-utilised land buildings."[177]

Province's completed housing projects

[153] Regarding its duty to progressively realise the right to have access to adequate housing, the Province submits the following: by 5 May 2017, the Province had developed 1 485 social housing units, of which 1 019 were in the inner-suburb areas close to major public transport nodes and within very easy access to important socio-economic nodes of Cape Town. By 14 May 2018, 2 168 social housing units had been completed in the Cape metropolitan area at a cost of R686 489 804. These units were located in areas such as Brooklyn, Bothasig, Steenberg, Belhar Gardens and Scottsdene, and the total number of social housing units planned for the Cape metropolitan area was 11 007, with an additional 3 844 units under discussion. The Province has developed the Belhar CBD with a mixed-use, high-density residential development, which provides for 4 190 units. This development is partly State-funded, 629 social housing units have been completed and about 1 000 private rental units are under construction for the lower GAP market, that is, typically people earning between R3 500 and R15 000 per month.

[176] The Cape Town Central City Regeneration Programme Strategic Framework aims to unlock Cape Town's potential to become a city that provides for the needs of all citizens. In line with this framework, the Province conducts investigations into the feasibility of social housing on certain land within the city. Moreover, one of the objectives of this programme is to develop a percentage of the residential stock in identified precincts for affordable housing, to ensure that poorer households are incorporated into the city.

[177] SCA judgment above n 54 at para 45.

Incomplete projects planned to be implemented in or near the inner-city

[154] The Province states that there were five completed social housing projects in Cape Town that provided 2 168 units. In addition, there was social housing in the pipeline for 10 810 units in Cape Town at a cost of R1.2 billion and 14 008 units outside Cape Town at a cost of R1.57 billion. The social housing pipeline in Cape Town consists of 42 projects, nine of which are in central Cape Town.

[155] The Province says that, initially, it prioritised the urgent housing needs of the poorest members of the community and, as a result, focused on three strategic priorities, namely upgraded informal settlements, increased affordable housing and free or subsidised housing for the most in need. This approach, which was aimed at the creation of the greatest number of housing opportunities for the most destitute, tends to result in developments on the urban periphery, either because that is where existing informal settlements are located or because land is available there at modest cost. According to the Province, this approach – providing as many dwellings as possible and as soon as possible for those most in need – was in accordance with the policy of the national government and was followed in other provinces as well.

[156] Moreover, the Province states that it was recognised by the national government in 2013 and 2015 as the leading province for the delivery of social housing. It spends its entire budget and consistently receives clean audits. By 29 June 2010 (ten months after the enactment of the SHA), the Province had submitted five proposed RZs in the Cape metropolitan area for designation by the Minister. This included the Cape Town CBD RZ.

[157] Additionally, by May 2018, the Province had resolved that 20% of the residential units to be developed on a 10.5 hectare precinct in central Cape Town (as defined by the High Court), known as the Somerset Precinct and also sometimes called the Helen Bowden site, would be used for social housing, despite the delay caused by the unlawful occupation of the site. The Province had granted approval for the disposal of 12 erven at a site in Woodstock, also in central Cape Town (as defined by the

High Court), to the City for social rental housing purposes at a price of R5.1 million, which was below the then-market value of R9 million. Ownership of the properties was in the process of being transferred.

Evaluation

[158] There is no rationale for the fact that the Province has not provided affordable housing in inner-city areas, such as Sea Point, or elsewhere near economic nodes, save for their submission that housing projects are in the pipeline to be implemented in due course.

[159] Notwithstanding the designation of sites for development, no substantial progress has been made in terms of concrete development plans, budget allocations, regulatory approvals or implementation frameworks. Furthermore, most of the projects have been in the pipeline programme for many years, without coherent and comprehensive plans for their implementation, and not a single housing programme has been completed in the inner-city.

[160] While I appreciate the Province's focus on building, upgrading and providing housing for the most vulnerable *on the periphery of the city*, this does not entail compliance with the duty that stems from section 25(5) of the Constitution, nor does it exonerate the Province from complying with such a duty. The obligation to provide access to adequate housing on an equitable basis includes the provision of well-located social or affordable housing that enables qualifying citizens to obtain such access. It is not a matter of dictating how the budget is spent, but of encouraging or ensuring that no obligation takes priority over the others.

[161] There is, of course, some leeway in how best to balance the obligations, particularly on a constrained budget, but the Province cannot choose to fulfil only one part of the obligation and effectively neglect or make no attempt at the other; it is a balancing act that must be undertaken. If there are budgetary constraints, the Province

should consider appropriate steps to address this issue, such as applying to the National Minister for a budget allocation.

[162] I am also aware of the multiple demands placed on State organs regarding housing, including the provision of accommodation on the outskirts of cities for the most vulnerable and destitute. Spatial injustice is just one aspect of this issue. However, the Province's explanation for not addressing spatial injustice has no merit. The Province may not selectively ignore its duty to combat spatial injustice by arguing that it provides housing for the most in need on the outskirts. In my view, some of the resources which the respondents have devoted to affordable housing outside of the CBD should have been redirected to affordable housing in the CBD and Sea Point.

[163] I agree with the applicants that the Province's failures, and indeed the City's, are not just related to the availability of resources or budget allocation but also to a lack of concrete planning to combat spatial injustice. As much as allocating housing on the outskirts may mean more people have access to a house, one cannot disregard location as a factor, as it is part of the "progressive realisation" test for adequate housing. This is particularly true in a city like Cape Town, where an organic integration is nearly impossible due to its historical and continuing spatial segregation along racial and class lines.

[164] In the result, the stance of the Province that it is more cost-effective to develop housing on the urban periphery rather than in centrally-located areas perpetuates spatial inequality.

Overall conclusion on whether the City and the Province have complied with their constitutional obligation

[165] Even though the City and the Province have completed numerous housing projects, most of them are not in the Cape Town CBD or its immediate surrounds. In

this regard, there are only two completed developments located in the "grey" area forming the main part of the CBD's immediate surrounds: Maitland and Brooklyn.[178]

[166] The approach taken by the respondents further highlights contemporary drivers of land and spatial inequality in Cape Town, namely, the city's acute housing affordability crisis and the pace and location of State-subsidised housing delivery. With regard to the affordability crisis, the high rental and property prices have excluded most families, especially impoverished people and low-income earners, and disproportionately affected black households. The majority of the people who come to the city for employment come from disadvantaged socio-economic backgrounds and need affordable or social housing closer to their workplaces, which are in the inner-city. There is a need for access to adequately located housing on an equitable basis to make ends meet and avoid commuting from afar every day to get to work.

[167] As detailed above, the City and the Province have identified a suite of policy measures and planning instruments to demonstrate compliance. These measures do not amount to reasonable compliance with their constitutional obligations, specifically in relation to the need for well-located social and affordable housing in central Cape Town. There is no doubt that the City and the Province have been progressively realising the right to housing in urban areas, but not in the CBD or close to economic nodes of Cape Town. The developments are not in well-established suburbs, albeit some may be close to the CBD. However, the right to adequate housing, as articulated in section 26 of the Constitution, entails that the adequacy of any housing provision includes not just the provision of shelter, but also consideration of its adequate location; that is, whether housing is situated in areas that are well-located with respect to urban opportunity, employment, services and social amenities. The provision of housing on the urban periphery, while a step toward fulfilling the right to have access to adequate housing, cannot be regarded as adequate if it excludes people from the social and economic fabric of the city centre.

[178] I say "grey area" because there is a definitional question as to precisely what areas surrounding the CBD can still be regarded as part of the inner-city.

[168] While there are multiple policies and pipeline projects on paper, the vast majority of the projects remain confined to the urban periphery, perpetuating long, expensive commutes and failing to break the pattern of exclusion from well-located, opportunity-rich areas.

[169] In the result, both the City and the Province have failed to comply with their obligation to realise the right to have access to adequate housing, which includes, amongst others, suitably located and affordable housing. In the premises, both have failed to comply with their obligations to implement and complete affordable housing projects in the CBD, or otherwise near economic nodes.

Tafelberg sale

[170] I accept that the City intended to purchase and develop the Tafelberg property for affordable or social housing, but could not obtain the support of the Province or purchase it at market-related prices. Additionally, the decision to sell the Tafelberg property was made by the Province, notwithstanding the City's desire for an alternative use. This case, however, and as mentioned earlier, is no longer solely about the respondents' positions regarding the cancelled sale of the Tafelberg property, but rather about the inner-city generally and what the City and the Province have respectively done or not done to redress spatial injustice. We are not assessing compliance with such a duty only in so far as the Tafelberg property is concerned. In so far as the cancelled disposal of the Tafelberg property is concerned, I agree that there was no case to which the City had to answer, as it had nothing to do with the disposal. The issue is whether the Province complied with the legislative requirements when it decided to sell the Tafelberg property.

Supreme Court of Appeal's findings

[171] The Supreme Court of Appeal held that the absence of a C-AMP in 2010 should be considered in light of the fact that GIAMA only came into effect on 30 April 2009.[179] In addition, as indicated in the preamble, this legislation is intended solely to introduce a uniform framework for the management of government immovable assets and does not constitute empowering legislation with respect to the disposal and acquisition of immovable assets by provinces. It is within this context that the Supreme Court of Appeal held that references in the Act to the inclusion of an immovable asset disposal strategy in management plans should be viewed.[180]

[172] The Supreme Court of Appeal further held that the High Court failed to identify a specific provision in either GIAMA or the WCLAA requiring the Province to inquire into whether the property could be used by another department, either within the Province or at the national government level.[181] Further, the Supreme Court of Appeal held that the High Court did not identify any provision requiring the Province to consider the disposal of the property, except in exceptional circumstances, and even then, in order to meet social needs.[182] The Court further found that, on the facts, the TPW Department had complied with the requirements set out in section 5(f) of GIAMA and correctly declared that the property was surplus to the DoE when the remedial school was vacated in 2010.[183]

Parties' submissions

[173] The NU Trust submit that the Supreme Court of Appeal erred in its conclusion that the Province was implementing GIAMA's provisions incrementally and that the WCLAA is the only source of the Province's power to dispose of provincial immovable property. The NU Trust also challenge the High Court's conclusion that there was no

[179] SCA judgment above n 54 at para 61.

[180] Id.

[181] Id at para 62.

[182] Id.

[183] Id at para 64.

requirement for the Province to inquire whether the property could be used at the national government level and that the Tafelberg property became surplus when the remedial school vacated it in 2010. They contend that the Supreme Court of Appeal misinterpreted the provisions of GIAMA, in particular the roles of the U-AMP and the C-AMP.

[174] On asset management plans, the NU Trust argue that GIAMA's requirements are mandatory, not incremental. They submit that a contextually sensitive and purposive reading of GIAMA requires a two-step process when determining whether a property becomes "surplus". This process entails that (a) the user must decide whether the property supports service delivery objectives to an efficient level and (b) the custodian must conduct a rigorous inquiry into whether the property can be used by another department for social development purposes. According to the NU Trust, this interpretation defeats the Province's claim that the Tafelberg property became surplus "by operation of law" in June 2010. They argue that the Province failed to explain why the property was not included or prioritised in the C-AMP, particularly given the Regeneration Programme embarked upon in 2010.

[175] The National Minister argues that the Supreme Court of Appeal misinterpreted GIAMA by failing to adopt a purposive and contextual approach to statutory interpretation. The National Minister argues that the Court's treatment of the WCLAA as the sole operative statute governing the disposal overlooks section 3(1) of the WCLAA, which explicitly subjects disposals to "any other law". According to the National Minister, the Supreme Court of Appeal's approach undermines the legislative intent behind GIAMA.

[176] The National Minister emphasises that GIAMA provides a uniform framework for managing immovable assets across both national and provincial departments. She submits that central to GIAMA's regulatory framework is the mandatory requirement for two distinct types of asset management plans: C-AMPs prepared by custodian departments and U-AMPs prepared by user departments, both of which must align with

GIAMA's objectives and be submitted to the relevant treasury for oversight. The Minister submits that the Province failed to comply with these requirements at the time of the disposal decision, and this failure is significant given the statutory requirement to consider whether the property could be utilised by other users for social development initiatives.

[177] The National Minister submits that the Supreme Court of Appeal misunderstood the constitutional and statutory obligations regarding intergovernmental relations as outlined in section 41(1)(h) of the Constitution. This provision requires all spheres of government to "co-operate with one another in mutual trust and good faith" and specifically mandates consultation on matters of common interest; this is reinforced in the IGFRA. The Minister submits that the failure of the Province to consult with the national government rendered the decision unconstitutional and unlawful.

[178] The Province submits that the finding of the Supreme Court of Appeal, to the effect that the WCLAA is the source of disposal power rather than GIAMA, focused solely on facts. The Province submits that the applicants mischaracterised their claim. The Province did not contend that the WCLAA takes precedence over GIAMA, nor that the power of the Province to dispose of property is sourced in the WCLAA and that the Province is thus not required to comply with GIAMA.

[179] The Province's case is that, as set out in the preamble of GIAMA, the Act is principally intended to provide a uniform framework for the management of immovable assets at the department level in both the provincial and national spheres of government. It states that the powers of the spheres of government to dispose of immovable property are conferred by the Constitution and other governing legislation, such as the WCLAA. Therefore, because the acquisition and disposal of immovable property are reasonably necessary for the effective exercise of the Province's constitutional obligations and powers, the power to dispose vests in the provincial sphere of government, and is not usually expected to be governed by national legislation.

[180] The Province further contends that the WCLAA commenced on 27 March 1998, before the enactment of GIAMA on 22 November 2007. Thus, from the outset, the WCLAA regulated the acquisition and disposal of the Tafelberg property.

[181] Furthermore, the Province submits that GIAMA is intended to introduce a uniform framework to manage assets across the provincial and national spheres, requiring that user and custodian departments be standardised. This standardisation is necessary to facilitate budgetary processes. They aver that the Public Finance Management Act[184] is the legislation that governs a uniform accounting system for the management of assets, devolving accountability to user departments to ensure that all costs related to immovable assets are borne by user departments. Therefore, a uniform management framework is required to ensure consistent government-wide immovable asset management, which would then inform the budget allocation process.

[182] Therefore, the Province submits that GIAMA does not purport to replace, nor detract from, a provincial government's constitutional powers of disposal. Instead, it provides for mechanisms aimed at ensuring that disposals are made once they have been carefully considered by the custodian and can achieve the best possible value for the provincial government.

[183] The Province acknowledges that section 5(1)(f) of GIAMA is intended to create a mechanism, internal to government, to ensure that custodians give careful consideration to how an asset may be used internally to achieve the objectives described in subparagraphs (ii) and (iii). However, it submits that it is the WCLAA that confers the power to dispose and dictates the purposes for which property may be disposed. Therefore, the provisions of GIAMA should be understood within the context of the Constitution and the WCLAA. Consequently, the Province is authorised by the Constitution and the WCLAA to dispose of immovable property, regardless of whether or not it is defined as "surplus" for purposes of GIAMA.

[184] 1 of 1999.

[184] The Province further submits that neither of the applicants were able to identify which provision makes the adoption of U-AMPs or C-AMPs mandatory to the exercise of power by the national or provincial governments to dispose of their immovable property and, had that been the case, it would have been stated in unambiguous terms. Furthermore, if it were the case that these asset management plans are required before disposals could be made, it would mean that no disposals could be made by national or provincial governments until the plans are compiled and approved by the relevant treasury, a lengthy process. This would be so even if a disposal were necessary to vindicate a constitutional right, such as access to adequate housing. This interpretation would be intrusive, cause an imbalance between the parties and fail to fit into the constitutional and relevant statutory framework.

Analysis

[185] As outlined above, it is still in the interests of justice to determine the relevant issues, despite the mootness of the lawfulness of the Tafelberg disposal. These issues are the following. What is the meaning of "surplus" land under GIAMA? What are the duties of the user and custodian of State land, and at what stage may the property be disposed of in terms of GIAMA? Does the disposal of provincial State land necessitate compliance with both GIAMA and the WCLAA? Is the Province obliged to consult the National Minister in terms of the IGRFA? I proceed to consider these questions.

Interpretation of "surplus" land under GIAMA

[186] GIAMA establishes a standardised framework for managing State immovable assets to align them with service delivery objectives and promote efficient governance. It applies to national and provincial government departments, focusing on accountability, cost-optimisation and socio-economic priorities. There is a mandatory two-step process that must be conducted before classifying land as "surplus" for disposal. Surplus land "means that the immovable asset no longer supports the service delivery objectives of a user". The first stage is at the instance of the *user*, and the

second is at the instance of the *custodian* department *for disposal*. A "user" is defined in section 1 of GIAMA as "a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy". A "custodian" is defined as a national or provincial department under section 4 of GIAMA.

[187] In this matter, the *custodian* of the Tafelberg property was the provincial TPW Department as provided for in section 1 of GIAMA. Meanwhile, the *users* of the property were the DoE, which used the school, and the DHS, which used the Wynyard Mansions until the last tenant was evicted in May 2014.[185]

[188] The Province labelled the property as surplus when the remedial school vacated it in 2010. However, it overlooked the fact that the DHS was also a user of the land until the last tenant of the Wynyard Mansions moved out. The Province also ignored the fact that from 2011, the DHS initiated an investigation into the feasibility of social housing on certain land within the city, including the Tafelberg property, in line with the Regeneration Programme and the Development Process, adopted by the Province in September and October 2010, respectively.

[189] In terms of section 5(1)(a) of GIAMA, the character of land as "surplus" depends on whether the current user makes use of the immovable asset in a manner which *efficiently* fulfils service delivery objectives. The user must demonstrate an intention to make efficient use of the immovable asset in a manner that meets service delivery objectives. If such use or the mere intention of it is shown, the property would not constitute "surplus" land. This is because the immovable asset would continue to support the service delivery objectives of the user. Even if the property is "surplus" to the needs of the current user, that does not mean that the land is "surplus" *for purposes of disposal*.

[185] SCA judgment above n 54 at para 4.

[190] The custodian takes control of the asset once the land is classified as "surplus" land for the current user. Sections 5(1)(f) and 13(3)(a) of GIAMA prescribe that the custodian department must then consider whether *other users* can use the asset before taking a decision to dispose of the asset. The custodian department must also consider the State's social development initiatives and socio-economic objectives before making a decision to dispose of the immovable asset. In terms of section 7, the custodian is obliged to take care of the asset and manage it according to the C-AMP.

Must there be compliance with both GIAMA and the WCLAA?

[191] The question whether provincial governments may dispose their property solely in terms of their own provincial legislation or are also required to comply with relevant national legislation is another issue that must be decided by this Court.

[192] In order to determine this issue, a proper interpretation of the extent to which GIAMA regulates the disposal of provincial property, as well as the proper interpretation of the WCLAA and the extent to which it may be subject to other legislation, is required. It is trite that 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.[186] The role that each of these components plays is modulated by constitutional values, in particular section 39(2) of the Constitution.[187]

[193] GIAMA establishes a standardised framework for managing State-owned immovable assets to align them with service delivery objectives and promote efficient governance. It applies to national and provincial government departments, focusing on accountability, cost-optimisation and socio-economic priorities. Section 5 of GIAMA sets out the principles of immovable asset management regarding the use, acquisition

[186] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.

[187] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21.

and disposal of immovable assets. The management of State assets must also be considered in light of the transformative objectives of the advancement of socio-economic rights and land reform. This necessarily includes co-operation with other spheres of government. The provisions relating to the disposal of State land are peremptory and accordingly must be complied with.

[194] In the case of disposals, the C-AMP plays a central role. This plan is necessary in order to prevent the isolated consideration of the disposal of State assets, in favour of a structured process, where careful attention is given to the ongoing usefulness to the government of each immovable asset that it holds.

[195] In terms of section 6(1) of GIAMA, an immovable asset management plan must be prepared. A C-AMP must contain at least, among others, a disposal strategy and a management plan (section 7(f)). Section 11 provides that a user must give effect to its U-AMP and conduct immovable asset management in a manner which is consistent with GIAMA and with its U-AMP. Section 13(3) further regulates the disposal by a custodian of an immovable asset. In terms of section 15, the Minister may, by notice in the *Gazette*, in respect of certain immovable assets or categories of immovable assets, exempt any organ of State or part thereof from any provision of GIAMA for a period determined in the notice. Furthermore, section 15 provides for instances in which an organ of State may be exempted from the application of GIAMA.

[196] The WCLAA governs the acquisition and disposal of immovable property by the Western Cape Provincial Government. The purpose of the WCLAA, as reflected in its long title and preamble, is to give effect to the Western Cape Government's constitutional power to acquire immovable property and dispose of provincial State land, while enabling public input without compromising the government's ability to secure advantageous transactions. The WCLAA provides detailed procedures for the disposal of provincial State land, including requirements for public notice and stakeholder consultation. The WCLAA emphasises the need for transparency in the disposal process.

[197] Section 3(1) of the WCLAA empowers the Premier to dispose of provincial State land on conditions that the Premier deems fit. Section 4 requires the Premier to co-ordinate provincial governmental actions regarding such land with the national and local spheres of government in accordance with Chapter 3 of the Constitution and section 7 of the Western Cape's Constitution.[188] The purpose of such co-ordination is to realise the nation's commitment to land reform and other reforms required to bring about equitable access to land and to rationalise the Province's custody, administration and disposal of its land. In terms of section 7(a) of the Western Cape's Constitution, the Province is required to act in accordance with the principles of co-operative governance and intergovernmental relations set out in the Constitution in all its dealings with national and other spheres of government.

[198] The underlying context of GIAMA and the WCLAA is one of co-operative governance as well as accountability and transparency. This is informed by the constitutional scheme of an interdependent structure of the three spheres of government under Chapter 3 of the Constitution. Further, the foundational constitutional values of accountability, responsiveness and openness necessitate that governance, including the management of State assets, is: transparent, to ensure an informed public; accountable, to safeguard against misuse of State resources; and responsive to the needs of the public, such as providing State housing to realise the transformative objectives of access to land and housing.

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[188] Chapter 3 of the Constitution, comprising sections 40 and 41, deals with co-operative government. Section 7 of the Western Cape's Constitution provides:

> "As part of the provincial sphere of government of the Republic of South Africa, the Western Cape government must—
>
> (a) act in accordance with the principles of co-operative government and intergovernmental relations set out in the national Constitution in all its dealings with the national government, the other provincial governments and the municipalities in the Western Cape;
>
> (b) participate in structures and institutions to promote and facilitate intergovernmental relations, established in terms of the national Constitution; and
>
> (c) make use of mechanisms and procedures for the settlement of intergovernmental disputes, established in terms of the national Constitution."

[199] The principle of co-operative governance was confirmed in *Maccsand*,[189] which clarifies how conflicting legislation across different spheres of government must operate within South Africa's constitutional framework. The case affirmed that the overlapping mandates of different spheres of government require collaboration rather than hierarchy. This Court stated:

> "The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith, and to co-ordinate actions taken with one another."[190]

[200] Accordingly, the powers allocated by the Constitution to the three spheres of government sometimes overlap. Laws within each sphere can serve different purposes for the level of government charged with the responsibility for administering them. Section 41 of the Constitution obliges these spheres of government to co-operate with one another in mutual trust and good faith and to co-ordinate their actions with one another. Both Parliament and the Provincial Legislatures can make laws relating to Schedule 4 matters.

[201] This means that when the Province disposes of provincial land, it must comply with both GIAMA and the WCLAA. This obligation arises from a purposive, textual and contextual interpretation and from a proper understanding of the manner in which the national and provincial spheres of government ought to operate under the

[189] *Maccsand (Pty) Ltd v City of Cape Town* [2012] ZACC 7; 2012 (4) SA 181 (CC); 2012 (7) BCLR 690 (CC).

[190] Id at para 47.

Constitution, in order to progressively realise the nation's socio-economic objectives. This necessarily includes co-operation with other spheres of government.

[202] With regard to the WCLAA, as section 3(1) makes clear, the power of the Premier to dispose of provincial State land on such conditions as are deemed fit is expressly made subject to the provisions of "any other law". GIAMA is such a law. The WCLAA, in section 4(1), requires co-ordination of the provincial government's actions, including the disposal of provincial State land, with the national and local spheres of government. In terms of section 4(2), the co-ordination required is with a view, among other things, to realise the nation's commitment to land reform and the other reforms required to bring about equitable access to all South Africa's relevant natural resources, and to rationalise, among others, the disposal of provincial State land.

[203] The language used throughout GIAMA consistently reflects the distinction between binding requirements, introduced by the peremptory "must",[191] and discretionary or non-binding functions, introduced by the word "may".[192] In my view, any other interpretation would render the binding provisions nugatory, and this would lead to an absurdity. The provisions dealing with disposal are peremptory and accordingly must be complied with.

[204] It can be accepted that in the case of disposals, the concepts of "government" and "user", properly construed, when used in GIAMA, and in particular in section 5(1)(f), refer to both national and provincial governments. Construing "government" in section 5(1)(f) as referring only to the government of which the custodian is part would impede, rather than advance, the goals of the section. In the case of disposals, the C-AMP plays a central role. The custodian must act in accordance with the provisions of section 5(1)(f) when it has decided to dispose of the property.

[191] See, for example, sections 4(4), 5(1)(a)-(f), 6(1)(a)-(b), and 6(2) and contrast with section 19(1)(a) and (c) and 19(2).

[192] A number of provisions state explicitly that they are imposing peremptory requirements. See sections 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").

This prevents the isolated and haphazard consideration of the disposal of State assets in favour of a structured process, where careful attention is given to the ongoing usefulness to government of each immovable asset held by the State. Prior to disposal, consideration is given to the question of whether the asset can be used by another user for the purposes of the government's broad social development and socio-economic objectives, including addressing the legacies of apartheid.

[205] A contrary interpretation undermines the legislative intent behind GIAMA and its role in ensuring co-ordinated and accountable management of State immovable assets. Furthermore, the exemption clause in section 15 would be meaningless where other relevant legislation, such as the WCLAA, is not subject to it. In the sale of the Tafelberg property, the DHS expressed interest and formally requested to use the property. Had the custodian (the TPW Department) followed the guidelines in section 5(1)(f), the DHS would not have withdrawn its interest when it was a user.

[206] On the face of it, there might be a tension between GIAMA and the WCLAA in relation to the circumstances where the provincial government seeks to dispose of provincial land. This is because the administration thereof ostensibly falls under different spheres of government, which are under a constitutional obligation to exercise their powers in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere. In particular, the requirements under section 5(1)(f) of GIAMA, as well as the requirement of a C-AMP, appear to be requirements over and above those in the WCLAA.

[207] However, the management of State immovable property, including disposal, is a concurrent national and provincial legislative competence. The WCLAA and GIAMA are directed at similar objectives. No inherent conflict exists: the WCLAA explicitly mandates co-ordination with national and local governments (section 4), aligning with GIAMA's aim to prevent fragmented asset management, albeit it does not apply to local government.

[208] In sum, GIAMA and the WCLAA operate co-operatively under South Africa's constitutional framework, with neither statute excluding the other. While GIAMA establishes a uniform national framework for managing State immovable assets (including disposals) to advance socio-economic objectives, such as land reform, the WCLAA governs provincial land administration with the same transformative goals. According to *Maccsand*,[193] co-operative governance obligations require provincial disposals to comply with both laws, as GIAMA's peremptory disposal provisions (for example, asset management plans and intergovernmental co-ordination) bind the provincial and national governments.

[209] Accordingly, the disposal of provincial State land must comply with both GIAMA and the WCLAA. These statutes provide complementary frameworks for the management and disposal of State land, ensuring alignment with constitutional socio-economic rights and structured intergovernmental collaboration, and neither can be disregarded in favour of the other.

[210] Therefore, the disposal of the Tafelberg property was unlawful because the Province did not take the requisite steps to procure the status of the land as surplus under GIAMA before disposing of it as provided in section 5 of GIAMA. Furthermore, both the TPW Department, as the custodian of the property, and the DHS, as the user, did not have asset management plans for the sale of the property as required by section 6 of GIAMA. In so far as the C-AMP is concerned, section 7 sets out the minimum contents of the plan, namely: a full inventory, current and future use of the assets, maintenance needs, condition, and performance of assets and disposal strategies, including rationale and impact. On the other hand, and in line with section 8, the U-AMP must include a strategic needs assessment, an acquisition plan, an operations plan and an immovable asset surrender plan.

[193] *Maccsand* above n 189.

Public participation in the Tafelberg sale

[211] The next issue to be determined is whether the Province fulfilled its constitutional obligations to facilitate public participation in the sale of the Tafelberg property, and whether the WCLAA Regulations on this aspect are unconstitutional.

[212] The provisions on public participation in the context of the sale of the Tafelberg property are section 3 of the WCLAA and the regulations passed under it, specifically regulation 4(6) and the proviso to regulation 4(1). The relevant parts of section 3 of the WCLAA read:

> "3. **Disposal of Provincial state land**
>
> (1) Unless otherwise expressly provided for in any other law, the Premier may dispose of provincial state land on such conditions as are deemed fit; provided that if provincial state land is disposed of at less than that land's market-related value, it must be a condition of the disposal that if the person who acquired that land no longer wishes to utilise it for the purposes for which it was acquired, that provincial state land must revert to the Western Cape Provincial Government.
>
> (2) The Premier must publish in the *Provincial Gazette* in the three official languages of the province and in an Afrikaans, an English and an isiXhosa newspaper circulating in the province in those respective languages, a *notice of any proposed disposal* in terms of subsection (1), calling upon interested parties to submit, *within 21 days* of the date of the notice, any representations which they wish to make regarding such proposed disposal; provided that the aforegoing provision does not apply to any disposal concerning the leasing of provincial state land for a period not exceeding twelve months without an option to renew.
>
> . . .
>
> (4)(a) The notices referred to in subsections (2) and (3) must include the following information regarding the provincial state land concerned—
>
> (i) the full title deed description of such land, including the title deed number, the administrative district in which the provincial

state land is situated and, if applicable, the nature of any right in or over such land;

(ii) the current zoning of such land; and

(iii) the actual current use of such land.

(b) The notice referred to in paragraph (a) must include an office address at which full details concerning the provincial state land in question and the proposed disposal may be obtained." (Emphasis added.)

[213] Regulation 4, headed "Acquisition and disposal of Provincial state land", in relevant parts, reads:

"(1) An offeror shall—

(a) complete and sign a written offer, and

(b) submit that offer to the Head of the Component[194] as a formal offer:

Provided that all offers of disposal shall contain a provision to the effect that the offeror acknowledges that:-

(i) the Provincial Cabinet, after consulting the Committee,[195] may, within 21 days of the receipt of written representations received pursuant to section 3(3) of the Act, or such longer period not exceeding 3 months as the Provincial Cabinet may determine in writing prior to the expiry of that 21-day period, resile from any contract resulting from the offer, and

(ii) in the event of the Provincial Cabinet so resiling the offeror will have no right of recourse against the Province or any of its organs or functionaries, but if the Province intends to sell the land at a higher price than that specified in the formal offer within a period of three months from the date when it resiled, the Province must first offer to sell the land to the offeror at that price.

. . .

[194] Defined in the Regulations as "the Component in the Western Cape Provincial Government responsible for administering the provincial state land portfolio".

[195] The Provincial Property Committee appointed in terms of regulation 3.

> (6) If a written contract has been duly signed on behalf of the Province, that contract shall be a proposed disposal or a proposed acquisition and, in the case of a proposed disposal, the Minister shall exercise the powers and comply with the duties conferred on the Premier by section 3(2), (3) and (4) of the Act." (Footnotes added.)

[214] The Supreme Court of Appeal interpreted these provisions to mean that while the Province solicits and considers written representations received, the transaction remains a proposal and is only completed and becomes a disposal once the Province makes a decision as to whether to resile from the proposed disposal or not.[196] The Court held that interested parties were afforded an opportunity to comment on a comprehensive proposal, which included not only the description of the property intended to be disposed of, but also the identity of the prospective purchaser, the value of the land, its current and intended use, the reasons why the offer had been accepted for further consideration and the proposed purchase price, amongst other details.[197]

[215] The NU Trust submit that the Supreme Court of Appeal misunderstood the requirements of meaningful participation when it held that the impugned regulations were constitutional and valid. They state that this conclusion is inconsistent in so far as it treats the transaction as a proposed disposal, for purposes of section 3(2) of the WCLAA, until the Minister complies with the notice-and-comment procedure, while also stating that the disposal becomes final once the Province decides whether to resile. As a further consequence of this logic, the NU Trust raise another inconsistency: if no written representations are received, then no second decision is taken whether to resile.

[216] The Province submits that the impugned regulations are constitutionally compliant in prescribing procedures for the disposal of immovable assets. While the NU Trust contend that "proposed disposal" requires public participation before contract

[196] SCA judgment above n 54 at para 101.

[197] Id at para 102.

conclusion, the Province maintains that its post-contract participation process aligns with procedural fairness under section 4(3) of PAJA and section 33 of the Constitution.

[217] The Province argues that, notwithstanding the National Minister's decision to abandon the challenge that the Act and Regulations are inconsistent, a post-contract public participation process remains valid under section 3(2) of the WCLAA. This is because the Province retains unilateral termination rights without adverse consequences, based on public feedback, maintaining the "proposed disposal" status until all representations are considered.

[218] The Province submits that contracts with resolutive conditions for public participation do not constitute administrative action under PAJA. However, the impugned regulations still align with PAJA, as section 4(3) allows for public participation to influence administrative actions even after their initial contemplation. The Province contends that the WCLAA balances constitutional asset disposal powers with public participation while securing advantageous transactions. While section 3(4)(a)(i)-(iii) does not require publishing buyer details or prices, section 3(4)(b) ensures public access to full disposal information at designated offices.

[219] SERI submits that the procedural requirements for disposal include an obligation to prioritise, in any process of public notice-and-comment, the participation rights of housing-insecure communities within the property's jurisdiction. Further, if the property is occupied by vulnerable residents, the relevant authorities will have the duty, beyond the more general public participation process, to meaningfully engage with the occupiers regarding the proposed disposal. This principle derives from the "participative nature of our democracy" explained in *Doctors for Life*.[198]

[220] SERI submits that this engagement obligation is triggered at the point when the disposal is considered, not *after* the decision is made. It argues that this obligation is

[198] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 121.

particularly pertinent when the State is considering retrogressive measures. SERI argues that the impugned regulations fail to provide for genuine participation. The impugned regulations allow public comment only after transaction completion, effectively precluding meaningful input on crucial aspects such as social housing possibilities, the protection of residents' rights and development conditions. The timing renders the participation process constitutionally deficient and requires regulatory amendment to allow earlier and more meaningful participation.

[221] As I see it, the provisions of section 3 of the WCLAA stipulate that land disposal must be done in consultation with the public. Subsection (1) stipulates that "the Premier may dispose of the provincial State land on such conditions as are deemed fit". I pause to emphasise that the conditions on which the Premier may dispose of such land are entirely at their discretion. Furthermore, subsections (2) and (3) contemplate the procedural requirements for a proposed disposal. They stipulate that the Premier must, in accordance with subsection (1), publish a notice of the proposed disposal in the *Provincial Gazette* and local newspapers in English, isiXhosa and Afrikaans. The contemplated notice must call upon interested parties or any persons affected by the proposed disposal to make written representations regarding the proposed disposal within 21 days of the date of the notice.

[222] Regulation 4, in turn, deviates from the requirements set by the legislation and makes additions. It does not alter the timelines or notice requirements; however, it makes determinations regarding the definition of "proposed disposal". Specifically, regulation 4(6) states that "a written contract [that] has been duly signed on behalf of the Province . . . shall be a proposed disposal". It then stipulates that, "in the case of proposed disposals, the Minister shall exercise the powers and comply with the duties conferred on the Premier by section 3(2), (3) and (4) of the Act" (the public participation requirements). Therefore, the definition of "proposed disposal" is narrowed to "duly signed contracts" which have gone through the internal valuation and other decision-making processes laid out in regulation 4(2)-(5).

[223] The proviso in regulation 4(1) contemplates the conclusion of a contract for the proposed disposal and regulation 4(6) concerns the publication of the notice contemplated in section 3 of the WCLAA, subsequent to the conclusion of a "duly signed contract" which has gone through the valuation and further decision-making process laid out in regulation 4(2)-(5). As a result, the definition of "proposed disposal" is narrowed. Clearly, regulation 4 permits the disposal or acquisition process to take place before public participation. This is substantiated as the regulation entitles the Provincial Cabinet in accordance with section 3(3) of the Act, to resile from the offer only after the conclusion of the contract and in reaction to the written representations.

[224] This effectively restricts the period during which the public participation requirements under section 3(2) of the WCLAA apply to a period after an offer has been agreed to and signed, subject to a clause allowing the government to resile in the event of public comments. It further restricts the Province's options of disposal in the case of resiling from such a "proposed disposal": if the property is offered to another offeror within three months, the Province must first offer it to the original offeror instead under regulation 4(1)(b)(ii).

[225] Our jurisprudence on public participation under the Constitution may shed light on the proper interpretation of the WCLAA.[199] In *Corruption Watch*,[200] this Court

[199] In *Mogale v Speaker, National Assembly* [2023] ZACC 14; 2023 (6) SA 58 (CC); 2023 (9) BCLR 1099 (CC) (*Mogale*) at para 3, this Court reiterated that the importance of public participation cannot be understated and that it is intended as a safeguard to protect the interests of the marginalised from being ignored or misrepresented, a break from the apartheid past. *Mogale* confirms the two important duties provided for in *Doctors for Life* id: the duty to provide meaningful opportunities for public participation in the law-making process and the duty to take measures to ensure that people can take advantage of the opportunities. Organs of State are not required to accommodate all demands arising in the public participation process, but must provide a meaningful opportunity to influence the decision, and take account of the public's views. In accordance with *Minister of Health v New Clicks South Africa (Pty) Ltd* [2005] ZACC 14, 2006 (1) BCLR 1 (CC); 2006 (2) SA 311 (CC) (*New Clicks*) at para 630 (judgment of Sachs J), it is inconsequential whether the organ of State changes its mind if it can be objectively shown that a reasonable opportunity was afforded to members of the public and interested parties to know about the issues and have an adequate say. In *South African Iron and Steel Institute v Speaker, National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC) at para 47, this Court held that the state must draw the public's attention to the impugned laws and consider their views, while acknowledging that legislatures must be afforded a significant measure of discretion in determining how to fulfil their duty to facilitate public involvement.

[200] *Corruption Watch (RF) NPC v Speaker, National Assembly* [2025] ZACC 15; 2025 (10) BCLR 1117 (CC); 2026 (1) SA 327 (CC).

affirmed that public participation – the public's right to have a voice in public affairs – is a constitutional imperative central to the country's participatory democracy: not a "nice-to-have accessory", but a thread woven into the fabric of our democracy. It is also integral to the legitimacy and transparency of governance and is constitutive of dignity. Although organs of State have a wide discretion in designing participation mechanisms, courts assess compliance objectively.[201] While practical considerations such as cost are relevant, they cannot justify inadequate public participation.[202] To assess compliance with this requirement, one must consider and determine whether the organ of State took reasonable steps to enable meaningful public participation.[203]

[226] This Court in *Corruption Watch* provided insight into what constitutes meaningful public involvement as follows:

(a) The public must be notified and informed of matters requiring public involvement, and they must be provided with sufficient information to engage meaningfully.

(b) Participation must occur at a stage in the process when it is possible for the input to alter or influence the outcome of the process.

(c) The process must be inclusive and not technologically or procedurally exclusionary. The public must have access to sufficient information about the subject matter to enable meaningful and informed deliberation.

(d) Although not bound by the public's views and comments, the organ of State must be open to being influenced by public input, meaning it must consider the views and comments of members of the public in its deliberations and decision-making, even if it ultimately disagrees.[204]

[201] Id at paras 1, 35 and 41.

[202] Id at para 29.

[203] Id at para 35.

[204] Id at para 36.

[227] The potential scope and obligation to facilitate public participation as a facet of participatory democracy, as envisioned in the Constitution, is arguably even greater at the local level, where the dynamic is undergirded by the anti-apartheid struggles historically often played out at a local community level.[205]

[228] The constitutional mandate requires meaningful public participation, based on adequate information provided to the public and a reasonable opportunity to engage in communication with the relevant institution. It bears emphasis that to be meaningful, the communication must be capable of influencing the decision-maker. Such influence generally exists only where the public participation process occurs before a decision is taken.

[229] The facts of the current case show that an inadequate public participation procedure was adopted. For this reason, even though the Tafelberg sale has been cancelled, the circumstances of the case serve to clarify the problems of the public participation process under the WCLAA and its Regulations. I illustrate this before engaging with the question relating to the constitutionality of the impugned regulations.

[230] The Provincial Cabinet decision to sell was taken on 11 November 2015. The first period of comment fell squarely during the Christmas period, as the initial advertisement in the *Gazette* was on 11 December 2015, when most people were on summer holidays, and the public participation process lasted 21 days. Contrary to what was required by the impugned regulations, the notice only contained the information required by section 3(4)(a). It did not go beyond that by providing information that the Day School had already been identified as the buyer and that the purchase price was R135 million. In this case, potentially due to these factors, the Province did not receive any comments in the original notice procedure. On the heels of this inadequate public participation procedure, there were requests for reasons to be given and litigation concerning the inadequacy of the public participation process ensued. A more

[205] *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP) at para 72.

appropriate public participation procedure ensued in May 2016, with a large number of comments received and further consideration on how to dispose of the property.

[231] The approach to the initial public participation procedure renders it obvious that in this instance it was from the outset seen as merely "ticking a box" by the provincial decision-makers, with little openness to the public's input. This suggests that the Province had already closed its mind to opposing viewpoints.

Constitutionality and validity of the impugned regulations

[232] The public participation process underlines that the impugned regulations are inconsistent with the WCLAA and thus unconstitutional. The impugned regulations' interpretation must start from the legal principles regarding public participation outlined above, and the public participation process laid out must be measured against these constitutional mandates.

[233] *Afribusiness*[206] outlines the relationship between legislation and supporting regulations as follows: (a) an Act provides the framework for the subject matter legislated upon, while regulations furnish details best left to functionaries; (b) the Legislature's intention must guide delegated legislation; and (c) delegated legislation cannot widen an act's purposes or depart from the Legislature's adopted plan.[207] The goal and function of regulations are to concretise abstract legal norms into applicable practical mandates, while staying within the scope and purpose of the legislation.

[234] Importantly, section 1(iii) of the WCLAA provides:

> "'[D]ispose' includes *the sale, exchange, donation or letting of* provincial state land (including the allocation of provincial state land free of charge for a period of time), the conclusion of any form of land availability agreement in respect of immovable

[206] *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

[207] Id at paras 103, 109 and 121.

> property with any person and the registration of any real or personal right in respect of provincial state land, and 'disposal' has a corresponding meaning." (Emphasis added.)

[235] It is clear from the outset that a disposal is not only the sale of a property. This is consistent with the requirements for public participation in a disposal, specifically for the notice of such, set out in section 3(4) of the WCLAA. The section does not require the sale price or the offeror's identity to be published, nor does the regulation. It may be inferred that, if a specific sale is being considered, any information available to the decision-maker should be communicated, as appropriate, to the public. Still, as a sale is not the only type of disposal envisioned by the WCLAA, it is not generally required. It is also clear from section 3(2) that this is not the only disposal that is considered to be subject to public participation, as it specifically exempts "any disposal concerning the leasing of provincial State land for a period not exceeding [12] months without an option to renew". The Act thus does not "implicitly" require a sale price and buyer, nor does it even imply that participation should or must only take place once an agreement over a sale has been concluded with a specific buyer.

[236] In this instance, regulation 4(6) impermissibly departs from the WCLAA framework by introducing a new meaning for "proposed disposal", curtailing public participation rights by permitting comments only after a disposal decision has been implemented through a comprehensive tender process and sale agreement.[208] Regulation 4(6) and the proviso in regulation 4(1), therefore, impermissibly narrow the provisions of the Act, contravening the purpose of providing for meaningful public participation and of achieving the goal of access to land,[209] and running contrary to the Act's express provisions.

[237] It also obviates the constitutional obligation of the Province to facilitate public participation in these processes. Such requirements are particularly weighty due to the subject matter at hand. The applicants argue that the constitutional imperative to view

[208] Id at paras 110-11.

[209] As can be gathered from sections 3 and 4(2), respectively.

State land as a transformative resource provides the foundational framework for understanding their other challenges. This transformative lens, they argue, informs both the substantive obligation to address spatial apartheid and the procedural requirements for managing and disposing of State land under GIAMA. They maintain that the public participation requirements in the WCLAA Regulations cannot be divorced from this context – they must facilitate, rather than frustrate, the use of State land to achieve constitutional objectives. The context of historical dispossession and unequal access to land as a means of oppression colours what "meaningful public participation" requires.

[238] Regulation 4(6) states that so long as a signed and otherwise binding contract for a disposal is subject to the right to resile due to public comment, such contract remains "proposed". Even further, it appears from regulation 4(6) that *only* such a contract constitutes a "proposed disposal". This narrowing is unconstitutional.

[239] A constitutional and purposive interpretation of section 3 of the WCLAA requires that it enable meaningful public participation capable of influencing decisions. It would, as the applicants argue, be unrealistic to imagine that there is no difference between a final, signed contract and a proposal under discussion internally and in how comments are taken into account in these different scenarios. I do not agree with the finding of the Supreme Court of Appeal that meaningful input can also be received after signing. Governmental decision-makers are ordinary people, and it is much harder to convince someone that they were wrong and that they have to effectively reverse a decision already taken than it is to try beforehand to make them see "the whole picture" and consider a different decision.

[240] It must be recognised that requiring public participation only after the Province has accepted and signed an offer of disposal undermines the very purpose of participation. By that stage, the horse has already bolted: it becomes significantly more difficult for the public to persuade decision-makers to rescind a sale that is already in motion. The onus falls unfairly on participants to reverse a binding commitment rather than meaningfully contribute to the initial decision. This approach diminishes the

chances that the views of the public will genuinely influence the outcome and risks reducing consultation to a formality, undermining the legitimacy of the process.

[241] The requirement of meaningful public participation is context-specific. In considering the historical and current-day context of land access, specifically public land in South Africa, and more particularly in areas such as Cape Town, as well as the rights in sections 25 and 26 of the Constitution, in my view, the requirements must be seen as especially high. With the process mandated by the impugned regulations, the Province is unable to meaningfully redress the past injustices of access to land in areas of economic opportunity by taking into account the views of the public.

[242] The issue to be determined is, then, what is required when one refers to meaningful public participation under section 3(2) of the WCLAA? The case law on public participation is well-established and settled. There have been a number of Constitutional Court decisions which have considered the lack of notifications in adequate languages,[210] periods for comment, facilities to take part in meetings and accessibility of information as constituent parts of meaningful participation.[211] While the precise requirements cannot be prescriptively determined, as they are case- and context-specific, a number of assertions may be made regarding the process under section 3(2) of the WCLAA.

[243] The argument that the impugned regulations do not interfere with the duty to facilitate participation before the final decision has been taken by the Province is misplaced. The argument is that the contract, although signed, has a resolutive condition. Therefore, it is not in full force and effect. At the point during the disposal in which public participation is facilitated, the matter is not final, so the argument goes. As stated above, however, there must be a meaningful opportunity to be heard and an opportunity to change the mind of the Province.

[210] As was the case with the first notice and comment procedure.

[211] See case law above n 199.

[244] As the impugned regulations envision, public participation takes place when an entitlement has already been conferred on the buyer. Even if resiling is possible, this is clearly not without consequences. A right to resile for a determined period constitutes a resolutive condition in the sales agreement. Therefore, the Supreme Court of Appeal's interpretation that, until such time as a decision is taken, the contract is only proposed against the principles of contract law, is incorrect. The final decision is made at the moment the sales agreement is reached, even if it is subject to a resolutive condition. Zulman states:

> "If the contract of sale is subject to a resolutive condition, the contract is complete (perfecta) as soon as the parties are agreed upon the thing to be sold and the price to be paid; and the sale is dissolved by the occurrence of the condition."[212] (Footnotes omitted).

[245] In *Diggers Development,*[213] the Council still had to decide whether to accept the sale, and so the condition was held to be a suspensive one. Here, by contrast, no decision is necessary to make the contract come into effect. Instead, the contract, if the Province simply does nothing, stays in effect, and the option to resile passes without having been taken. Effectively, when only giving notice and soliciting public comment after an agreement has been signed, the public does not participate in the decision to dispose, but only participates on the question whether the disposal should be cancelled.

[246] "Dispose" and "disposal" are defined in section 1(iii) of the WCLAA. A purposive interpretation of section 3 of the WCLAA contemplates public participation before the Province confers any entitlement on the buyer. It is only in this context that the Province would be able to consider the views of the public in order to meaningfully redress past injustices in access to land in areas of economic opportunity. This is because requiring the public to participate in the process subsequent to a decision to

[212] Zulman *Norman's Law of Purchase and Sale in South Africa* 6 ed (LexisNexis, 2017) Chapter 9.7.1.

[213] *Diggers Development (Pty) Ltd v City of Matlosana* [2011] ZASCA 247; [2012] 1 All SA 428 (SCA).

dispose would place an enormous strain on the public to persuade the Province to change the decision, once it has been made, subject to the completion of certain procedural steps.

[247] In the result, the impugned regulations requiring and enabling an opportunity to participate only after the acceptance of the offer for disposal, as envisioned by regulations 4(1) and (6), are unreasonable and inadequate, and the impugned regulations must be declared invalid.

The IGRFA and the obligation to consult with the National Minister

[248] The National Minister's main argument is that the Province failed to consult her in terms of the IGRFA on its intention and decision to dispose of the Tafelberg property. The Province contends that the IGRFA, while giving effect to section 41(2) of the Constitution, limits consultation to affected organs of State and co-ordinated action affecting other governments' material interests. Neither the Constitution nor the IGRFA imposes a duty to consult the Minister before disposing of provincial property.

[249] SERI identifies the following specific circumstances requiring national government consultation: (a) properties occupied by underprivileged residents; (b) properties proposed for affordable housing development; and (c) properties where the national government has expressed prior interest. This requirement, argues SERI, is supported by international law obligations, particularly the requirement in the AU Guidelines[214] for national-level review of retrogressive measures.

[250] In *Electronic Media Network*,[215] this Court said that consultation requires "a genuine and objectively satisfactory effort . . . to create a platform for the solicitation of

[214] AU Guidelines above n 150 at para 20.

[215] *Electronic Media Network Ltd v E.tv (Pty) Ltd* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC).

views".[216] In *Langeberg Municipality*,[217] it was stated that "[n]one of these spheres of government nor any of the governments within each sphere have any independence from each other".[218]

[251] Section 5 of the IGRFA requires all spheres of government to act collaboratively when executing their duties. This includes considering the circumstances of other governments; material interests and budgets; consulting with affected organs of State through either formal prescribed procedures or appropriate alternative methods; and co-ordinating actions to avoid duplication and jurisdictional conflicts when implementing policies or legislation that affect other government interests. The Minister relied on section 4(1) of the WCLAA as the source for the obligation to inform and consult. This section requires the Premier to co-ordinate the provincial government's action regarding the administration of provincial State land with the national and local spheres of government.[219]

[252] The trite principles of interpretation require that the text be interpreted harmoniously.[220] First, there are some factual circumstances that exist in favour of interpreting such an obligation, and these are:

(a) From 2011, the DHS initiated an investigation into the feasibility of social housing on certain land within the city, including the Tafelberg property, in line with the Regeneration Programme and the Development Process;

(b) The DHS made use of the Wynyard Mansions until 30 May 2014, when the last tenant vacated the property;

(c) On 13 March 2013, Mr Tshangana, the Manager, Property Planning in the DHS, advised that his department was of the view that both erven

[216] Id at para 37.

[217] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC).

[218] Id at para 26.

[219] As is also contemplated in Chapter 3 of the Constitution and section 7 of the Constitution of the Western Cape, 1997.

[220] *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* [2018] ZACC 41; 2019 (1) BCLR 53 (CC); 2019 (2) SA 1 (CC) at para 106.

comprising the Tafelberg site were needed for the development of "integrated and sustainable human settlements", more specifically, social housing for persons in the income bracket of R1 500 to R7 500; and

(d) On 30 March 2017, the National Minister of the Department of Human Settlements informed the Province of her intention to develop social housing on the Tafelberg property and referred a dispute related to its sale under the IGRFA. She indicated plans to pursue intergovernmental dispute resolution, while the Premier denied the existence of a dispute between the National Department and the Province, and asserted that the IGRFA found no application in the circumstances, but indicated her willingness for engagement to take place between members of the respective offices about the sale.

[253] Second, in terms of section 146(1) and (2) of the Constitution, where there is a conflict in respect of a matter for which national and provincial authorities both have legislative competence, parliamentary or national legislation that pertains uniformly to the country as a whole takes priority over the legislation of the province(s) in certain circumstances. As with the WCLAA and GIAMA, for example, which set their own procedural requirements for the disposal of State property, this legislation will need to be considered in the interpretation of any other legislation dealing with the same subject.

[254] Third, the applicants are correct that the WCLAA expressly, in section 4(1), requires co-ordination of the provincial government's actions, including the disposal of provincial State land, with the national and local spheres of government. This brings me to the jurisprudence on "meaningful engagement" in respect of public participation as a means of giving substance to the expectation of "co-ordination" under section 4(1).

[255] If this Court is to employ the well-established *Grootboom* reasonableness analysis, not as a procedural inquiry into compliance with good governance standards, but as a substantive, context-infused obligation requiring deliberate steps aimed at achieving the objects of reasonable legislative measures adopted in pursuit of

progressively fulfilling constitutional obligations, it can benefit greatly from assessing the jurisprudence on "meaningful engagement" in public participation in answering what constitutes "meaningful" consultation in the sphere of co-operative government.

[256] The following principles and guidelines to ensure that the engagement process is meaningful have been stated in this Court's decisions:[221]

(a) Section 152 of the Constitution states that local government must provide services to communities in a sustainable way. It must promote social and economic development and it must encourage communities and community organisations to be involved in matters of local government.

(b) The Housing Act provides that national, provincial and local government must make it possible for all relevant stakeholders to participate in housing development.[222]

(c) Engagement should ordinarily happen before issues go to court and not after[223] and should involve other stakeholders.[224]

(d) Dependable and meaningful lines of communication must be maintained. There must be open communication channels.

(e) The engagement process must be structured, co-ordinated, consistent and comprehensive, especially where large numbers of people might be affected. Thus, engagement needs to be developed as a structured long-term process.

[257] Liebenberg considers the open-ended criteria of meaningful engagement as developed by this Court to "bear many of the hallmarks of a deliberative conception of democracy".[225] Meaningful engagement and consultation in this instance should be a

[221] *Olivia Road* above n 125 at paras 13-21; *Thubelisha Homes* above n 95 at paras 117, 238, 247, 261, 378 and 380.

[222] Section 2(1)(l). See also section 9(2)(a).

[223] *Abahlali Basemjondolo Movement SA v Premier of the Province of KwaZulu-Natal* [2009] ZACC 31; 2010 (2) BCLR 99 (CC).

[224] *New Clicks* above n 199 at para 627.

[225] Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Juta, Cape Town 2009) at 301.

way of participating in deliberative democracy, not merely settlement negotiations.[226] The wording of section 4(1) of the WCLAA, the wording of the IGRFA and the wording of GIAMA, viewed within the context of the right to housing, envision co-ordination that requires realising the constitutional commitments to land reform, redress and spatial justice. There is a reasonable expectation that the disposal of assets of this kind and in this manner will be in conjunction with and in terms of meaningful modes of consultation with, the relevant national government department.

[258] In sum, the Province's failure to inform and consult the National Minister of Human Settlements before deciding to dispose of the Tafelberg property was a breach of its duties under the constitutional scheme of co-operative government and the IGRFA. By unilaterally alienating a strategically located public asset in circumstances where national policy, funding instruments and statutory housing mandates were implicated, the Province disabled the intergovernmental co-ordination that GIAMA and the housing framework presuppose. This omission, viewed together with the non-compliance with GIAMA and the defective public participation process, furnishes a further ground on which the Tafelberg property sale falls to be declared unlawful and inconsistent with the Constitution.

Conclusion

[259] It follows that the Supreme Court of Appeal erred when it concluded that there was no evidence supporting the contention that the City and the Province failed to meet their constitutional obligations. The evidence demonstrates that the respondents have failed to comply with their constitutional obligation to redress spatial injustice by enabling citizens to gain access to land on an equitable basis, through, among others, providing well-located social and/or affordable housing in the Cape Town CBD.

[260] The disposal of the Tafelberg property was not in compliance with GIAMA, since regardless of the existence of provincial legislation governing the administration

[226] Id.

of provincial land, such as the WCLAA, compliance with the national legislation is required for a lawful disposal of State land. The public participation process envisaged by regulation 4(6) and the proviso in regulation 4(1) does not constitute meaningful public participation. Therefore, the impugned regulations are unconstitutional and invalid. Lastly, in line with the principles of co-operative governance and intergovernmental relations, the Province had an obligation to consult with the national government regarding its intended sale of State property such as the one in question. It follows that the appeal must be upheld.

Remedy

[261] This brings me to the question of an appropriate remedy.

Parties' submissions

[262] The NU Trust submit that an effective remedy should be granted. It contends that in order to achieve this, a structural interdict is necessary. This remedy should contain three elements: (a) a comprehensive audit must be conducted to establish the full extent of State land which could be made available for affordable housing in central Cape Town; (b) the City and the Province must formulate a co-ordinated programme together, to determine how much of this land should be used for affordable housing and what can be released for other purposes; and (c) a timetable should be drawn up.

[263] The Province submits that the High Court improperly positioned itself as the arbiter of the Province's housing policy, violating the separation of powers by requiring specific social housing proposals for its assessment. With reliance on *Mwelase*,[227] the Province contends that no matter how egregious the breach of the Constitution is, a court may not usurp and exercise the powers vested in another State organ. The Province submits that the structural interdict cannot be effective as it omits the most

[227] *Mwelase v Director-General, Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (6) SA 597 (CC); 2019 (11) BCLR 1358 (CC).

important sphere of government, that is, the national government, which is the source of funding for social housing.

[264] The City argues that the structural relief granted by the High Court is misplaced as the City extensively addressed its housing programmes. The High Court, when it granted the declaratory order, conflated the obligations of the Province and the City. The City's difficulty in accessing national government-controlled vacant land, coupled with excluding the national government from the structural interdict, would doom social housing development efforts. Without the national government's involvement, such orders become ineffective and unenforceable. The High Court's far-reaching orders created unrealistic obligations for the City.

[265] Moreover, the City submits that the relief sought and set out in the applicants' practice note in this Court was not foreshadowed in the founding affidavit or in the High Court, and the applicants have not sought to amend their papers. Therefore, no case has been made out for the relief sought. Additionally, the Province submits that it did not have an opportunity to present evidence on how the order would affect existing programmes, particularly given the outdated pleadings and ongoing property ownership processes.

Analysis

[266] The State's constitutional obligations to take reasonable measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis and to achieve the progressive realisation of the right to adequate housing, require the Province, the City and the National Minister to co-operate and take reasonable measures to redress spatial apartheid. These obligations to address spatial apartheid, while not precisely defined, require meaningful consideration of location and historical context when making decisions about State land in historically significant areas. While the courts have not prescribed a specific weight to be given to spatial justice concerns versus other societal obligations, they have established that housing policies must actively work to dismantle, rather than perpetuate, apartheid's spatial

legacy. These obligations become particularly acute when dealing with well-located State land in urban centres where historical dispossession occurred.

[267] I have had due regard to the fact that the effluxion of time between the inception of litigation in 2018 and the delivery of this judgment is such that the Province and the City may well have formulated, implemented and completed some of the projects relating to social housing within the inner-city of Cape Town that were included in their pipeline projects. However, this Court cannot rely on media statements and press reports not duly filed during these proceedings for any work done after 2018. This means that the matter must be determined on the papers as they stand, albeit with the recognition that steps may have been taken by the Province and the City in the interim.

[268] This Court cannot simply craft a declaratory order without going further and defining with precision what the respondents must do. This Court cannot, for example, simply say that the State has a duty to act reasonably without explicating what it means in practical terms. However, it also cannot intrude too far into the realm of State obligations and tell the relevant governments how to comply with their constitutional obligations.

[269] In *TAC*,[228] this Court held that a structural interdict will be granted in instances where "it is necessary to secure compliance with a court order". However, in *Sibiya*,[229] it was held that supervisory orders are suitable in instances where a court cannot assume that the order will be carried out promptly.[230] In this case, the obligations placed on the City and the Province are simply too complex for a structural interdict, so a supervisory order is preferable to ensure the order of this Court will be properly carried out. This can be reasonably presumed in the current circumstances, as the City and the Province

[228] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at para 129.

[229] *Sibiya v Director of Public Prosecutions, Johannesburg* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC); 2006 (1) SACR 220 (CC).

[230] Id at paras 61-2.

have had housing projects in the pipeline since 2017, without addressing what they intend to do to implement them.

[270] By contrast, a supervisory order, including the audit which NU Trust propose be undertaken by the Province and the City, will require the provision of the relevant information necessary to collate and assess the various measures adopted by different organs of State since the inception of this litigation to address spatial apartheid.

[271] However, expedience is not the only reason why such a supervisory order is preferable. The circumstances of this case are such that it is in the interests of all parties affected that the Province and the City be required to place a comprehensive plan and report before a court, or at least make such a plan available to the public that shows how they intend to rectify their failures. The approval of such a plan by a court can allow the Province and the City to move forward with the implementation thereof in compliance with their constitutional obligations, while simultaneously putting the applicants in the position to place their contentions before the court, voice their discontent and hold the respondents accountable where necessary. This relief is thus an invitation to the respondents and the aggrieved parties to engage meaningfully and formulate a plan in order to achieve compliance with the Constitution.

[272] What is further clear from the papers is that all levels of government are obliged through the Constitution and legislation to combat spatial apartheid and effect transformation of society. Accordingly, the national government has a duty to allocate funding for initiatives and projects to alleviate spatial apartheid; to identify the status of land owned by national organs of State in the Cape Town CBD and Sea Point, including parcels of land suitable for social housing; and to take reasonable steps to ensure that such land is utilised to address spatial apartheid. However, the National Minister of Human Settlements has not been joined as a party in the NU Trust's application. Therefore, notwithstanding the National Minister's constitutional and statutory responsibilities in this regard, this Court is not in a position to make any order against the National Minister in this application.

Costs

[273] The applicants in both applications seek costs against the City and the Province. While both the City and the Province participated in the proceedings, the Province's unique constitutional position and responsibilities distinguish its role. The litigation in this matter was sparked by the Province's decision to sell the Tafelberg property despite such property having been found suitable or feasible for social or affordable housing. The City, on the other hand, had nothing to do with this decision. It had indicated its interest in acquiring and developing the property in question for social or affordable housing, but could not do so at market-related prices. Additionally, the City mainly relied on the Province to make the land available for such a purpose. A substantial part of the complaints in these matters does not implicate the City at all.

[274] Thus, the Province must pay the costs of the applicants in the NU Trust's application, since it is the Province's conduct that led to this litigation. In regard to the National Minister's application, the trend of this Court's decisions is not to order costs as between competing organs of State, since ultimately it is the public that pays, in any event.[231] In the present case, the question whether the Province had a constitutional duty to consult with the National Minister before disposing of the Tafelberg property involves resolving a novel constitutional issue. The Province did not act unreasonably in opposing the National Minister's application. In that application, therefore, the parties must pay their own costs.

Order

[275] In the result, the following order is made:

[231] See, for example, *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality* [2021] ZACC 46; (2022) 43 ILJ 505 (CC); 2022 (8) BCLR 959 (CC) at para 33; *Public Protector v President of the Republic of South Africa* [2021] ZACC 19; 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) at para 147; *Minister of Police v Premier of the Western Cape* [2013] ZACC 33; 2013 (12) BCLR 1405 (CC); 2014 (1) SA 1 (CC) at para 72.

In Case CCT 126/24 *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others*:

1. Leave to appeal is granted.
2. The appeal is upheld and the order of the Supreme Court of Appeal is set aside and is replaced with the following:
3. It is declared that the obligations of the Provincial Government of the Western Cape (Province) and the City of Cape Town (City) in terms of sections 25(5), 26(1) and 26(2) of the Constitution, and the legislation enacted to give effect to these rights, require that, in taking reasonable legislative steps and other measures, within their available resources, to progressively realise the right to adequate housing:
   (c) the location of housing must be treated as a relevant factor in determining what constitutes adequate housing and equitable access to land, having regard to the constitutional imperative to redress the spatial injustice inherited from apartheid; and
   (d) reasonable measures to fulfil these obligations must include the provision of affordable housing falling within the area of the formerly defined restructuring zone "CBD and surrounds (Salt River, Woodstock and Observatory)" and, to the extent that it did not fall within the restructuring zone as so defined, Sea Point (collectively Cape Town CBD and Sea Point).
4. It is declared that the Province and the City have failed to comply with their obligations declared in paragraph 3 above in the implementation and completion of their respective social housing programmes, policies and projects in the Cape Town CBD and Sea Point.
5. The Province must submit to the High Court of South Africa, Western Cape Division, Cape Town (High Court), and serve on all parties, a report under oath, within three months of the date of this order, setting out—
   (f) the Province's current policies and programmes for the provision of affordable housing in the CBD, including the steps taken to give effect to the obligations declared in paragraph 3;

(g) a schedule of affordable housing projects in the areas in the CBD that—

(i) have been completed since the commencement of these proceedings in the High Court;

(ii) are currently under construction; and

(iii) are under consideration;

(h) the budgetary resources allocated and expended on affordable housing in the CBD, and the extent to which the national social housing funding has been applied for within these areas;

(i) the steps taken by the Province to co-ordinate with the City and the national sphere of government in respect of the planning and implementation of affordable housing in the CBD; and

(j) the further steps the Province intends to take and the projected timelines for such steps.

6. The report contemplated in paragraph 5 must also include, separately from the details in paragraph 5, similar information in respect of any policies, programmes and projects which involve social housing in areas sufficiently close to the CBD that should, in the Province's opinion, be taken into account in assessing compliance with the obligation in paragraph 3 above.

7. The City must, within three months of the date of this order, submit to the High Court and serve on all other parties a report in accordance with paragraphs 5 and 6 above, subject to any changes necessitated by the context.

8. The applicants may serve and file affidavits, if any, responding to the contents of the reports referred to in paragraphs 5, 6 and 7 above, within three weeks of the service and filing of the aforesaid reports.

9. The Province and the City may serve and file affidavits, replying to the contents of the affidavits referred to in paragraph 8 above, if any, within two weeks of the service and filing of the aforesaid affidavits.

10. Any of the parties may thereafter request the High Court's Registrar to enrol the matter for hearing, and the High Court may thereupon make any further order or determination, as may be necessary or appropriate with a view to finalising the matter.
11. It is declared that the Province failed to meaningfully engage with the public and hold a meaningful public participation process in relation to the disposal of the Tafelberg property, namely the property comprising Erven 1[...] and 1[...] Sea Point, situated at 3[...] M[...] Road, Sea Point.
12. Regulation 4(6) and the proviso in regulation 4(1) (impugned regulations) of the Regulations made under section 10 of the Western Cape Land Administration Act 6 of 1998 (WCLAA) by Provincial Notice No 595, published in Provincial Gazette No 5296 on 16 October 1998 are declared to be unconstitutional and invalid in that, contrary to section 3 of the WCLAA, the impugned regulations provide for public participation to take place only after a disposal contract has been concluded.
13. The declaration of invalidity referred to in paragraph 12 above is suspended for 12 months from the date of this judgment to allow for the defect to be remedied.
14. The Province must pay the applicants' costs, including the costs of two counsel, in the High Court, Supreme Court of Appeal and this Court.

In Case CCT 128/24 *National Minister of Human Settlements and Another v Minister for Transport and Public Works, Western Cape and Others*:

1. Leave to appeal is granted.
2. The appeal is upheld, and the order of the Supreme Court of Appeal is set aside and is replaced with the following:
3. It is declared that the failure of the Provincial Government of the Western Cape (Province) to inform and consult with the National Minister of Human Settlements regarding its intention to dispose of the Tafelberg property, namely the property comprising Erven 1[...] and 1[...] Sea Point, situated at 3[...] M[...] Road, Sea Point, was a contravention of the

Province's obligations of co-operative governance in terms of the Constitution and the Intergovernmental Relations Framework Act 13 of 2005.

4. It is declared that regulation 4(6) and the proviso in regulation 4(1) of the Regulations (impugned regulations) made under section 10 of the Western Cape Land Administration Act 6 of 1998 (WCLAA) by Provincial Notice No 595, published in Provincial Gazette No 5296 on 16 October 1998, are unconstitutional and invalid in that, contrary to section 3 of the WCLAA, the impugned regulations provide for public participation to take place only after a disposal contract has been concluded.

5. The declaration of invalidity referred to in paragraph 4 above is suspended for 12 months from the date of this judgment to allow for the defect to be remedied.

6. The parties must bear their own costs in this Court, the High Court and the Supreme Court of Appeal.

For the Applicants in CCT 126/24:	P Hathorn SC and C De Villiers instructed by Ndifuna Ukwazi Law Centre
For the Applicants in CCT 128/24:	I Jamie SC, T Masuku SC and L Stansfield instructed by Office of the State Attorney, Pretoria
For the First to Fourth Respondents in CCT 126/24 and CCT 128/24:	E Fagan SC, K Pillay SC, A du Toit and M Mokhoaetsi instructed by Office of the State Attorney, Cape Town
For the Fifth Respondent in CCT 126/24 and CCT 128/24:	N Bawa SC and T Mayosi instructed by Riley Incorporated
For the Amicus Curiae:	J Brickhill and N Ali instructed by Socio-Economic Rights Institute of South Africa