IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 7908/2017

In the matter between:

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

And

MINISTER FOR TRANSPORT AND PUBLIC WORKS:	
WESTERN CAPE	First Respondent
PREMIER OF THE WESTERN CAPE PROVINCE	Second Respondent
THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)	Third Respondent
CITY OF CAPE TOWN	Fourth Respondent
MINISTER OF HUMAN SETTLEMENTS	Fifth Respondent
THE PROVINCIAL GOVERNMENT OF THE	
WESTERN CAPE	Sixth Respondent
THE MINISTER OF PUBLIC WORKS	Seventh Respondent

THE MINISTER OF HUMAN SETTLEMENTS:	
WESTERN CAPE	Eighth Respondent
SOCIAL HOUSING REGULATORY AUTHORITY	Ninth Respondent
MINISTER OF RURAL DEVELOPMENT	
& LAND REFORM	Tenth Respondent
MINISTER OF FINANCE	Eleventh Respondent
GARY FISHER	Twelfth Respondent

AND IN **CASE NO.12327/2017**

In the matter between:

MINISTER OF HUMAN SETTLEMENTS	First Applicant
NATIONAL DEPARTMENT OF HUMAN SETTLEMENTS	Second Applicant
SOCIAL HOUSING REGULATORY AUTHORITY	Third Applicant

and

PREMIER OF THE WESTERN CAPE PROVINCE	First Respondent
MEC FOR TRANSPORT AND PUBLIC WORKS:	
WESTERN CAPE PROVINCE	Second Respondent
MEC FOR HUMAN SETTLEMENTS:	
WESTERN CAPE PROVINCE	Third Respondent
CITY OF CAPE TOWN	Fourth Respondent
THE PHYLLIS JOWELL JEWISH DAY SCHOOL (NPC)	Fifth Respondent
TRUSTEES OF THE NDIFUNA UKWAZI TRUST	Sixth Respondent

Coram: P.A.L. Gamble and M.I. Samela, JJ.
Date of Hearing: 25, 26, 27, 28 & 29 November 2019.
Date of Judgment: 31 August 2020.

JUDGMENT DELIVERED ON 31 AUGUST 2020

GAMBLE, J:

INTRODUCTION

[1] In the heart of the Cape Town suburb of Sea Point stands a derelict school building now colloquially known as “the Tafelberg site”. Tafelberg was the name of a remedial school which the building housed until 2010, when it was relocated to purpose-built premises in the Northern Suburbs. This case concerns the future use of the Tafelberg site. For the sake of convenience I shall refer interchangeably to the school premises as “the property” and/or “the Tafelberg site”, or simply as “Tafelberg”.

HISTORICAL BACKGROUND TO THE PROPERTY

[2] In 1899 the Colonial Government established the Ellerslie Girls High School on the property. The double story building conforms to the architectural style of the late Victorian era, and comprises a stone facade with decorative gabling. There is an historic garden and a tree-lined avenue on the property which, together with the original Victorian building, enjoys heritage protection status. The property measures 1,7054 ha in extent and consists of 2 separate erven, no’s 1424 and 1675, Sea Point. It fronts onto Main Road, Sea Point (its street address is 355 Main Road) and is bounded along its periphery by various suburban street – Milner, Herbert and Heathfield Roads and The Glen.

[3] Over the years the L-shaped property was expanded, as additional classrooms and the like were added, and at some stage a small block of flats, Wynyard Mansions,

was built on the south eastern corner of the property, abutting on to Herbert Road.[1] Occupation of these flats, which was rent-controlled, was managed by the Department of Public Works. The property also has a large swimming pool, playgrounds and tennis and netball courts on it.

[4] In 1989 the Western Cape Provincial Department of Education merged Ellerslie Girls' School with Sea Point Boys' High School to form Sea Point High, and the erstwhile premises of the boys' school (a short distance further along Main Road) were utilised to accommodate the new co-educational place of learning. The property was then used to house the Tafelberg Remedial School for scholars with learning difficulties, most of whom were bussed to the school from their homes elsewhere. The remedial school was closed in June 2010, when the scholars were relocated to the school in Bothasig referred to earlier. Since then Tafelberg has effectively been mothballed: the property has been secured with barbed wire and hoarding where practicable, and it has remained unused for the past 10 years.

[5] The erven on which the school and Wynyard Mansions are situated are registered to the Provincial Government of the Western Cape ("the Province"), which commenced steps in August 2010 to determine the most suitable way to utilise the derelict property. The tenants of Wynyard Mansions were given notice and, after a disposal process which endured for more than five years, the property was eventually sold by the Province to the Phyllis Jowell Jewish Day School (NPC) ("the Day School"), in January 2016, for R135m. That sale has been challenged on two fronts in separate applications before this Court, which were consolidated for the purposes of the hearing before us.

THE RTC APPLICATION – CASE NO.7908/17

[6] The first application for, inter alia, the review of the sale of the Tafelberg site, was launched on 5 May 2017, under case no. 7908/17, by Ms. Thozama Angela Adonisi (as the first applicant) and five others, citing the Minister for Transport and

[1] This building is located exclusively on Erf 1675 while the school is on Erf 1424.

Public Works: Western Cape ("the MEC") as the first respondent together with eleven other respondents whose identities will emerge as this judgment unfolds. Included in that number are the Day School (as third respondent), the City of Cape Town ("the City"- as fourth respondent), the Minister of Human Settlements ("the National Minister" – as fifth respondent) and the Social Housing Regulatory Authority ("the SHRA" – as ninth respondent).

[7] Ms. Adonisi, who deposed to the founding affidavit, works as a nurse at the Christian Barnard Memorial Hospital in Cape Town, and resides in the basement of a block of flats in Sea Point. She is a member of the leadership committee of the Sea Point Chapter of "Reclaim the City" ("RTC" – the fifth applicant), which is described in the founding affidavit as follows:

'It is a voluntary social movement that is made up of Cape Town working class residents (including domestic workers, waitrons, call-centre workers, carers and security guards), learners, university students and professionals who seek to promote and protect the right to land and housing for all residents in Cape Town. Reclaim the City consists of over 200 supporters in its Sea Point Chapter and has approximately 3000 supporters across Cape Town. The social movement was launched at a public community meeting held in Cape Town on 13 February 2016 as a direct response to the sale, by the Province, of State land in Cape Town to private sector investors…'

[8] The second applicant in the RTC application is Ms. Phumza Ntutela, a resident of the Cape Town suburb of Nyanga, which is located on the Cape Flats about 25km from Sea Point. In the founding affidavit Ms. Ntutela's personal circumstances are described as follows:

'She is a parent of two daughters, one of whom is a learner at Sea Point High School. She has been a Sea Point resident since 1981. She and her children have lived in 'maids' quarters' in the basement of various apartment buildings in and around Sea Point. Today, she, her daughter and her grandson live in Nyanga, as a direct result of being forced out of Sea Point because of the inability to afford accommodation in the area following her early retirement in 2005, as a result of chronic arthritis, from her employment as a secretary.'

[9] The third applicant, Sharone Daniels, lives in Ocean View in the southern Peninsula, having been forcibly removed there from Simon's Town. Although Ms. Daniels works in the city, she has no obvious residential connection with Sea Point. The fourth applicant is Ms. Selina La Hane, a 71-year-old adult female who resides in Sandrift, Milnerton, which is approximately 15km distant from Sea Point. Ms. La Hane's personal circumstances are described thus in the founding affidavit:

'She is the guardian of her grandson aged 15 and a great granddaughter aged 10, who attend Cape Town High School[2] and Prestwich Primary School,[3] respectively. She has been a Sea Point resident since 1974. She had previously lived in Wynyard Mansions, provincially-owned rental units located on a portion of the Tafelberg Property (erf 1424) and had lived there since 1995 with other predominantly working-class tenants. Today, she lives in Sandrift after being relocated and displaced by the Western Cape Department of Human Settlements…'

[10] In the RTC application the MEC is cited as the first respondent, because he is the official responsible for the disposal of immovable assets owned by the Province, which includes the Tafelberg site. The MEC exercises those functions under the Western Cape Land Administration Act, 6 of 1998 ("the WCLAA")[4] and the Government Immovable Asset Management Act, 19 of 2007 ("GIAMA")[5] and, in terms of s4 thereof, was designated by the Premier of the Province ("the Premier") as the custodian of immovable assets registered in the name of the Province.

[11] The Premier was joined as the second respondent in the RTC application in her capacity, acting together with the other members of the Provincial Cabinet, as the official responsible for the disposal of the Tafelberg site in terms of s3 of WCLAA.

[12] The City was joined as the fourth respondent in the RTC application on the following basis, according to the founding affidavit:

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[2] Situated in the inner city suburb of Gardens.

[3] Situated in the inner city area between De Waterkant and the V & A Waterfront.

[4] This is a statute passed by the Western Cape Provincial Legislature.

[5] National legislation.

'The City is cited by virtue of the fact that the Tafelberg Property, and further similarly situated properties forming part of the Cape Town Central City Regeneration Programme fall within its jurisdiction and that the City, with the concurrence of the provincial government, identifies restructuring zones for purposes of social housing designated by the National Minister of Human Settlements in terms of the Social Housing Act, 16 of 2008 ("Social Housing Act")[6]. . . (T)he applicants contend that the City and the province have failed to comply with its (sic) constitutional and statutory obligations to redress spatial apartheid in central Cape Town.'

[13] The National Minister was cited in light of her constitutional and statutory responsibilities in respect of the provision and administration of housing delivery arising from, *inter alia*, the Constitution of the Republic of South Africa,1996 ("the Constitution"), the Housing Act, 107 of 1997 ("the Housing Act") and the SHA.

[14] The Minister of Public Works in the National Government was cited as the seventh respondent in the RTC application, as the custodian of immovable assets in the national sphere of government under GIAMA.

[15] The SHRA was cited as the ninth respondent in the RTC application in that, having been established in terms of Chapter 3 of the SHA, it is the custodian of social housing (as defined in the SHA) in the Republic.

[16] Equal Education, a non-governmental organization ("NGO") with a focus on educational issues, applied to be, and was duly joined as, an *amicus curiae* in the RTC application.

[17] I shall revert later to the relief sought in the RTC application, but it bears mention at this juncture that there is no issue regarding the *locus standi* of any of the applicants in that application.

THE NATIONAL MINISTER'S APPLICATION – CASE NO.12327/17

[6] Hereinafter referred to as the "SHA".

[18] On 11 July 2017 the National Minister effectively joined the litigation, by issuing her own application for declaratory and other relief. She joined the National Department of Human Settlements ("the DHS" – as second applicant) and the SHRA as the third applicant. Included amongst the respondents in the National Minister's application were the Premier (as first respondent), the MEC (as second respondent), the City (as fourth respondent) and the Day School (as fifth respondent).

THE LEGAL TEAMS

[19] RTC was represented by Mr. P. Hathorn SC and Ms. C. de Villiers, instructed by Ndifuna Ukwazi Law Centre ("Ndifuna") of Cape Town. Ndifuna[7] is a public interest law firm active in social issues in Cape Town and is controlled by the Ndifuna Ukwazi Trust, whose trustees were joined in the RTC application as the sixth applicant and were joined by the National Minister in her application as the sixth respondent.

[20] The National Minister was represented by Mr. I. Jamie SC, Mr. T. Masuku SC and Ms. L. Stansfield, instructed by the State Attorney, Pretoria.

[21] The SHRA was represented by Ms. E. Webber, instructed by M F Jassat Dhlamini, attorneys of Johannesburg, while Equal Education was represented by Ms. J. Bleazard and Mr. U. Naidoo, on the instructions of the Equal Education Law Centre in Cape Town.

[22] The Premier, the MEC, the Provincial Government (the sixth respondent in the RTC application), the Minister of Human Settlements: Western Cape (the eighth respondent in the RTC application and the third respondent in the National Minister's application and hereinafter referred to as "MHS: WC") were represented by Mr. E. Fagan SC, Ms. K. Pillay SC, Ms. A. du Toit and Ms. M. Mokhoetsi, on the instructions of the State Attorney, Cape Town.

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[7] Ndifuna Ukwazi is an isiXhosa phrase loosely translated as 'I want to know'.

[23] The City was represented by Ms. N. Bawa SC and Mr. T. Mayosi, instructed by Riley Incorporated Attorneys, while the Day School was represented by Mr. P. Farlam SC, Mr. B. Joseph SC and Mr. G. Quixley, on the instructions of Edward Nathan Sonnenberg Attorneys of Cape Town.

[24] The combined applications ran into more than 8000 pages and were contained in more than 30 lever arch files. The papers were meticulously collated and presented by the various attorneys, for which we express our gratitude. For the sake of convenience the parties agreed to compile a core bundle of the most relevant documents, and these were utilised during the 5 days over which the matter ran.

[25] Counsel all submitted detailed heads of argument, which have greatly assisted in the preparation of this judgment. At our request, counsel prepared (and adhered to) a timetable to facilitate the presentation of their arguments, and we would like to commend all counsel for the quality of their oral arguments in what rightly is to be described as a marathon matter of great significance to all the parties concerned.

THE RELIEF SOUGHT IN THE RTC APPLICATION

[26] The RTC application contemplates relief on a range of issues at various levels, from the infringement of constitutional rights and obligations to a direct attack on the sale of the Tafelberg site to the Day School. At the core of the constitutional attack, is the legacy of segregated living areas imposed on the people of our country by a plethora of legislation passed under the apartheid government. The parties referred in this regard to the persistence (after more than 25 years of democracy) of “spatial apartheid” in central Cape Town and I shall do likewise.

[27] The relief originally sought in the notice of motion was amended (only in minor respects and without objection) at the conclusion of argument, and in terms of a draft order ultimately presented to the Court by Mr. Hathorn SC the following relief is sought by RTC:

'1. It is declared that the first, second, fourth, sixth and eighth respondents have failed to comply with their obligations, in terms of sections 25(5), 26(1) and 26(2) of the Constitution[8], and the legislation enacted to give effect to these rights, to redress spatial apartheid in central Cape Town (the boundaries of which are depicted on the map annexed hereto marked "A").

2. The first, second, fourth, sixth and eighth respondents are directed to comply with their constitutional and statutory obligations as declared by this court in the preceding paragraph 2 (sic).

3. The first, second, fourth, sixth and eighth respondents are directed to file reports under oath, within three months, stating what steps they have taken to comply with their constitutional and statutory obligations as declared by this Court, what future steps they will take in that regard and when such future steps will be taken.

4. The applicants are granted leave to file an affidavit or affidavits responding to the reports referred to in the preceding paragraph, within one month of them having been served on their attorneys of record.

5. Furnishing directions with regard to the further conduct of the matter pursuant to the filing of the reports and affidavits referred to in the preceding paragraphs.

6. Reviewing and setting aside the designation by the provincial government in June 2010 of Erf 1675, an unregistered portion of Erf 1424 Sea Point, and remainder of Erf 1424 Sea Point (collectively, 'the Tafelberg Properties') as 'surplus' in terms of the Government Immovable Asset Management Act, 19 of 2007.

7. Reviewing and setting aside the decisions of the Western Cape Education Department and the Western Cape Department of Human Settlements respectively to surrender the

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[8] The relevant sections of the Constitution read as follows: –

'25(5) The state must 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. . .'

'26(1) Everyone has the right to have access to adequate housing.

26(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.'

Tafelberg Properties to the Western Cape Department of Transport and Public Works in 2010.

8. Reviewing and setting aside the decision of the Western Cape Department of Transport and Public works in March 2015 to dispose of the Tafelberg Properties in (sic) the open market.

9. Reviewing and setting aside the decision of the Western Cape Department of Human Settlements as reflected in its letter dated 17 August 2015 to the Western Cape Department of Transport and Public Works to withdraw its proposal to use the Tafelberg properties.

10. The November 2015 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, to sell the Tafelberg Properties to the third respondent, 'together with the deed of sale in respect of the Tafelberg Properties… entered into between the Third and Sixth Respondents', is reviewed and set aside.

11. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded with the Third Respondent is reviewed and set aside.

12. The Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, is directed to take into account, and have due regard to, the legal obligation to provide, and the need for, affordable social housing in central Cape Town, and the suitability of the Tafelberg Properties for social housing, in any decision in respect of the use or disposal of the Tafelberg Properties.

13. The Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet (or a delegate), is directed to consult with the National Department of Human Settlements, the Provincial Department of Human Settlements, the City of Cape Town and the Social Housing Regulatory Authority before taking any decision in respect of the use or disposal of the Tafelberg Properties.

14. It is declared that Sea Point falls within the restructuring zone 'CBD and surrounds (Salt River, Woodstock and Observatory)' in sub-regulation 6.1 of the Provisional Restructuring Regulations Published under General Notice 848 in Government Gazette 34788 of 2 December 2011 ('sub-regulation 6.1').

15. It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under the Western Cape Land Administration Act, 6 of 1998 by provincial notice number 595 published in Provincial Gazette number 5296 of 16 October 1998 are unconstitutional and invalid.

16. It is declared that the disposal of the Tafelberg Properties in accordance with Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under the Western Cape Land Administration Act, 6 of 1998 by provincial notice number 595 published in Provincial Gazette number 5296 on 16 October 1998 is unlawful.

17. In so far as may be necessary, the period of 180 days contemplated in section 7(1) of the Promotion of Administrative Justice Act, 3 of 2000 ('PAJA') is extended to the date on which the review proceedings under the above case number were instituted.

18. Alternatively, and in any event, insofar as may be necessary, the institution of the proceedings for review on 5 June 2017 is condoned.

19. Those respondents who opposed the application are ordered to pay the Applicants' costs of suit, including the costs of two counsel.'

THE RELIEF SOUGHT IN THE NATIONAL MINISTER'S APPLICATION

[28] The National Minister's case is founded, firstly, on Chapter 3 of the Constitution and the legislation promulgated pursuant thereto, *viz.* the provisions of the Intergovernmental Relations Framework Act, 13 of 2005 (*"*IGRFA")[9]. The National Minister similarly attacks the validity of the WCLAA Regulations, and further relies on non-compliance by the Province with GIAMA, in calling for the review and setting aside of the sale of the Tafelberg property to the Day School. On that basis the National Minister asks for an order in terms of a revised draft handed up to Court at the conclusion of the hearing herein, as follows:

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[9] The long title of IGFRA reads: 'To establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith.'

‘1. Declaring that the Western Cape Provincial Government’s (‘WCPG’) failure to inform the National Government, represented by the First and Second Applicants, of its intention to dispose of Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (collectively “the Tafelberg Property”), and prior to doing so, to consult and engage with it in this regard, constitutes a contravention of the WCPG’s obligations in terms of Chapter 3 of the Constitution and the Intergovernmental Relations Framework Act, 13 of 2005 (“IGRFA”).

~~2. Declaring that there is an intergovernmental dispute between the National, Provincial and Local spheres of government within the meaning of section 1 of IGRFA relating to the sale or intended sale, as the case may be, of the Tafelberg Property by the WCPG to the Fifth Respondent.~~

~~3. Directing the First Second and Third Respondents to engage the First and Second Applicants and the Fourth Respondent in an intergovernmental dispute resolution process as envisaged by Chapter 3 of the Constitution and regulated by IGRFA.~~

4. Declaring the WCPG’s failure to publish in IsiXhosa the notice dated 15 May 2015 calling for offers for the purchase of the Tafelberg Property to be in contravention of the provisions of section 5(1) of the Western Cape Constitution and section 3(2) of the Western Cape Land Administration Act No 6 of 1998 (“WCLAA”).

5. Reviewing and setting aside the publication on or about 15 May 2015 of the notice, published in Afrikaans and English, calling for offers for the purchase of the Tafelberg Property.

6. Declaring the decision of WCPG, alternatively the Provincial Cabinet, in or about November 2015 to dispose of the Tafelberg Property through a deed of sale entered into with the Fifth Respondent to be unlawful and invalid.

7. Reviewing and setting aside the Provincial Cabinet’s decision on 22 March 2017 not to resile from the contract of sale concluded between the WCPG, alternatively the Provincial Cabinet, and the Fifth Respondent in respect of the Tafelberg Property on the basis that the decision is inconsistent with the provisions of sections 5(1)(a) and (f), read with sections 3(c) and (d), of GIAMA, and thus unlawful.

8. Declaring the deed of sale between the WCPG, alternatively the Provincial Cabinet, and the Fifth Respondent in respect of the Tafelberg Property to be void ab initio and of no force or effect, alternatively voidable and setting same aside.

9. Declaring the provisions of Regulation 4(1) and (6) of the Land Administration Regulations, made under section 10 of the WCLAA, to be ultra vires the WCLAA and therefore invalid.

10. Directing the First, Second and Third Respondents to pay the Applicants' costs, including the costs of three counsel.'

[29] During argument Mr. Jamie SC indicated that the Province no longer sought the relief in prayers 2 and 3 of the draft. As to prayer 4, after Mr. Masuku SC had addressed the Court in relation to the invalidity of the notice due the failure to publish it in isiXhosa, the Day School's attorney diligently conducted a late night internet search and established that the notice had indeed been so published. This was confirmed in a short affidavit handed up, without objection, on the last day of the hearing and so the relief sought in prayer 4 was also abandoned by the National Minister.

[30] I shall return to discuss the National Minister's application in greater detail later in this judgment. Suffice it to say at this stage that the basis for the IGRFA relief is that the Province is alleged to have failed to consult or inform the DHS of its intentions regarding the disposal of the Tafelberg site, and that it failed to coordinate its actions with those of the national government or its agencies, including the SHRA, or to take into account their material interests in the property and its disposal. The Province admits the failure to consult, claiming that there was no legal obligation on it to do so. In relation to the review points, the Province argues that the impugned decisions are not administrative action and are therefore not susceptible to review at law. Further, the Province argues that any review application is time-barred.

[31] But first it is necessary to go into the background to the two applications, and the approach required in law to address them. In so doing, I have relied extensively on the heads of argument filed on behalf of the applicants, which sketch a factual

matrix and historical background that is largely not in dispute. Further, I did not understand counsel for the Province or the Day School to take issue with the approach mandated under the Constitution to the assertion by RTC of its members' socio-economic rights, or of the interpretation and application of the land and housing rights protected under the Constitution.

THE FACTUAL AND LEGAL CONTEXT UNDERPINNING THE RTC APPLICATION.

[32] RTC forcefully asserts a stark reality that stares every Capetonian in the face on a daily basis. Despite the beauty of the edifice that stands guard over the city, Table Mountain, and its spine that stretches all the way to Cape Point at the southern tip of the Peninsula, and notwithstanding its forests, beaches and world class facilities which make it one of the world's most sought after tourist destinations, Cape Town remains one of the most spatially divided cities in South Africa.

[33] As pointed out by Dr. Lorna Odendaal[10], one of the expert witnesses who deposed to an affidavit on behalf of RTC, spatial segregation and socio-economic exclusion remain barriers to equality and justice in our city. She describes how the city's sprawling landscape manifests as segregated residential settlement patterns, along racial and class lines, which produce an urban form characterised by densely populated locations where, on the one hand, African[11] and Coloured people live, usually in informal settings with limited or no access to employment opportunities, social amenities or public services, and on the other hand, central or well-located residential areas that offer the above, but which are significantly less densely inhabited and typically dominated by White people. This phenomenon is described as "inverse densification".

[34] One of the most pronounced consequences of such inverse densification is that working class residents and the poor are unable to afford accommodation in the

[10] Associate Professor in the School of Architecture, Planning and Geomatics at the University of Cape Town.

[11] For the necessary purpose of racial distinction this judgment will refer, where necessary, to the following groups – 'African'", 'Coloured', 'Indian' and 'White'.

inner city or the surrounding central areas. Consequently, poorer residents of the city have to spend high percentages of their income on travelling costs to reach their places of employment, or to enjoy the city's many public and private amenities.

[35] A useful discussion of the effects of spatial apartheid in relation to the Cape Peninsula is to be found in the affidavit of Prof. Susan Parnell[12], a further expert witness on behalf of RTC:

'While apartheid urban planning affected all South African cities, it was particularly effective in Cape Town, because of the city's unique typographical layout and racial demographics. Mountains, oceans and other natural features serve as unwitting allies in controlling movement and land use, and the Western Cape's status in the apartheid era as a 'Coloured labour preference area' led to a unique three-way segregation between Coloureds, Blacks and Whites.

Cape Town today exhibits an inverse densification. A largely poor and working class Coloured and Black majority live on the urban periphery, in very densely populated settlements, far from jobs, and with poor access to amenities and services. Well-located central areas are dominated by middle class and affluent, predominantly White, households. These areas are characterized by relatively low densities, and an acute shortage of affordable housing options despite excellent access to amenities, services and employment opportunities. This dislocation results in an unjust, inefficient and ultimately unsustainable segregated urban environment.

Cape Town's economic centre is the central city, but it remains vastly less densified and diverse than it was fifty years ago. Over the past two decades government has failed to remedy this, by not meaningfully integrating Black and Coloured working class people into the central city. The rising costs of market-rate housing (rented or owned), and government failures to meaningfully encourage social and affordable housing in well-located areas (through radically up-scaled public provision or private regulation), have increasingly pushed poor, working and middle class families further away from economic and social centres. This sustains and advances the racial and class divides of apartheid.

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[12] Professor in the Environmental and Geographical Sciences Department of the University of Cape Town.

Spatial segregation and associated patterns of sprawl impose a number of costs on the household, society, and the state, which become increasingly difficult to reverse over time.

Neighbourhoods of concentrated low income households experience disproportionate levels of crime, poor educational outcomes, higher incarceration levels, and low levels of public health. Despite greater need for government intervention in these areas, access to services and amenities tend to be significantly worse than in more affluent or mixed-income neighbourhoods.

The long-term financial costs imposed on the state through the creation of poverty traps in dislocated low income neighbourhoods tend to be ignored when urban planning decisions are made. Too often, the focus remains on expediency, short-term gains and cost savings.

Government's constitutional duty to progressively realise the right to physical housing structures cannot be divorced from its responsibility to advance spatial justice. Progressively addressing historic and ongoing spatial injustice requires effective, co-ordinated and integrated broad-based social and affordable housing programmes, land use regulations, and spatial development strategies.'

[36] RTC advances its case against this socio-economic and socio-political background. Relying on the provisions of the Constitution referred to in its notice of motion, RTC says that there is a positive obligation on the Province and the City to take reasonable legislative and other measures to foster conditions which will enable citizens of the Peninsula to gain access to land on an equitable basis, all of this subject to available resources. It refers specifically to the Housing Act, the SHA and the Spatial Planning and Land Use Management Act, 16 of 2013 ("SPLUMA"), as important legislative instruments in the mandated obligation on the part of the Province and the City to urgently address the spatial inequality referred to.

[37] RTC links its application to the Tafelberg site because it says the availability of this state-owned land presented the authorities with a fairly unique opportunity to promote housing under the SHA, rather than to dispose of the property to an entity for private development at, what by all accounts is, a sum of money well above the market value of the land. It must be stressed, therefore, that RTC's application is

fundamentally based on the obligation to provide social housing in central Cape Town and its surrounds.

[38] It is not RTC's case that the property should have been made available for the provision of accommodation under the government's more generalised housing plan, referred to in common parlance as "RDP Housing". This refers to a scheme in terms whereof compact houses that have been built by the government are given to low income families, who earn a combined income of less than R3500 per month per household. Importantly, RDP houses are owned (and not rented) by the beneficiaries and there are strict conditions relating to occupation and leasing. The DHS no longer refers to the RDP housing plan as such, but has updated the plan and now calls it "Breaking New Ground*"* or "BNG"[13]. I shall, however, maintain use of the acronym RDP for reasons which will become apparent later.

UNDERSTANDING SOCIAL HOUSING

[39] With the promulgation of the SHA in 2009 a new category of subsidised housing was effectively created. As the definition in s1 of the SHA demonstrates:

'"**social housing**" means a rental or co-operative housing option for low to medium income households at a level of scale and built form which requires institutionalised management and which is provided by social housing institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in this Act; . . .'

[40] Section 2 of the SHA contains a multitude of general principles applicable to social housing. I shall refer to certain specific principles later, but for the present they may be conveniently summarised as follows. The aim of the SHA is to promote access to socio-economic resources in urban areas and assist with restructuring cities to ensure greater social, economic and racial integration with more compact residential areas. To this end, priority must be given to the needs of low and medium income households in respect of social housing development, and the SHA expressly

[13] https://www.groundup.org.za/article/everything-you-need-know-about-government-housing/

requires that all three spheres of government promote, amongst other aspects, the social, physical, and economic integration of housing development into existing urban and inner city areas through the creation of quality living environments.

[41] To this end, and as will appear later from the approach to litigation of this nature, housing programmes implemented under the SHA must ensure that they are responsive to local housing demands and special priority must be given to the needs of women, children, child-headed households, persons with disabilities and the elderly. Further, they must support the economic development of low to medium income communities by providing housing close to jobs, markets and transport and by stimulating job opportunities to emerging entrepreneurs in the housing services and construction industries.

[42] The expert evidence adduced on behalf of RTC stresses the importance of access to well-located land to redress spatial injustice, whether through social housing under the SHA or otherwise. The experts contend that the availability of appropriately priced state-owned land is an essential requirement for addressing spatial exclusion and advancing spatial justice in central Cape Town. In the view of Dr. Odendaal, in particular, the single greatest contemporary driver of spatial injustice in the city is the price of well-located land and housing. Suitable land for social housing (and other forms of more affordable housing) is extremely scarce in the central city area and will only become more so in the future. This view is shared by the City and is not disputed by the Province.

[43] Architecturally, a social housing programme usually comprises a set of residential units, similar to a block of flats or a collection of townhouses, which are erected and managed by a recognised “social housing institution” which is defined in s1 of the SHA as ‘an institution accredited or provisionally accredited under this Act which carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households (excluding immediate individual ownership and a contract as defined under the Alienation of Land Act, 1981 (Act No. 68 of 1981), on an affordable basis, ensuring quality and maximum benefits for residents, and managing its housing stock over the long term . . .’

[44] Two criteria immediately stand out in this definition. Firstly, there can be no private ownership in a social housing scheme (as there is in RDP housing), and secondly, there are fixed levels of income which prospective lessees must meet, with such income categories being fixed by the National Minister from time to time. At the hearing of this matter the Court was informed that in order to qualify for a social housing lease a tenant had to fall within the income band of R5000 to R15 000 per month.

[45] There are already a number of social housing schemes operating in the Cape Peninsula. One such scheme, by way of example, is Communicare,[14] which owns and manages some 3375 rental units. These range from areas such as Mitchells Plain, where a bachelor flat in the Montclair Place complex costs R800 per month, to Brooklyn, where a bachelor flat in the Drommedaris complex is leased out for R4100 per month. Those complexes were built, and are managed, by Communicare, which was the recipient of state subsidies in respect of each such complex.

[46] RTC's interest in the Tafelberg property in particular, is the fact that it says that the site presents an ideal opportunity for the development of a social housing scheme to provide much needed affordable housing to the women and men who live and work in the Sea Point area, be they domestic workers, nurses, shop assistants, employees in the hospitality industry or semi-skilled workers earning enough to meet the income threshold set under the SHA. RTC complains that instead of properly considering the suitability of the site for social housing (and in so doing beginning to break down the barriers set up by spatial apartheid), the Province has been driven by purely financial considerations in selling the property to the Day School, whose declared intention is to relocate, from the neighbouring suburb of Camps Bay, an orthodox Jewish day school, primarily dedicated to the religious instruction of scholars who may one day enter the rabbinical calling.

[47] I should perhaps point out at this stage that the Day School says too that it intends to develop the property extensively: with not just a day school exclusively for

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[14] www.communicare.co.za

Jewish children, but a kosher restaurant, a day clinic/hospital and the provision of new accommodation for retired Jewish senior citizens, currently accommodated in Highlands House on the slopes of Devil's Peak, which is said to be overcrowded and in a poor state of repair. In short, the Day School's declared intention is, in embracing and advancing the rights protected under s15(1)[15], s30[16] and s31[17] of the Constitution, the development of the site into a precinct dedicated exclusively to the service of Cape Town's admittedly dwindling Jewish community.

AN OVERVIEW OF THE PARTIES' RESPECTIVE POSITIONS

[48] As will be seen from the relief claimed in the notice of motion cited above, RTC has adopted a multi-pronged attack. Firstly, it attacks the failure of the Province and the City, over the first 25 years of democratic rule, to address the issue of spatial apartheid in central Cape Town, and to this end it seeks declaratory relief, and a structural interdict, to hold the authorities to account in respect of their alleged failure to comply with their respective constitutional and statutory obligations in that regard. Consideration of these claims involves an assessment of various policy instruments applicable to both the Province and the City.

[49] Secondly, it attacks the sale of the property on the basis of legality, alleging a failure to comply with various statutory and legal obligations in initially putting the property out to tender and ultimately concluding the sale to the Day School. Finally, there is an attack on the reasonableness of the conduct of the Province and the City,

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[15] S15(1) – 'Everyone has the right to freedom of conscience, religion, thought, belief and opinion.'

[16] S30 – 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.'

[17] S31– '(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community –

(a) to enjoy their culture, practice their religion and use their language; and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.'

which it claims renders the sale unlawful, with particular focus on the failure to properly consider the prospect of a social housing development on the property.

[50] The National Minister's case is of a far narrower focus. She contends that the Province was statutorily obliged to engage and consult with her prior to the sale of the property, and that the failure to do so rendered the disposal of the property unlawful and liable to be impugned. The National Minister effectively asks for the clock to be wound back and for the requisite engagement to be ordered to take place before disposal of the property can be effected. The National Minister also alleges non-compliance with a number of statutory prescripts, which she says renders the sale of the property unlawful. Her case is therefore a legality attack.

[51] I shall deal with the respondents' defences and responses to the various claims made against them as I evaluate each of the applicants' claims and arguments. For present purposes it suffices to say that the attitude of the Province is that it is an organ of state that has a very limited ability to generate income of its own. It receives its income from central government (with all the vagaries that central government's income generation may embrace as the economy and revenue streams change course from time to time), and the Province says that it is obliged to distribute that income in accordance with its own budgetary constraints. The bulk of its income is spent on health and education (a figure of around 70% was mentioned by Mr. Fagan SC in this regard) and the remaining 30% must be spread across a number of other departments including housing, roads and infrastructure.

[52] Given the limitations on income generation, the Province says that the disposal of redundant assets is one way to supplement its coffers. In the context of the Tafelberg site (which was commercially valued at around R108m), the offer of R135m from the Day School was, as Mr. Fagan SC put it in the vernacular, a 'no- brainer'. I understood counsel to suggest through the use of this popular euphemism that the decision to sell was so obvious that it required little or no thought on the part of the Province. But regardless of the enormous financial benefit afforded by the sale, the Province took issue with both the suggestions of any statutory non-compliance or any

illegality on its part. It does not dispute that it has failed to facilitate the provision of social housing in the Cape Town CBD and adjacent areas.

[53] In relation to the National Minister's assertion that it was duty bound to consult her, the Province disputed the existence of any statutory obligation in that regard, but went on to point out that when it had responded to the National Minister's enquiries, the lines of communication had effectively fizzled out.

[54] The City's financial resources are more extensive than those of the Province given that, besides allocations from central government, it has the power to levy rates and taxes and other streams of income on its inhabitants. The City's position, said Ms. Bawa SC, was that the progressive realisation of the right to housing, as contemplated in the Constitution and as interpreted in *Grootboom*[18], did not entitle a party to demand a specified form of housing, such as social housing, in a designated area, for example, central Cape Town. Ms. Bawa SC went on to explain how the City effectively found itself between a rock and a hard place. Its waiting list for rental stock, particularly in the Coloured areas, went back several decades, while it also had to contend with the influx of millions of people from the former Bantustans, such as Transkei and Ciskei, and the demand for control over illegal land occupations and squatting.

[55] In relation to the need for social housing the City's position is that this type of accommodation is of fairly recent origin, given that the SHA is legislation which has only been on the statute book for the last 10 years or so, while SPLUMA is even more recent – of the order of 5 years. The City's acceptance that it has done little to address the absence of social housing in central Cape Town is therefore qualified by this contextual setting.

[56] On the policy front, in purporting to address spatial apartheid, the City referred the Court to a plethora of policy documents which it had adopted over the years and

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[18] *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

which were said to be in the process of implementation. It was important to note too, said counsel, that the City Council had been controlled by different political parties during the past 25 years, with differing political agendas, and that this factor was an important consideration in evaluating its compliance with its Constitutional obligations.

[57] The Day School effectively makes common cause with the Province in endorsing the legality of the sale of the property to it. There is an explanation of the Day School's current accommodation predicament (largely of its own making, it must be said) and the broader advantages that the site offered for the community. As Mr. Farlam SC rather pithily put it, the proposed development was 'Good for the site, good for Sea Point and good for the City.'

[58] Given that there were considerable areas of overlap in the respective parties' cases, counsel shared the burden of labour, so that Mr. Jamie SC dealt with some aspects of the case which also fell within the remit of Mr. Hathorn SC's argument. Likewise Messrs Fagan SC and Farlam SC also divvied up their arguments in relation, for example, to the constitutional and administrative law issues. We are indebted to counsel for this sensible approach to their workloads in an endeavour to curtail the duration of the hearing.

[59] Against that more general background, I consider it prudent to commence with an overview of the various statutory and policy instruments at play in this matter.

THE APPROACH TO LITIGATION INVOLVING THE VINDICATION OF SOCIO-ECONOMIC RIGHTS

[60] The point of departure in this case is the Constitution and it is therefore necessary to consider first principles. In *Mazibuko*[19] O'Regan J contextualized, in fairly general terms, the approach to the realization of the socio-economic rights incorporated in the Constitution.

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[19] *Mazibuko and others v City of Johannesburg and others* 2010 (4) SA 1 (CC) para 59. The case involved the right of access to water by citizens of Soweto.

'[59] At the time the Constitution was adopted millions of South Africans did not have access to the basic necessities of life, including water. The purpose of the constitutional entrenchment of social and economic rights was thus to ensure that the State continue to take reasonable legislative and other measures progressively to achieve the realisation of the rights to the basic necessities of life. It was not expected, nor could it have been, that the State would be able to furnish citizens immediately with all the basic necessities of life. Social and economic rights empower citizens to demand of the State that it act reasonably and progressively to ensure that all enjoy the basic necessities of life. In so doing, the social and economic rights enable citizens to hold government to account for the manner in which it seeks to pursue the achievement of social and economic rights.'

[61] In *Grootboom*[20] the Constitutional Court was specifically required to consider the right to housing protected under s26 of the Constitution – the first time that the Court dealt with the issue of the socio-economic rights guaranteed under the Constitution. The Court made it clear that there was an obligation on the State to take reasonable legislative and other measures to achieve the progressive realisation of the housing rights under consideration in that case, and stressed that this entailed both the obligation to formulate reasonable programmes designed to achieve the objective in issue and to implement those programmes reasonably. Yacoob J continued thus:

'[43] In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program. The program must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A program that excludes a significant segment of society[21] cannot be said to be reasonable. Conditions do not remain static and therefore the program will require continuous review.'

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[20] Para 42.

[21] RTC argues that that those who earn between R5000 and R15 000 per month, thereby qualifying for social housing, constitute such a segment.

[62] In *TAC*[22] the Constitutional Court stressed that the role of the courts is to guarantee that democratic processes are protected and to ensure accountability, responsiveness and openness, as required by s1 of the Constitution. In relation to socio-economic rights, it was said that the courts have to ensure that legislative and other measures taken by the State are reasonable. The role of the courts in that regard is restrained by focusing on ensuring that the State takes measures to meet its constitutional obligations and by evaluating the reasonableness of such measures.

[63] In *Mazibuko* O'Regan J stressed that while the Constitution does not require that the State immediately furnish citizens with all the basic necessities of life, constitutionally guaranteed socio-economic rights *per se* empower citizens to demand of the State that it acts reasonably, and ensures that all persons enjoy access to the basic necessities of life on a progressive basis. This enables citizens to hold government accountable (through both the ballot box and litigation) for the manner in which it ought to promote realisation of these rights.[23]

[64] Further, challenges involving the assertion of socio-economic rights require the State to explain and give reasons for its decisions and actions. In doing so, government is obliged to provide access to the information it has considered, as well as the processes followed, in determining the content and implementation of its policies. Disclosing such information reveals the substantial importance of socio-economic rights litigation: if the process followed by government is flawed, or the information gathered is inadequate or incomplete, appropriate relief may be sought.[24]

[65] And so, *Mazibuko* stresses that socio-economic rights litigation represents an important mechanism to hold the democratic arms of the government to the promises in the Constitution. In this way, litigation fosters a form of participative democracy that holds government accountable and requires it to answer, between elections, for

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[22] *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 (5) SA 721 (CC) paras 36 & 38. The case concerned the provision by the State of anti-retroviral drugs to pregnant women for the prevention of mother-to-child transmission of HIV.

[23] *Mazibuko* para 59.

[24] *Mazibuko* para 71.

specific aspects of its policy. That goal is served when government respondents take steps in response to such litigation to ensure that the measures they adopt are reasonable, within the meaning of the Constitution. This contributes to the deepening of democracy.[25]

[66] In his address, Mr. Hathorn SC stressed that the RTC challenge was not directed at government's statutory or policy framework aimed at advancing spatial justice through the provision of affordable, well-located housing. That framework had largely been established by national government through the adoption, *inter alia,* of legislation such as the Housing Act, the SHA and SPLUMA. Rather, said counsel, the challenge was in respect of the manner in which the constitutional and statutory obligations (as well as the policies formulated in terms of the applicable legislation) had been implemented by the Province and the City.

[67] In short, it was argued that the RTC application required the Province and the City to explain why their policies directed at redressing spatial injustice were reasonable; to explain the processes they had undergone in formulating such policies; to explain the alternatives considered; and to state the reasons why they opted for the policies selected.

[68] In this regard the applicants rely specifically on the following passages in *Mazibuko:*

'[161] When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable. Government must disclose what it has done to formulate policy: its investigation and research, the alternatives considered, and the reasons why the option underlying the policy was selected. The Constitution does not require government to be held to an impossible standard of perfection. Nor does it require courts to take over the tasks that in a democracy should properly be reserved for the democratic arms of government. Simply put, through the institution of the courts, government can be called upon to account to citizens for its decisions. This understanding of social and economic rights litigation accords with the founding values of our

[25] *Mazibuko* para 96.

Constitution and, in particular, the principles that government should be responsive, accountable and open.

[162] Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to 'progressively realise' social and economic rights in mind. A policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights consistently with the obligations imposed by the social and economic rights in our Constitution.' (Internal reference omitted.)

THE PROPERTY AND HOUSING CLAUSES IN THE CONSTITUTION

[69] As prefaced above, RTC bases its case on a cluster of legal relationships between the Province, the City and its residents, rooted in ss25(5) and 26 of the Constitution and the legislative framework enacted thereunder to give effect to these rights. Given the relationship between residents and the authorities, it has been pointed out that these provisions demand on-going, dynamic and responsive public responsibilities at all times.[26]

[70] The right conferred in s25(5) establishes a justiciable socio-economic right to gain access to land on "an equitable basis."[27] Importantly, it is an '*access*' right as distinct from a more direct right '*to*' land, and encompasses the appropriate services and financial assistance required to obtain land.[28] Since this right is not limited by any internal limitation such as 'progressive realisation' (as one sees in s26(2) with regard to housing), the implication is that access to land is immediately realisable,[29] subject, however, to the obligation on the state under s25(5) to foster conditions for access to land 'within its available resources*.'*

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[26] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others (Centre on Housing Rights and Evictions and another, Amici Curiae)* 2010 (3) SA 454 (CC) para 343; *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) paras 24 – 25.

[27] *Rahube v Rahube and others* 2019 (2) SA 54 (CC) para 50.

[28] *Grootboom* para 35.

[29] cf. *Governing Body of the Juma Musjid Primary School and others v Essay N.O. and others* 2011 (8) BCLR 761 (CC) para 37.

[71] I agree with Mr. Hathorn SC's submission in this regard that, given the Constitution's broader goals of redress in relation to land in particular, and the advancement of substantive equality, the phrase 'on an equitable basis' must imply a pattern of access, holding, and the use of land that is designed to alleviate inequality in terms of race, gender and other relevant criteria.

[72] On the other hand, under s26(2) the right to adequate housing imposes positive obligations on the State to take reasonable legislative and other measures to achieve the progressive realisation of that right, subject always to available resources. Mr. Hathorn SC submitted that the primary focus in relation to RTC's claims concerned the positive obligations imposed on the Province and the City by ss26(1) and (2), and in particular on the 'other measures' contemplated under s26(2), given that the relevant legislative provisions were already in place.

[73] In *Grootboom*[30] the Constitutional Court undertook a detailed analysis of the obligations imposed by ss26(1) and (2) and concluded that:

73.1. There was a negative obligation on the authorities to desist from impairing the right of access to adequate housing;

73.2. The right to adequate housing went further than the provision of bricks and mortar: access to land and appropriate services as well as financing was required, thus providing a link to the s25 rights;

73.3. The State was required to create conditions which enabled access to housing for people at all economic levels of our society. Thus, where citizens were in a financial position to afford adequate housing, the State's primary obligation was to make it possible for such persons to obtain access thereto, hence the introduction of the SHA;

73.4. The State's housing obligations were contextually dependent and might differ between provinces, cities and rural areas;

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[30] Para 34 *et seq.*

73.5. S26(2) imposed a positive obligation on the State to devise comprehensive and workable plans to achieve its statutory obligations;

73.6. The yardstick according to which the State's compliance with its statutory obligations was to be measured was the test of reasonableness. Accordingly, any proposed housing programme had to be co-ordinated, coherent and comprehensive and determined at all three tiers of government, in consultation with each other, with a view towards the progressive realisation of the right in question;

73.7. All legislative enactments had to be supported by appropriate and well-directed policies and programmes which had to be reasonable, both in conception and implementation; and

73.8. The reasonableness of a housing programme would be determined contextually taking into account, inter alia, its social, economic and historical context, the short, medium and long term needs of the community, while being balanced and flexible. Importantly, the court cautioned that a programme that excluded a significant segment of society might not be considered to be reasonable in the circumstances.

[74] In conclusion on this overview of the constitutional imperatives, it must be borne in mind that the Constitutional Court has repeatedly referred to s237 of the Constitution and required that all constitutional obligations are to be performed diligently and without delay.[31]

[75] In their heads of argument on behalf of RTC, counsel referred to various international instruments which they said placed obligations on the state under international law.[32] I do not intend to traverse these instruments in this judgment, not

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[31] *TAC* para 81; *Khumalo and another v Member of the Executive Council for Education, KwaZulu Natal* 2014 (5) SA 579 (CC) para 46. See also *Women's Legal Centre Trust v President of the Republic of South Africa and others* 2018 (6) SA 598 (WCC) paras 249 & 250.

[32] See for example *The International Covenant on Economic, Social and Cultural Rights* ("ICESCR")

because of their lack of relevance, but because I believe that the approach mandated by the Constitutional Court in the cases referred to take account of these obligations, *viz.* that all levels of state are to provide affordable housing in locations proximal to socio-economic goods, services and opportunities, as expeditiously as possible, through the design and implementation of policies and programmes that not only provide better housing to the poor and marginalised, but also challenge and overcome spatial and socio-economic inequality and exclusion.

THE STATUTORY FRAMEWORK – THE HOUSING ACT

[76] The long title of the Housing Act of 1997 proclaims that its purpose is:

'To provide for the facilitation of a sustainable housing development process; for this purpose to lay down general principles applicable to housing development in all spheres of government, to define the functions of national, provincial and local governments in respect of housing development. . .'

[77] In s2 thereof the legislature has listed the general principles applicable to housing development, which oblige all three spheres of government to, inter alia:

77.1. give priority to the needs of the poor in housing development;

77.2. promote the process of racial, social, economic and physical integration in urban and rural areas;

77.3. promote higher density housing developments to ensure economic utilisation of land and services; and

77.4. promote the housing needs of marginalised women and other groups disadvantaged by unfair discrimination.

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which South Africa ratified in January 2015, and the General Comment of the *United Nations Committee on Economic, Social and Cultural Rights* ("the CESCR"), which is intended to be a guide to the interpretation of ICESCR.

THE SOCIAL HOUSING ACT

[78] I have already dealt above with certain aspects of the SHA, whose long title reads as follows:

'To establish and promote a sustainable social housing environment; to define the functions of national, provincial and local governments in respect of social housing; to provide for the establishment of the Social Housing Regulatory Authority in order to regulate all social housing institutions obtaining or having obtained public funds; to allow for the undertaking of approved projects by other delivery agents with the benefit of public money; to give statutory recognition to social housing institutions; and to provide for matters connected therewith.'

[79] The Preamble to the SHA is particularly relevant because it sets the constitutional, legislative and social context for the application of the statute:

'WHEREAS in terms of section 26(1) of the Constitution of the Republic of South Africa, 1996, everyone has the right to have access to adequate housing;

AND WHEREAS in terms of section 26(2) of the Constitution, 1996, the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;

AND WHEREAS in terms of section 2(1)(a) of the Housing Act, 1997. . . national, provincial and local spheres of government must give priority to the needs of the poor in respect of housing development;

AND WHEREAS all three spheres of government must, in terms of section 2(1)(e)(iii) of the Housing Act, 1997, promote the establishment, development and maintenance of socially and economically viable communities and of safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions;

AND WHEREAS all three spheres of government must, in terms of section 2(1)(e)(vii) of the Housing Act, 1997, promote higher density in respect of housing development to ensure the economical utilisation of land and services;

AND WHEREAS there is a need for social housing to be regulated;

AND WHEREAS there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market, . . .'

[80] In addition, the following general principles incorporated in s2(1) of the SHA oblige national, provincial and local government to support the economic development of low to medium income communities, by providing housing in close proximity to jobs, markets and transport and, in terms of s2(1)(i), in particular, are intended to promote:

'(iv) social, physical, and economic integration of housing development into existing urban and inner-city areas through the creation of quality living environments;

(v) medium to higher density in respect of social housing development to ensure the economical utilisation of land and services; . . .

(viii) the suitable location of social housing stock in respect of employment opportunities; . . .

(ix) the conversion or upgrading of suitable residential and non-residential buildings for social housing use; . . .'

<u>THE SPACIAL PLANNING AND LAND USE MANAGEMENT ACT</u>

[81] The introduction of SPLUMA on 1 July 2015 was an important piece of legislation in the government's quest to tackle spatial apartheid. Once again, the preamble to that statute is important in setting the legislative and socio-economic background which the act seeks to remedy:

'WHEREAS many people in South Africa continue to live and work in places defined and influenced by past spatial planning and land use laws and practices which were based on –

- racial inequality;

- segregation; and

- unsustainable settlement patterns; . . .

AND WHEREAS parts of our urban and rural areas currently do not have any applicable spatial planning and land use management legislation and are therefore excluded from the benefits of spatial development planning and land use management systems;

AND WHEREAS various laws governing land use give rise to uncertainty about the status of municipal spatial planning and land use management systems and procedures and frustrates the achievement of cooperative governance and the promotion of public interest; . . .

AND WHEREAS spatial planning is insufficiently underpinned and supported by infrastructural investment;

AND WHEREAS it is the State's obligation to realise the constitutional imperatives in . . .

- section 25 of the Constitution, to ensure the protection of property rights including measures designed to foster conditions that enable citizens to gain access to land on an equitable basis;

- section 26 of the Constitution, to have the right of access to adequate housing which includes an equitable spatial pattern and sustainable human settlements; . . .

AND WHEREAS the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities;

AND WHEREAS sustainable development of land requires the integration of social, economic and environmental considerations in both forward planning and ongoing land use management to ensure that development of land serves present and future generations;

AND WHEREAS regional planning and development, urban and rural development and housing are functional areas of concurrent national and provincial legislative competence;

AND WHEREAS provincial planning is within the functional areas of exclusive provincial legislative competence, and municipal planning is primarily the executive function of the local sphere of government;

AND WHEREAS municipalities must participate in national and provincial development programmes;

AND WHEREAS it is necessary that –

- a uniform, recognisable and comprehensive system of spatial planning and land use management be established throughout the Republic to maintain economic unity, equal opportunity and equal access to government services;

- the system of spatial planning and land use management promotes social and economic inclusion;

- principles, policies, directives and national norms and standards required to achieve important urban, rural, municipal, provincial, regional and national development goals and objectives through spatial planning and land use management be established; and

- procedures and institutions to facilitate and promote cooperative government and intergovernmental relations in respect of spatial development planning and land use management systems be developed, . . .'

[82] In summary, therefore, it may be said that at a macro level SPLUMA seeks to rationalise the Republic's previously fragmented legislative planning and land use management system, while promoting socio-economic benefits and transforming racially and spatially divided settlement patterns, in a manner that gives effect to the rights protected in ss25 and 26 of the Constitution.[33]

[83] S7 of SPLUMA establishes five principles applicable to spatial planning, land development and land use management. The first principle of spatial justice requires, amongst other things, that 'past spatial and other development imbalances must be redressed through improved access to and use of land'. In light of SPLUMA's commitment to give effect to ss25 and 26 of the Constitution, the development of adequate, affordable housing on well-located land thus represents an appropriate

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[33] Strauss, M & Liebenberg, S.: 'Contested Spaces: Housing Rights and Evictions Law in Post-Apartheid South Africa' (2014) 13(4) *Planning Theory* 428 at 434.

mechanism for advancing and realising the legislative imperative of spatial justice. One of the primary mechanisms for achieving this is through forward planning policy documents, such as "Spatial Development Frameworks" ("SDF's").

THE 2014 WESTERN CAPE PROVINCIAL SPATIAL DEVELOPMENT FRAMEWORK

[84] In the founding affidavit in the RTC application there is a detailed reference to the Provincial SDF, which is evidently a detailed document covering a vast array of aspects. Ms. Adonisi submits (and I did not understand there to be any debate in that regard) that the document is intended to align spatial plans, housing policies, environmental plans, and development strategies of national government, provincial departments, and municipalities. The following guiding principles are incorporated therein:

84.1. Spatial justice, noting that '[p]ast spatial and other development imbalances should be addressed through improved access to and use of land by disadvantaged communities';

84.2. Sustainability and resilience, observing that 'land development should be spatially compact, resource-frugal, compatible with cultural and scenic landscapes. . .'

84.3. Efficiency, with the focus on 'compaction as opposed to sprawl; mixed-use as opposed to mono-functional land uses; residential areas close to work opportunities as opposed to dormitory settlements; and promotion of public transport over car use. . .';

84.4. Accessibility, focusing on 'improving access to services, facilities and employment, and safe and efficient transport modes. . .' *and*

84.5. Quality and livability, with the focus on 'liveable settlements [that] finance individual and community facilities'.

[85] The founding affidavit goes on to point out that the Provincial SDF addresses the important relationship between planning for future land use and affordable housing strategies. It highlights the following passage in the Provincial SDF as being of particular significance in the present matter.

'Exclusionary land markets mitigate against spatial integration of socio-economic groups and limit affordable housing on well-located land. At the same time, government sits on well-located under-utilised land and buildings'[34]….

However, earlier in the document there is a cautionary word regarding the distinction between policy and practice:

'Given the complexity and risks of changing current spatial patterns, the default position is to revert to business as usual. Politicians, the private sector, and spatial planners have different agendas and resultant timelines. Political decision-making often contradicts stated spatial policies . . .'[35]

THE CITY'S MUNICIPAL SPATIAL DEVELOPMENT FRAMEWORK OF 2012

[86] Besides the contents of the Provincial SDF, spatial development in the city is further informed by the City SDF of 2012. This document calls for 'the transformation of the Apartheid City' by, amongst other things, '(where appropriate) using state-owned infill sites to help reconfigure the distribution of land uses and people.'

[87] The City SDF further aims to increase the access of low-income earners to affordable housing that is located in close proximity to the city's economic opportunities.[36] In addition, Policy 37 of the City SDF calls for public-private partnerships to accelerate integrated housing development. This requires the identification of 'publicly owned land that can be used for housing projects, which will be executed in partnership with the private sector. Projects should provide for socio-

[34] Provincial SDF p88.

[35] Provincial SDF p30.

[36] City SDF p77.

economically integrated communities in a similar ratio of income distribution to the municipality as a whole.'[37]

RELEVANT POLICY CONSIDERATIONS

[88] Lastly in this overview, I turn to the various policies which fall for consideration in this matter. At the outset it must be said that the Province has always accepted that it has been required to address spatial imbalances. This appears from the affidavit of Ms. Jacqueline Gooch, the Head of Department in the DTPW, and the main deponent to the Province's answering papers in the RTC application. The Province's obligation in this regard arises from, *inter alia*, National Government's Urban Development Strategy of 1995, the Development Facilitation Act of 1995 and the National Department of Housing's Urban Development Framework of 1997.

[89] Ms. Gooch testifies that in 2010, the Provincial Cabinet adopted the Cape Town Central City Regeneration Programme ("the Regeneration Programme"), the Strategic Framework whereof was completed in August 2010 ("the August 2010 Strategic Framework"). The latter document identified a number of development precincts in central Cape Town and included a number of aims and objectives in line with the statutory framework outlined above. These included encouraging development which supported the expansion of mixed use, mixed income opportunities, and development of a percentage of the residential stock in identified precincts for affordable housing to ensure that poorer households were incorporated into the central city.

[90] In her affidavit Ms. Gooch points out that the Province has been, and remains committed to, addressing spatial integration. She goes on to say that the task of redressing the imbalances occasioned by South Africa's discriminatory past is an objective which will be realised progressively over time, while simultaneously acknowledging that spatial apartheid in Cape Town was nowhere near to being redressed.

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[37] City SDF p78.

[91] As far as the City is concerned, Mr. Lungelo Mbandazayo (the erstwhile City Manager) deposed to its main answering affidavit in the RTC application. He confirms the City's commitment to tackle spatial injustice almost 25 years ago in a policy document entitled 'A Guide for the Spatial Development in the Cape Metropolitan Functional Region: April 1996.' This is a document that specifically recognised that improved land use and transport patterns were necessary to address 'the historical legacy of under-development and deprivation that has contributed to leaving our cities and towns spatially (and socially) divided and highly inefficient.' The document also identified 'the lack of adequate and affordable housing, especially in areas close to jobs, transport, community facilities, and so on' as constituting serious challenges to 'restructuring the region and redressing the [spatial] imbalances.' Further concerns which are identified by Mr. Mbandazayo include the need for national and provincial housing policies that make 'it possible to develop affordable housing within the inner Cape Metro Region.'

[92] Mr. Mbandazayo confirms the need to redress spatial injustice in the city, acknowledging that apartheid spatial planning has created a city which was highly fragmented along racial lines, with the majority of poor, black communities living on the periphery, far from socio-economic opportunities and being deprived of access to amenities. He points out that the footprint of apartheid still prevails and that this affects the poorest and most vulnerable of the city's residents the most, saying that this has to be redressed and that the City has a role to play in doing so. Finally, Mr. Mbandazayo says that the City accepted that facilitating access to residential housing for poorer residents closer to where they worked and closer to public amenities (including educational facilities) was critical for the transformation of Cape Town and had to be pursued.

[93] Lastly, the deponent to the answering affidavit by the Day School, Mr. Lance Katz, referred the Court to one of the City's more recent policy documents, of September 2017, entitled 'Woodstock, Salt River and Inner City Precinct Affordable Housing Prospectus' in which the City affirms its commitment to 'leverage City-owned assets such as land and property to achieve spatial transformation to create an inclusive urban fabric.'

[94] In summary then, it is fair to say that the statutory and policy framework which finds its origins in the Constitution and the legislation mandated thereunder, renders it necessary for both the Province and the City to redress the legacy of spatial apartheid as a matter of constitutional injunction. The constitutional and statutory obligations of these tiers of government to provide access to land and housing on a progressive basis, encompass the need to urgently address apartheid's shameful and divisive legacy of spatial injustice and manifest inequality. I shall revert later to assess whether the Province and the City have discharged their constitutional mandates in this regard but before I do so, it is necessary, as *Grootboom* and *Mazibuko* suggest, to contextualise the historical and social background to Cape Town's spatial apartheid.

THE HISTORICAL CONTEXT RESULTING IN SPATIAL APARTHEID

[95] In the extracts of the expert witnesses to which I have already referred, the core factor giving rise to spatial apartheid has already been alluded to. The policy of influx control, so systematically enforced by the apartheid government was, arguably, one of the most pernicious aspects of the implementation of its segregationist policies. A suite of legislation was passed which deprived African, Coloured and Indian citizens of rights of ownership in, and to occupation of, land while simultaneously determining where racial groups might reside and how these groups were to be moved, if they found themselves in areas which the legislature had proscribed.

[96] The historical context for the shortage of land and housing in the Western Cape as it existed in 2000 was, with respect, most accurately summarized thus in *Grootboom*:

'[6] The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the 'coloured labour preference

policy'. In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape Peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now.' (Internal references omitted.)

[97] Coupled with the policy of influx control was the enforcement of the Group Areas Act, 41 of 1950, which saw the large scale forced removal of Coloured and Indian people during the 1960s and 1970s, from District Six and parts of, inter alia, Woodstock, Salt River, Kensington, Sea Point, Green Point and De Waterkant, to newly created suburbs such as Manenberg, Hanover Park, Belhar and Mitchells Plain on the Cape Flats. Working people who once lived close to their places of employment were then required to travel long distances, using an inadequate public transport system, to earn their weekly wages, not to speak of their limited access to public and social amenities.

[98] In his affidavit on behalf of the City, Mr. Mbandazayo confirms that the effect of apartheid policies was the systemic deprivation of persons of colour of access to urban land and residential accommodation across Cape Town, in favour of Whites. The Province, too, acknowledged in 2013, in the midst of a debate around the utilization of the Tafelberg site, the state of inequality in land use in Cape Town. In motivating for the consideration of the use of the property for housing purposes in a letter to the DTPW (to which further reference will be made later), the Head of Department of the PDHS, Mr. Mbulelo Tshangana, remarked that "Cape Town is one of the most segregated cities in the world'.

[99] RTC also adduced the expert evidence of Mr. Malcolm McCarthy, the General Manager of the National Association of Social Housing Organizations ("NASHO"), who deals with the dearth of social housing projects in, or near, central Cape Town. Mr. McCarthy holds the view that apartheid planning has been particularly effective in Cape Town, resulting in an unjust, inefficient and unsustainably segregated urban environment. He attributes the failure to implement social housing initiatives in the Cape Town CBD and surrounds, to the skewed manner in which the Province conceived and implemented its so-called "urban regeneration" objective.

[100] Mr. McCarthy points out that since the late 1990s, the City and the Province's approach to urban regeneration has had the effect of forcing lower income households out of the centre of the city and the surrounding areas, without providing new opportunities for such people wanting to live closer to their places of employment. One has seen how old office blocks in the city centre have been renovated, and new buildings have been erected, to provide up-graded and up-market residential accommodation to households in the income bracket reserved for the top 20% of income earners, while the so-called "gentrification" of areas such as Bo-Kaap, Woodstock and Salt River has seen rental properties accommodating poor and working people snapped up by developers, for the construction of apartment blocks where rentals are beyond their reach.

[101] The result is, firstly, that the people who least can afford the cost of transportation, have been moved further out to the periphery, while those who can afford that cost have taken up residence in the inner city, in the process pushing up the demand for such residential accommodation and escalating property prices. Secondly, this phenomenon has the direct consequence that the procurement of land for social housing has become inordinately expensive and scarce. The state cannot afford to pay market related prices for the acquisition of land in the inner city, and the only meaningful way in which this shortage of land for social housing projects can be addressed by the State, is to make use of such pockets of state-owned land as exist in and around the CBD.

[102] Simply put, the procurement by the State of privately owned land in the inner city has become prohibitively expensive. Indeed, at the end of the day, there is no dispute between the Province and the City, on the one hand, and RTC on the other, over the shortage of state-owned land in or near the inner city which is available for the development of affordable housing and, in particular, social housing projects. In the result, unless meaningful attempts are made by the authorities to redress the situation, spatial apartheid will be perpetuated, not only in the inner city areas but across the greater Cape Peninsula.

[103] I shall return later to the question of compliance by the City and the Province with their respective constitutional obligations as they arise from RTC's notice of motion, and turn now to the issues relevant to the disposal of the property to the Day School. The question of interpretation of the various statutory instruments is central to this.

STATUTORY INTERPRETATION UNDER THE CONSTITUTION

[104] In the founding affidavit RTC asserts that the Province misconceived its constitutional and statutory obligations in relation to land reform in the process of disposing of the Tafelberg site. This claim therefore requires an understanding of the rights and duties of government bodies in general, and the Province in particular, in respect of land which they own. The point of departure in that regard is the property clause – s25 of the Constitution – and any enquiry must proceed on the basis of statutory interpretation under the Constitution.

[105] The cases dealing with statutory interpretation in the constitutional era are legion. More recently, the Constitutional Court restated in *Makate*[38] that the 'mandatory constitutional canon' of construction, referred to earlier in *Fraser*[39], required every court to read legislation through the prism of the Constitution, s39(2) whereof requires the court in so doing to 'promote the spirit, purport and objects of the

[38] *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 87 – 88.

[39] *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 43.

Bill of Rights.' This has a number of implications for a court interpreting such a provision.

[106] Firstly, where a statutory provision is capable of more than one meaning, the court must prefer an interpretation which renders it constitutionally compliant over one that does not, in the event that it is reasonably possible to do so. Further, the court is obliged to prefer an interpretation which better promotes the spirit, purport and objects of the Bill of rights, even if none of the interpretations would render the statutory provision unconstitutional. [40]

[107] Secondly, the provision in question must be reasonably capable of bearing the interpretation opted for. In *Public Servants*[41] the Constitutional Court noted that the application of s39(2) required 'that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution.'

[108] In the third place, the Constitution generally (and s39(2) in particular) requires the court to 'prefer a generous construction over a merely textual or legalistic one in order to afford claimants the fullest protection of their constitutional guarantees.'[42]

[109] Next, the Constitutional Court has cautioned against 'blinkered peering at an isolated provision' in a statute. Rather, statutory interpretation should consider both the purpose of the provision and the context in which it appears. Accordingly, courts should adopt a purposive interpretation which is compatible with the mischief which the statute in question seeks to address. This in turn requires courts to consider the object of the statute as a whole, then to have regard to the provision under consideration and ultimately to seek, as far as possible, to interpret the legislation so that it furthers that objective. [43]

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[40] *Makate* para 89.

[41] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) para 20.

[42] *Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

[43] *Daniels v Scribante and another* 2017 (4) SA 341 (CC) paras 23 - 28.

[110] Lastly, while the text of the statute itself is the starting point, s39(2) implies context as the touchstone for contemporary statutory interpretation. Context, in turn, embraces both 'the social and historical background of the legislation' and 'the grid . . . of related provisions and of the statute as a whole, including its underlying values.'[44]

INTERPRETING SECTION 25 OF THE CONSTITUTION

[111] In general terms it may be said that the Province enjoys all the rights customarily afforded to private land owners.[45] However, its powers and duties in respect of its land are subject to the residual provisions of s25 of the Constitution[46] and are also circumscribed by any applicable statutes – in this case GIAMA and the WCLAA. This then obligates the State *qua* landowner, for instance, to address the historical perversity of the grossly unequal distribution of land, as part of its broader societal obligation, while simultaneously exercising its individual property rights. Clearly, a balancing act is implied in this regard and the approach was described by the Constitutional Court thus in *FNB*:[47].

'[49] The subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of s25 and their historical context, and indeed in the context of the Constitution as a whole. Subsections (4) to (9) all, in one way or another, underline the need for and aim at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions are not directly relevant to the present case, but ought to be borne in mind whenever s25 is being construed, because they emphasise that under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations.' (Internal reference omitted.)

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[44] *Goedgelegen* para 53.

[45] *Minister of Public Works and others v Kyalami Ridge Environmental Association and another (Mukhwevho Intervening)* 2001 (3) SA 1151 (CC) paras 39 – 40.

[46] In particular ss25(4) – (9).

[47] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and another* 2002 (4) SA 768 (CC) paras 49 – 52.

[112] As I have already mentioned, the imperative to address the historically unequal distribution of land, implicit in s25, alerts a court to the priority accorded to the remedies contemplated in the property clause in the Constitution.

112.1. So, one sees in s25(4)(a) the injunction that 'the public interest includes the nation's commitment to land reform'.

112.2. Then, s25(5) enjoins the State 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.'

112.3. Lastly, s25(8) directs that no provision of s25 'may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of . . . [s25] . . . is in accordance with the provisions of section 36(1).'[48]

[113] I have already dealt with the mandated approach to litigation involving the vindication of socio-economic rights. Given that the provisions of s25(5) (upon which RTC, inter alia, relies) establish a justiciable socio-economic right, the measures taken by the Province in the present situation must meet the constitutional standard of reasonableness. Such reasonableness, in turn, is to be assessed with reference to context, which is best achieved by considering the purpose for which the measure is

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[48] '**Limitation of rights**

36. (1) The rights in the Bill of Rights may be limited only terms of the law of general application to the extent that the limitation is reasonable and justifiable an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose.'

pursued.[49] I turn next to consider the particular statutes which fall to be considered in this case.

GIAMA

[114] GIAMA is national legislation passed in 2007, which came into effect on 30 April 2009, and whose long title reads as follows:

'To provide for a uniform framework for the management of an immovable asset that is held or used by a national or provincial department; to ensure the coordination of the use of an immovable asset with the service delivery objectives of a national or provincial department; to provide for issuing of guidelines and minimum standards in respect of immovable asset management by a national or provincial department; and to provide for matters incidental thereto.'

[115] In s3 of GIAMA the objects of the Act are stated to be to:

'(a) provide a uniform immovable asset management framework to promote accountability and transparency within government;

(b) ensure effective immovable asset management within government;

(c) ensure coordination of the use of immovable assets with service delivery objects of a national or provincial department and the efficient utilisation of immovable assets;

(d) optimise the cost of service delivery by –

(i) ensuring accountability for capital and recurrent works;

(ii) the acquisition, reuse and disposal of an immovable asset;

(iii) the maintenance of existing immovable assets;

(iv) protecting the environment and the cultural and historical heritage; and

[49] *Rahube* para 50.

(v) improving health and safety in the working environment.'

[116] In considering the application of GIAMA in this matter, it is important to have regard to the distinction drawn in the definitions in s1 between a 'custodian' and a 'user':

'"**custodian**" means a national or provincial department referred to in section 4 represented by the Minister of such national department, Premier of a province or the MEC of such provincial department, so designated by the Premier of that province; . . .'

'"**user**" means a national or provincial department that uses or intends to use an immovable asset in support of its service delivery objectives and includes a custodian in relation to an immovable asset that it occupies or intends to occupy, represented by the Minister of such national department, Premier of a province or MEC of such provincial department, so designated by the Premier of that province.'

[117] The statutory relationship between, and the responsibility of, the custodian and user in each case, is described in s4 of GIAMA:

'(1) The departments managed by the following executive organs of state within the national and provincial spheres of government are custodians:

(a) the Minister, in relation to the immovable assets that vest in the national government, except in cases where custodial functions were assigned to other Ministers by virtue of legislation before the commencement of this Act;

(b) subject to subsection (5), the Minister responsible for Land Affairs, in relation to immovable assets acquired for land reform, as well as immovable assets that vest in the national government and are situated within the former homelands, except in cases where custodial functions in respect of those areas were assigned to another Minister by virtue of specific legislation before the commencement of this Act; and

(c) a Premier of a province or an MEC designated by the Premier, in relation to an immovable asset that vests in a provincial government.

(2) A custodian –

(a) acts as the caretaker in relation to an immovable asset of which it is the custodian;

(b) may –

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

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

(c) is, subject to section 18, liable for any action or omission in relation to an immovable asset of which it is the custodian, excluding an act or omission in good faith.

(3) The Minister or MEC of a user is –

(a) subject to section 18, responsible for the performance of the functions assigned to it by this Act or any agreement with the custodian of the immovable asset that it occupies; and

(b) liable for any act or omission in relation to the immovable asset concerned, excluding an act or omission in good faith.

(4) A custodian and user must settle any dispute between them in the manner contemplated in the Intergovernmental Relations Framework Act, 2005 . . .'

[118] Applying these provisions of GIAMA to this matter, the position is that the DTPW is the custodian of immovable property vesting in the Province, including the Tafelberg site, and in terms of s4(2) of GIAMA, the DTPW acted as the caretaker of that property of which it was the custodian. As custodian, the DTPW was then empowered by s4(2)(b)(ii) of GIAMA to acquire, manage and dispose of the Tafelberg

site. Its power in that regard was, however, subject to any relevant Provincial statute, such as the WCLAA.

[119] S5 of GIAMA sets out certain statutory principles relating to the management of state owned immovable assets, including the use, acquisition and the disposal thereof. Of relevance for present purposes is the following:

'5(1) The following are principles of immovable asset management:

(a) An immovable asset must be used efficiently and becomes surplus to a user if it does not support its service delivery objects at an efficient level and if it cannot be upgraded to that level; . . .

(e) when an immovable asset is acquired or disposed of best value for money must be realised;

(f) in relation to a disposal, the custodian must consider whether the immovable asset concerned can be used –

(i) by another user or jointly by different users;

(ii) in relation to social development initiatives of government; and

(iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth. . .'

[120] S6 of GIAMA requires the preparation of various forms of immovable property asset management plans, by the respective accounting officers of the user and custodian departments. In so doing the accounting officer in question must:

'(a) meet the objects of this Act;

(b) adhere to the principles contemplated in section 5;

(c) adhere to any regulations published in terms of section 20; and

(d) adhere to standards issued in terms of section 19.'

[121] Under s7 of GIAMA provision is made for custodian asset management plans ("C-AMPs"), while s8 deals with user asset management plans ("U-AMPs"). The purpose of these plans is to provide a basis for the strategic planning and management of immovable assets owned by, inter alia, the Province. On 20 October 2008, some 6 months before GIAMA came into operation, National Government published "User Guidelines" and "Custodian Guidelines", which contained detailed requirements as to what both U-AMPs and C-AMPs must contain.

[122] Under s10 of GIAMA the U-AMP –

'(a) is the principal immovable asset strategic planning instrument which guides and informs all immovable asset management decisions by the user;

(b) binds the user in the exercise of its executive authority, except to the extent of any inconsistency between a user immovable asset management plan and this Act or the immovable asset management guidelines published by the Minister under section 19, in which case this Act or those guidelines prevail.'

[123] Furthermore, s11 of GIAMA requires that the user –

'"must give effect to its user immovable asset management plan and conduct immovable asset management in a manner which is consistent with this Act and its user immovable asset management plan.'

[124] Lastly, there is s13(3) of GIAMA which permits a custodian to dispose of a surplus immovable asset:

'(a) by the allocation of that immovable asset to another user; or

(b) subject to the State Land Disposal Act, 1961… and any provincial land administration law, by the sale, lease, exchange or donation of that immovable asset or the surrender of a lease.'

Importantly, for the purposes of this matter, 'surplus' is defined under s1 to mean 'that the immovable asset no longer supports the service delivery objectives of a user'.

[125] To sum up, once an immovable asset becomes 'surplus' it should be surrendered to the custodian, which becomes its caretaker, and is required to manage it in accordance with its C-AMP. A custodian may dispose of a surplus immovable asset, either to another user or, alternatively, to a private entity, but before a disposal to a private entity can take place, a two-stage decision-making process is involved.

[126] Firstly, the user of the asset must decide whether the asset is 'surplus', i.e. that it does not support its service delivery objectives at an efficient level and cannot be upgraded to that level.[50] This decision must be made in terms of the U-AMP, which is the principal immovable asset strategic planning instrument and is binding on the user. GIAMA states explicitly that users must conduct immovable asset management in a manner consistent with the Act and their U-AMPs.[51]

[127] Thereafter, the custodian must decide, in terms of its C-AMP, whether the surplus asset can be allocated to another user or jointly to different users[52], having regard to government's social development initiatives and socio-economic objectives, including land reform.[53]

THE WCLAA

[128] In 1998 the Legislature of the Province adopted the WCLAA and, while that statute precedes the promulgation of GIAMA by more than a decade, it constitutes

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[50] s5(1)(a).

[51] Ss10(a)&(b) and 11.

[52] S13(3)(b) read with s5(1)(f).

[53] S13(3)(b) read with s5(1)(f).

'relevant provincial land administration' law as contemplated in s4(2)(b)(ii) of GIAMA. Further, on 16 October 1998, the Premier (pursuant to the powers granted under s10) promulgated the applicable regulations in respect of the WCLAA.

[129] The long title of the WCLAA reflects that its purpose is '(t)o provide for the acquisition of immovable property and the disposal of land which vests in it by the Western Cape Provincial Government and for matters incidental thereto.'

[130] S3(1) of the WCLAA empowers the Premier to dispose[54] of provincial state land, while s4 requires the Premier to co-ordinate the provincial government's actions regarding the administration of provincial state land with the national and local spheres of government with a view, firstly, to realising the nation's commitment to land reform, and other reforms required to bring about equitable access to all relevant natural resources, and, secondly, to rationalise the custody, administration and disposal of such land.

[131] In terms of the WCLAA Regulations, there is a rather cumbersome process applicable to the disposal of provincially owned land:

131.1. The offeror completes and signs a written offer;

131.2. The written offer must contain a provision to the effect that the Cabinet, after consulting the Provincial Property Committee ("the PPC") may within 21 days of receipt of its written representations received pursuant to the provisions of s3(3) of the WCLAA, or such longer period (not exceeding three months) as the Cabinet may determine, in writing prior to the expiry of the 21-day period, resile from any contract resulting from the offer;

131.3. Where the offer exceeds the sum of R10m or where the proviso to sub-regulation 4(b) is applicable, the offer itself, a valuation of the land as determined by an independent valuer, and the DTPW's written report must be submitted to the PPC;

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[54] In s1 the definition of '"dispose' includes the sale and letting of such land.

131.4. The PPC must report in writing to the Cabinet on the offer, whereafter the Cabinet shall decide whether the offer is to be accepted;

131.5. Should the Cabinet so decide, the Provincial Minister responsible for administering the provincial state land portfolio shall sign the written contract on behalf of the Province, subject to the provisos to regulation 4(1);

131.6. If a written contract has been duly signed on behalf of the Province, that contract shall constitute a proposed disposal and the Minister shall exercise the powers and comply with the duties conferred on the Premier by ss3(2), (3) and (4) of the WCLAA;

131.7. S3(2) and (3) of the WCLAA provide for a notice-and-comment public participation process in respect of the proposed disposal, whereafter the Cabinet may decide to resile from any contract resulting from the offer.

THE PRELIMINARY PROCESS FOLLOWED BY THE PROVINCE IN RELATION TO THE DISPOSAL OF THE TAFELBERG SITE

[132] When the remedial school was moved to Bothasig in June 2010, the DTPW was the custodian under GIAMA of both the school on the Tafelberg site and Wynyard Mansions. The Western Cape Education Department ("WCED") was the user under GIAMA of the school premises, while the PDHS was the user of Wynyard Mansions, and continued to be so until the last tenant, Ms. Angela Wise, was evicted from her flat in the building with effect from 30 May 2014.

[133] The Province's case is that as of June 2010 both the Tafelberg School site and the Mansions site became 'surplus' under GIAMA 'by operation of law.' Ms. Gooch said as much in a letter dated 1 April 2016, when Ndifuna sought reasons from the Province for the sale of the property to the Day School and counsel, for the Province persisted with this interpretation in argument.

[134] RTC takes a different view, however, and contends that, given the aforementioned definition of 'surplus' under GIAMA, read with the provisions of s5(1)(a) thereof, the relevant decision-maker is required, first, to establish that the immovable asset in question does not support the user's service delivery objectives at an efficient level and, thereafter, the decision-maker must be satisfied that the property cannot be upgraded to such an efficient level.

[135] As far as the WCED was concerned, the school premises were evidently no longer suited to, nor required for, educational purposes from 2010 and that part of the Tafelberg site might notionally therefore have been regarded as surplus to its needs. As far as the PDHS was concerned, it remained the user of the Wynyard Mansions premises until at least 30 May 2014 and RTC argues that it is only from that date that one can begin to consider whether that part of the Tafelberg site was 'surplus'" under GIAMA. This argument finds resonance in the fact that on 26 March 2013, as indicated earlier, the Head of the PDHS, Mr. Tshangana, wrote to The Manager: Property Planning in the DTPW regarding both erven 1424 and 1625, stating that the PDHS –

'would like to confirm that erven 1424 and 1625, Sea Point, are needed to further the Western Cape Government Provincial Objective 6, which speaks to developing integrated and sustainable human settlements.'

The documentation before the Court therefore reflects that the PDHS was interested in using the entire property for sustainable housing purposes long after 2010.

THE WESTERN CAPE PROPERTY DEVELOPMENT PROCESS

[136] I referred above to the Regeneration Programme for the central city area, which was adopted by the Provincial Cabinet in September 2010. The following month the Cabinet also adopted the Western Cape Property Development Process ("the WCPDP"), which was a policy-cum-strategy document designed to establish the process to be followed by the Province, in relation to property development projects to

be undertaken by private developers on surplus provincial land, in an attempt to contribute to the Province's social, economic and environmental transformation.

[137] In March 2011 the erstwhile MEC, Mr. Robin Carlisle, added the Tafelberg site to the Regeneration Programme. Thereafter, and in May 2011, the PDHS hosted a workshop to discuss the viability of social housing on the various Regeneration Programme sites and, flowing from this discussion, a process was adopted to investigate generally the feasibility of social housing on such sites. This perforce included the Tafelberg site.

[138] However, whilst the process initiated by the PDHS (then still a GIAMA user) was under way, the DTPW, *qua* custodian, began implementation of the WCPDP and commenced a so-called "Phase 1: High Level Scoping" exercise aimed at establishing the development potential of the Tafelberg property. RTC argues that in so doing the DTPW jumped the gun in taking a step in respect of the property which was not sanctioned under either the WCPDP or GIAMA. It contends that the site was not (i) unused or (ii) under-utilised and (iii) not used for its intended purpose, as defined in the WCPDP and, importantly, says RTC, the site was not surplus under GIAMA.

[139] In July 2011 a "Heritage Impact Assessment" was conducted as part of the Phase 1 Scoping exercise and subsequently, in October 2011, an "Urban Design Report" was completed. Neither exercise considered any form of affordable housing on the Tafelberg site.

[140] Some 18 months later, and on 26 February 2013, the DTPW sent letters to various provincial departments requesting them 'to advise whether the [Tafelberg] properties were required for infrastructure purposes to further government objectives.' The DTPW made it clear that, failing such infrastructure requirements, it would consider disposing of the property under the WCLAA. Written representations were invited from fellow departments by 28 March 2013.

[141] It was in response to this invitation that Mr. Tshangana wrote the letter of 26 March 2013 to the DTPW, to which reference has already been made. The document

seeks to make out a case for social housing and I shall quote from it as it provides a useful summary of the major considerations at play in this case.

'The Department would like to confirm that erven 1424 and 1625, Sea Point, are needed to further the Western Government provincial objective 6, which speaks to developing integrated and sustainable human settlements. These sites will specifically contribute to sustainable provincial resource use, which includes increasing the densities of human settlements, gap reduction through partnerships and investment and the enhanced supply of affordable rental housing for persons earning between R 1500 - R7500 [per month] . . .

The demand for affordable rental opportunities, situated within close proximity to economic opportunities, transportation nodes and social infrastructure can thus not be under-estimated, nor can the opportunities the sites present for racial and economic integration.'

[142] After presenting a map depicting average residential property prices in the Peninsula, the Head of Department ("HOD") continues:

'What [the map] essentially shows is that very limited opportunities exist for persons in the income bracket R1500 - R7500 to own property anywhere in close proximity to the City Centre, where they may work, go to school, etc. If ownership is a distant possibility for many Capetonians, [the map] particularly highlights the need for Government to develop affordable, high density rental housing opportunities in this area.

The housing instrument which can be utilised is the Social Housing Programme, which has been used to fund developments in Milnerton, Bothasig and Steenberg (adjacent to Marina da Gama) recently. The rental stock developed is managed by social housing institution (sic). Rentals charged vary between a minimum of approximately R750 and a maximum of approximately R2200 (dependent on unit size), with rental collection rates achieved at 97.8%, 99.2% and 98% respectively. The sites can be made available on a long-term lease, which means government retains the asset for sustainable future opportunities with no expense, while it increases in value and is managed and maintained efficiently externally . . .

In terms of these specific Sea Point sites, funding has already been invested by the . . . SHRA and NASHO in order to evaluate site feasibility for rental housing. Proposed urban designs are attached . . . and more information is available upon request.

This historical site is deeply embedded in the urban fabric of Sea Point, one of the oldest sections on (sic) Cape Town. It is located between mountain and sea, creating a typical linear development along a narrow corridor. Commercial and high-rise residential buildings dominate the recreational and tourism sea front edge, with a rich mix of high and affordable accommodation entailing (sic) varying forms of tenure.

The Tafelberg school property is very well suited for residential use, and Social Housing in particular. It is well serviced by public transport and engineering services. It is recognised that careful thought and design are (sic) required for an appropriate use and response to the existing school buildings, which enjoy heritage protection and cannot be demolish (sic) or altered. The opportunity for the development of some retail and commercial uses on the Main Road frontage should be exploited as it has the potential to provide some cross subsidisation for Social Housing. Refurbishment must also be considered for the conversion of the existing school buildings, potentially to community facilities.

The site offers opportunities for a number of independent blocks that can be developed separately over time, as well as being developed in such a way as to have little impact on each other spatially and operationally. The development can therefore arguably take the form of a group of independently developed projects, even if developed at the same time by the same developer. The density and height can be higher or lower, without negatively affecting the surrounding residential fabric.

The site on the Main Road can potentially be developed as a residential block with retail on the ground floor, with separate access from other blocks. The retail component can have a direct link to Main Road, with shops serving pedestrian and passing vehicular traffic. The opportunity presents itself to locate businesses in that location that meet certain needs of the residents such as a laundromat, chemist, grocery store, restaurant, etc., which could also serve the broader community.

Being located so close to the Main Road and accompanying public transport, together with the lower parking requirements for social housing, much of the open areas between the buildings can be utilised as positive recreational and green space for residents, rather than for mono-functional parking areas. This will result in a much higher quality environment benefiting both the residents as well as the surrounding residential areas.'

[143] Finally, in drawing his conclusions, the HOD says the following:

'Cape Town is one of the most segregated cities in the world. With this in mind, land cost is so significant in the Province that we could not afford to purchase market-related land which offered even slightly similar opportunities to this one. Were these portions of land to be disposed of, the opportunity cost for integration within the borders of the City could potentially be lost to us forever.

Taking cognisance of the above, the Department of Human Settlements thus note (sic) our objections to erven 1424 and 1625, Sea Point being disposed of by the Western Cape Government, as it can be better utilised to further Government objectives.

We request that it be transferred to either the Department or to the City of Cape Town, with a condition that it be utilised for the provision of affordable rental housing opportunities.'

[144] The response to the HOD's proposal is to be found in the minutes of a meeting held on 15 May 2013 between the DTPW and PDHS. The meeting was attended by the 2 political functionaries involved, Mr. Carlisle as MEC in charge of public works in the Province, and Mr. Bonginkosi Madikizela then as MEC in charge of provincial housing. The minutes reflect that Mr. Carlisle was alone while Mr. Madikizela was accompanied by representatives both of his ministry and the PDHS, although the HOD of the latter was not there. From a GIAMA perspective this was in effect a meeting of user and custodian as contemplated in that act.

[145] The minutes indicate that the housing officials led by Mr. Madikizela were keen to secure provincial land for the development of, inter alia, social housing projects:

'Minister Madikizela . . . stated that the purpose of the meeting was to discuss land owned by . . . [the DTPW] . . . which could potentially be used for human settlement development, specifically for the social housing programme. In addition, the meeting also aimed to dispel any confusion emanating between the two departments regarding the availability and suitability of land for human settlements development . . . '

[146] A representative of the PDHS, Ms. J. Samson, advised the meeting that the Tafelberg site, and a site in Woodstock,[55] could be used for housing development, but

[55] It appears that this was a reference to the Woodstock Hospital site.

was told there and then by Mr. Carlisle that the Tafelberg site was not available for housing. It appears from the minutes that Mr. Carlisle considered the property to be prime land that could be sold for about R80m. The minutes list a number of 'land parcels', some of which might be considered suitable for housing development.

[147] What is also clear from the minutes is that the two provincial departments were not *ad idem* as regards the use of state owned land for future human settlements. To this end Mr. Carlisle suggested that a list be drawn up of –

(i) 'uncontested land';

(ii) 'land that the two departments agree can be used for human settlement development'; and

(iii) 'land that only one department is considering for human settlement development.'

[148] Ultimately it was agreed at the meeting that the DTPW would –

'compile a list of land, indicating uncontested land, so that the two departments can agree on what can or should be considered for human settlement development. [PDHS] and [DTPW] to work together to transfer the Woodstock land.'

[149] Notwithstanding this proposed course of action, it is apparent that as of May 2013 the MEC (as political functionary in charge of the custodian department of the Tafelberg property) had decided that the property was to be sold off on account of its high market value, and that there would be no further consideration as to its utility within the Province.

[150] Later in that month, on 23 May 2013, a report was prepared for the Provincial Steering Committee in accordance with the aforementioned Stage1: High Level Scoping criteria as part of the WCPDP. The report requested that the Provincial Steering Committee clarify the process and procedures pursuant to the HOD's letter of 26 March 2013 and, in particular, to advise on the way forward in relation to the

disposal of the so-called 'Main Road Precinct'. This was understood by all concerned to be a reference to the Tafelberg site. Annexed to this report was a so-called "Project Authorization Document" in which the disposal of the property to the private sector through a long term lease was contemplated. The provision of affordable housing on the property was not amongst the objectives listed in this annexure.

THE EXPRESSION OF INTEREST PROCESS

[151] In March 2014 the DTPW took its next step under the WCPDP when it issued a bulky 50-page document entitled "Expression of Interest: Property Development Investment Opportunities in the Cape Town Central City Regeneration Programme." For the sake of convenience I shall simply refer to this document as "the EOI".

[152] The declared purpose of the EOI was to 'present . . . development and investment opportunities of four properties, released incrementally to the market . . . for property development and investment purposes in accordance with [certain specified] commercial arrangements', the details whereof were included in the document. The four properties in question were identified as:

152.1. The Alfred Street Complex

> 'This is a property situated in Alfred Street in the Prestwich Precinct, linking the Cape Town CBD and the V&A Waterfront with an estimated total of 65 000m² potential bulk available. Other properties in the precinct belonging to the [Province] will be released in the next group or tranche.'

152.2. Helen Bowden Nurses' Home Site

> 'This is a property situated in the Somerset [Hospital] Precinct, neighbouring the V&A Waterfront and the Cape Town Stadium with an estimated total of 46 000m² potential bulk available (applying a bulk factor of 3.29). Other properties in the precinct belonging to the [Province] will be released in the next tranche.'

152.3. Top Yard

‘Top Yard is part of the Government Garage Precinct and is located in the Cape Town CBD less than 500m from the National Parliament and the Company Gardens. The property is currently utilised as a ground level parking facility with tarmac surfacing. A total of 46 484m² (bulk factor of 4) is estimated to be the potential bulk available on Top Yard under the new zoning Scheme. Other properties in the precinct belonging to the [Province] will be released in the next tranche.’

152.4. Main Road Sea Point

‘The Main Road Precinct is the site of the former Tafelberg Remedial High School and is located at 355 Main Road Sea Point east; approximately three and a half kilometres from Cape Town’s Central Business District (CBD). The site consists of erven 1424 Sea Point comprising a total site area of 1.7054 hectares. The site offers a development yield of approximately 20 000m² of mixed-use space comprising 12 200m² residential use, 1700 m² retail use, 700 m² restaurant and 5000 m² business use. Other properties in the precinct belonging to the [Province] will be released in the next tranche.’

[153] There are four important factors which emerge from the EOI. Firstly, the Tafelberg site was advertised for mixed use development, including a residential component. Secondly, the property was considered by the Province to fall within the central city area for purposes of the Regeneration Programme. Thirdly, notwithstanding the possibility of a residential component, the prospect of affordable housing is not mentioned in respect of any of the four sites. Fourthly, the EOI emphasized that the Province and the DTPW had:

‘made a policy decision that the [Province] will retain ownership of the properties in order to capture the broader benefit of property regeneration. An outright sale of the properties is therefore not under consideration.’

[154] The EOI specifically asked potential interested parties to deal with the question of socio-economic objectives:

'21. What levers may be available to DTPW to implement its socio-economic objectives set out in section 1 whilst protecting the financial feasibility of prospective investment? Which, if any, of these objectives would materially impact financial feasibility? Is there a range of tolerance for acquiring such objectives to be met? For example, is there a maximum percentage of available area that should be assigned to socio-economic objectives, such as creating green, open spaces?[56] What is a tolerable range for this percentage?

22. Would the Respondent support the pursuit of an exemption from the Preferential Procurement Policy Framework Act, 2000 for the anticipated procurement process to allow more flexibility in accommodating BBBEE and socio-economic objectives?'[57]

[155] On 20 March 2014, the MEC (then still Mr. Carlisle) hosted an investors' conference in Cape Town to 'showcase the four investment opportunities that the department will be making available to interested private sector parties.' Interested parties were invited to submit expressions of interest by 17 April 2014. The four properties referred to by the MEC are those referred to in the EOI.

[156] In the founding affidavit Ms. Adonisi points out that on 17 April 2014, Ndifuna, Equal Education and a third affiliated NGO, the Social Justice Coalition ("SJC") made a joint submission in the public interest to the MEC (Mr. Carlisle), objecting to the long-term lease to private developers on the basis that the Tafelberg site should be developed for mixed income housing, particularly in the context of the shortage of suitable, well-located state owned land available for public housing in the inner city.

[157] A demand was simultaneously made of the MEC that the Regeneration Programme in respect of the 4 properties proposed in the EOI be halted, in order to consult with local and national government about utilising the land in question to address the urgent spatial planning and housing needs in the city. Later the same day Mr. Carlisle called Mr. Dustin Kramer of the SJC telephonically, and advised him,

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[56] It appears that the author of the document conflated environmental considerations with socio-economic objectives which would ordinarily include affordable housing.

[57] As will appear later this was an attempt to relax the requirements for Black empowerment objectives while paving the way for White commercial interests.

inter alia, that there was neither the intention nor the desire on the part of the Province to relocate poor people into Cape Town's city centre or surrounds as part of the densification of central city housing developments. This was said by Mr. Carlisle to be a 'disservice' to poor people for whom the proposal would not be a 'living solution', although the MEC did not spell out what he meant in that regard. It is common cause that Mr. Carlisle also told Mr. Kramer during their discussion that 'there cannot be RDP in the City'. This latter remark, with undertones relating to both race and class, was understood to be a reference to the CBD and surrounds.

[158] On 11 June 2014 Mr. Kramer delivered a further demand of the Province, for the attention of the new MEC, Mr. Donald Grant, who had in the interim replaced Mr. Carlisle:

'We demand an undertaking that he will halt any sale/lease of the land referred to in the submission, in order to consult immediately on using available, including Province-owned land, for a broader plan to deal adequately with the urgent spatial planning and housing needs of the city, particularly for those most vulnerable and in need.'

[159] On 11 June 2014, the new MEC replied to the letter of 17 April 2014 from the NGO's and dealt with a number of issues, not all of which need be traversed at this stage. In his reply, Mr. Grant did not contradict or repudiate the earlier statements made to Mr. Kramer by Mr. Carlisle in their telephonic conversation of 17 April 2014[58]. It can therefore be safely assumed that the official policy of the Province at that stage was that it had no intention of considering the relocation of poor people to central Cape Town and surrounds and that affordable housing would not be made available for this purpose.

[160] In his letter Mr. Grant also stated that the Regeneration Programme had been set up 'to extract maximum value from the most valuable inner city properties' and thereby, through effective and efficient management of its assets, generate income to meet, inter alia, its obligations to the 'poorest of the poor' by way of cross-

[58] This remark was later referred to more generally by counsel through the use of the slogan 'No RDP in the CBD'.

subsidisation. The process of addressing apartheid spatial planning was said by the MEC to be a complex matter and needed to be done 'in a programmatic management and not on a site-by-site basis.'

[161] The MEC went on to point out that there was a vast difference between developing housing in the CBD and developing housing on the edges of the metro, stating that:

'The financial modelling for affordable low cost and social housing is heavily dependent on aspects such as government subsidies, free land and ownership solutions. In the inner city this modelling is simply impossible to apply and a very different approach, factoring in the high cost of land, the cost and complexity of building high-rise structures, issues of cross-subsidisation within mixed-use, mixed-tenure solutions and the management, maintenance and operation of such developments, is required.'

[162] Having earlier acknowledged that 'the legacies of apartheid-type spatial planning [needed] to be reversed', Mr. Grant concluded his letter as follows:

'With this as background the [DTPW] believes it is going about its business in a responsible manner and that our decisions and actions with regard to these properties, based on considerations of policy, are not unconstitutional as you have alleged. The Province will therefore continue with this work. In doing so it will consult with all relevant parties (including the parties to the submission) who may contribute constructively to realising the dream of a better City and a better Province.'

[163] It would have been apparent to the SJC and its alliance parties at that stage already that the prospects of the Tafelberg site being redeveloped for social housing were remote, to say the least. One of the principal obstacles appears to have been the insistence by the Province that it procure fair market value for its land. So, for example, one sees in May 2014 a situation where the DTPW offered to dispose of the derelict Woodstock Hospital site to the City for R30m in order that it could be developed for affordable housing purposes. The response of the City in July 2014 to this proposal was that the delivery of social housing on that site would not be viable at the selling price as proposed by the Province.

EXCURSUS: COMMUNICARE'S RESPONSE TO THE EOI

[164] Communicare, to which reference has already been made, is a fully accredited social housing institution under the SHA. On 17 April 2014 it responded to the EOI and indicated that it was of the view that the fact that the Province was considering granting a long lease on the property would not affect the potential use of the property to achieve the desired socio-economic objectives. In so doing, said Communicare, the state would be able to retain the asset.

[165] Communicare indicated that it was 'very interested' in the Tafelberg site and held the view that the best use for the property would be a combination of social housing and market-related rental units, with an additional component of retail space. It considered that it could complete such a project within 48 months. Mr. Hathorn SC observed that it was significant that at this stage a body with extensive experience in the social housing sector considered that the property was suitable for housing under the SHA and that such an undertaking was economically viable.

STEPS TAKEN BY THE PROVINCE AFTER THE EOI PHASE

[166] In terms of cl 4.2.1.5[59] read with cl 6.2.1 of the WCPDP, upon completion of the second phase (i.e. the EOI phase), a decision was required to be made as to which of the projects would proceed to the implementation phase, based on the optimum use defined in respect thereof. In the replying affidavit, Ms. Adonisi takes the point that there is no evidence in the documentation made available to the applicants of any such decision having been made at the time by the Provincial Steering Committee in terms of the WCPDP, as to whether the development then proposed in respect of the Tafelberg site (i.e. a development on the property by a private developer under a long term lease) should proceed.

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[59] Cl 4.2.1.5 reads: 'The decision should be articulated by the Project Steering Committee, approved by the Accounting Officer after receiving the views and recommendations of the Provincial and National Treasury. Thereafter, it should be presented to the Provincial Cabinet for noting and National Treasury should be informed of the decision.'

[167] In a late supplementary answering affidavit filed in February 2019 the Province made the allegation that Ms. Adonisi's conclusion was wrong, but tendered no documentary proof of the steps contemplated under the clause in question. Given the reporting lines to the DTPW's Accounting Officer, and Provincial and National Treasury, it is inconceivable that there is no documentation supporting the bald allegation. Rather, said Mr. Hathorn SC, the evidence before the Court strongly suggests that the process under the WCPDP was simply abandoned when it became clear that the Province elected to generate revenue in the short term. I consider that counsel's conclusion is justified on the papers for the reasons that follow later.

THE EDUCATION HEAD OFFICE PROJECT

[168] In her affidavit Ms. Gooch refers to a PPP[60] which the DTPW was considering in order to facilitate the relocation of the WCED's head office from the Golden Acre/Grand Parade area in the central CBD to the Provincial Office Precinct[61]. The Province says it was concerned about the high rentals that it was paying in the mid-town buildings housing the WCED and was looking for other less costly options. In the circumstances it says a PPP presented a viable solution. However, by October 2014 it appeared that there were problems with the economic viability of the proposed PPP: the capital contribution to be made by the Province had escalated sharply – from R210m to R540m – and, in addition, the Provincial Treasury was opposed thereto.

[169] The way out of the financial squeeze was conceptualised by Ms. Gooch and a Mr. Pillay, who was then at the helm of the Regeneration Programme. The idea was to sell the Tafelberg site to fund a portion of the PPP shortfall. Accordingly, in January 2015, the DTPW made a submission to the Provincial Cabinet for approval to enlist a private entity for the Education Head Office PPP. In its submission the DTPW pointed out that it had been agreed with Provincial Treasury that a capital contribution

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[60] A public/private partnership.

[61] This is an area in the immediate vicinity of the Western Cape High Court, the Provincial Head Office building in Wale Street and the adjacent city blocks to the north and west thereof.

would be made out of the funds set aside in the Asset Finance Reserve and that 'an additional contribution [would] be derived from the sale of properties which properties would be ring-fenced for this purpose.'

[170] In the replying affidavit, Ms. Adonisi points out that no detail was given of the properties earmarked for the proposed sale, and in particular that no mention was made of the contemplated sale of the Tafelberg property in order to fund the shortfall in the PPP. Further, there had not been a proper update of the Regeneration Programme so as to include the Tafelberg and Woodstock Hospital sites therein after it was decided to dispose of them.

[171] In light hereof, said Mr. Hathorn SC, the Provincial Cabinet had not been placed in a position to re-assess the suitability of the various precincts in order to optimally achieve the aims and objectives of the Regeneration Programme. Nor, it was argued, was the Cabinet able to properly evaluate the benefit of continuing with the PPP in light of the competing interest in the Tafelberg site given, firstly, that the PDHS had formally made it known that it required the property for housing purposes, secondly, that feasibility processes had been undertaken in respect of social housing projects on both the Tafelberg and Woodstock Hospital sites and, most importantly, that the opportunities for affordable housing in and around the city centre were scarce.

THE MARCH 2015 DECISION TO SELL THE TAFELBERG PROPERTY

[172] In the answering affidavit, Ms. Gooch says that in March 2015 the DTPW's Immovable Asset Management Directorate decided to sell the Tafelberg property. This decision was evidently based on the Cabinet decision of January 2015 to finance the shortfall in the PPP through the sale of provincial properties. Nothing is said by the Province of the implementation of the WCPDP process, and it must be concluded that this had simply fallen by the wayside as far as the Tafelberg site was concerned. As Mr. Hathorn SC stressed, there is no documentation referred to by Ms. Gooch in support of the decision to sell the property. Consequently, one does not know who made the decision, when it was made or what the terms of the intended disposal

were. All that is said is that the sale would 'achieve the objectives of the Urban Design Report.' The absence of detail is regarded as significant, because at that time the objection by the HOD of the PDHS of 23 March 2013 still stood.

[173] Having decided to sell the property, the DTPW then purported to follow the provisions of the WCLAA. On 23 March 2015 it procured a valuation from an independent third party (Appraisal Corporation), that reflected the market value of the land at R107,3m, and thereafter it prepared a bid document which was published in the Government Gazette in terms of the WCLAA. The bid document stipulated that only bids above the market value as determined by an independent valuer would be considered. It also made provision for a scoring system in terms whereof 90 points would be allocated for price and only 10 points for B-BBEE[62] criteria.

[174] It is clear that the tender document was then loaded in favour of price and would have minimal regard to the interests of Black empowerment: it paved the way for a White buyer with deep pockets to acquire the property and effectively put paid to any prospect of social housing options on the property. The tender document is consonant with the mantra 'No RDP in the CBD' and effectively preserves the *status quo* in Sea Point: apartheid spatial planning would not be disturbed.

[175] In so doing, the Province paid little attention to its constitutional obligations to achieve land reform under s25 of the Constitution. And, in opting for a high value sale, it effectively perpetuated that which its own officials and functionaries had repeatedly cautioned against and complained of: the inability of the State to deliver affordable housing in and around the CBD due to the high cost of available land.

[176] The cut-off date for the submission of tenders was 9 June 2015 and, while 5 bids were received by the Province, only 2 exceeded the independent market valuation and they were then evaluated on the 90/10 points basis. It would be fair to say that the Day School, with its offer of R135m, won the race by the proverbial country mile and on 3 July 2015 the DTPW, acting in terms of the WCLAA, had little

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[62] Broad-based Black Economic Empowerment.

difficulty in recommending the disposal of the property to the Day School to the PPC. Later that month the PPC resolved to recommend the sale in terms of Reg 4(5) of the WCLAA Regulations.

WITHDRAWAL BY THE PDHS OF ITS INTEREST IN THE PROPERTY

[177] Mr. Hathorn SC argued that the recommendation of the PPC in approving the sale to the Day School was based on an incorrect factual assumption, *viz.* that the Tafelberg property was not in use, or required for, government purposes. This, it was said, was because the property was not 'surplus' under GIAMA. Reliance was placed in this regard on the letter from the HOD of 26 March 2013.

[178] On 7 August 2015, a month after the recommendation to the PPC and more than 2 years after the HOD's letter indicating his department's interest in the property for housing purposes, the DTPW's Director for Property Acquisitions, Mr. E.P. Maytham, formally wrote to the PDHS informing it that a decision had been made to dispose of the property in order to create an income stream for the Asset Reserve Fund, to be used for the construction and maintenance of 'social infrastructure'. Curiously, the Province has never explained how the construction of an office block in the Provincial Precinct can be regarded as social infrastructure.

[179] In requesting the PDHS to formally withdraw its interest in the property and to confirm that the DTPW could proceed with the disposal, the following was said by Mr. Maytham:

'The Tafelberg High School in Sea Point, Cape Town, was decommissioned in June 2010 and the Property was relinquished to the DTPW . . . as the custodian of immovable assets for the future administration thereof.

During 2009 the Western Cape Provincial Cabinet approved the Strategic Framework for the Central City Regeneration Programme, which provides the mandate to make under-performing properties available to the open market with the intention to create an income stream for the Asset Reserve Fund, which will primarily be used for the construction and maintenance of social infrastructure.

A decision was reached by DTPW to dispose of the . . . [property] . . . in the open market for the purposes as mentioned above. The disposal process is currently underway.

The . . . Cabinet also in August 2014 endorsed the Memorandum of Understanding . . . regarding the utilisation of Properties (sic) in the custodianship of the DTPW for Human Settlement Development, whereby approval was granted for DTPW to avail certain portions of land to the . . . [PDHS] . . . for the said purpose.

In view of the aforementioned the . . . [PDHS] . . . is hereby requested to withdraw their (sic) request to avail . . . [the Tafelberg property] . . . for human settlement development, and also to confirm that the DTPW can proceed with the disposal of the . . . [Property], in order to create the necessary income for the construction and maintenance of social infrastructure for the Western Cape Government.'

[180] The response to this request (directed for the attention of Ms. Gooch) came from the then HOD of the PDHS, Mr. Thando Mguli, in a letter dated 17 August 2015. The content thereof reflects Mr. Mguli's obvious frustration at being confronted with a *fait accompli* and further demonstrates, *inter alia,* a different understanding of the concept of 'surplus' under GIAMA.:

'I have considered your request for the . . . [PDHS] . . . to withdraw its interest in the abovementioned . . . [property] . . . for human settlement development. Although the subject property is found to be suitable for the development of housing to cater for the [PDHS'] . . . target market, I agree to your request in the spirit of cooperation and the interest of achieving our provincial goals.

Unfortunately this spirit of cooperation and sharing a common goal does not seem to be reciprocal in our Departments' engagements among the rank and file, albeit the case on paper.

For the record, and I know that you will not be aware of it, it needs to be stated that until now, no property that resorted under the custodianship of the DTPW, has been released and used for human settlement development. In contrast therewith, [the PDHS] has already transferred the custodianship of literary hundreds of hectares of serviced sites to DTPW for educational and other purposes.

This event, however, presents an opportunity to refine the understanding of how the two departments are to work together in the use of provincial land to realise the provincial goals.

In response to my earlier request (dated 6 July 2015) for [the DTPW] to identify more land that can be made available for human settlement development, as per the Memorandum of Understanding between our departments, it was stated that no 'surplus' land (I understand the definition of 'surplus' to be that the land is not needed for provincial functions) is available to be used for human settlement development. The notion that only 'surplus' land should be identified for human settlement development is flawed (sic) on the wrong assumption that human settlement development is not a core provincial function. It is conceded that the needs of the other provincial departments could first be considered, but if a particular property is not needed for those functions, it must be considered for human settlement development before any other interest and before it can be classified as "surplus" property. Those officials who hold this opinion have to be assisted to fully understand the scope of the provincial government's mandate and that [the PDHS] does not have to solicit favour to get access to provincial state land, but that human settlement development should get equal, if not priority, attention. In this regard it is also disturbing that some DTPW officials often pronounce themselves on policy matters that are [PDHS] prerogatives, and questioning (sic) important issues about whether municipalities or the [PDHS] should undertake human settlements development.

It is therefore my surmise (sic) that this warped understanding of officials of the provincial mandate and the respective roles of our departments, is the reason for the lack of progress almost a year since we have agreed to work together in the release of land for human settlements. I think it is imperative that we clear the obvious confusion to properly mandate our teams to implement our strategic agenda.'

It is apparent from this letter that Mr. Mguli had a good understanding of the imperatives of land reform and housing as contemplated in ss25 and 26 of the Constitution.

THE PROVINCIAL CABINET DECISION TO SELL THE TAFELBERG SITE

[181] After obtaining the recommendation of the PPC and having persuaded the HOD of the PDHS to forego any interest in the property for housing purposes, the

DTPW believed it was in a position to take the envisaged sale to the Day School to the Provincial Cabinet for approval. Accordingly, and on 11 November 2015, the MEC (then still Mr. Grant) made a submission to the Cabinet, to which I shall refer as "the November 2015 Cabinet submission".

[182] The purpose of the November 2015 Cabinet submission was to obtain approval[63] for the disposal of the property to the Day School in the sum of R135m, which as we have seen exceeded the assessed market value by some R28m (i.e. by more than 25%). In broad terms the November 2015 Cabinet submission dealt with the purpose of the submission – listing only two provincial strategic goals[64] – and further provided background to the deal, motivation for the disposal and contained submissions with regard to the anticipated use of the proceeds of the sale.

[183] In relation to the 'surplus' issue, the submission contains the following by way of background:

'6. In June 2010, the school was relocated to Bothasig, and since then the buildings stood vacant. Subsequent to the closure of the school, the Properties were **relinquished** to the Department of Transport and Public Works: Immovable Asset Management (DTPW: IAM) for the future administration thereof.' (Emphasis added.)

[184] The submission also deals with achieving the professed objectives of the Urban Design Report of 2011 ("the UDR"), which flowed from the Regeneration Programme[65] and notes that the decision to dispose of the properties was reached by the DTPW: IAM in March 2015.

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[63] In terms of Reg 4(5) of the WCLAA Regulations.

[64] 'PSG 2: Improve education outcomes and opportunities for youth development;
PSG 4: Enable a resilient, sustainable, quality and inclusive living environment'.

[65] 'This study proposed an urban design concept intended to provide proposals for the future development of the Properties. The UDR also provided spatial and design criteria for assessing any future development proposals . . . The development concept of the UDR envisaged a mixed use development . . .'

[185] Cabinet was informed by the MEC of certain of the provisions of GIAMA which were considered applicable in the circumstances, including the following: -

'22.1 An immovable asset becomes surplus to the user if it does not support its service delivery objectives at an efficient level and if it cannot be upgraded to that level . . .

22.4 The Custodian, when it disposes of any immovable asset, must consider whether the asset cannot be used in relation to the social development initiatives of government; and

22.5 Whether it cannot be used in relation to government's socio-economic objectives including the alleviation of poverty, job creation and wealth distribution.'

[186] The submission goes on to record that '(a)ll Government Departments including the Department of Rural Development and Land Reform were consulted before a decision to dispose of the Properties was taken.' As will be seen later, this allegation is incorrect in that the National Department of Human Settlements was never consulted in circumstances where it claimed it was reasonable to do so.

[187] The November 2015 Cabinet submission also recorded the exchange of correspondence in August 2015, and referred to the earlier correspondence between Messrs Maytham and Mguli, as follows:

'24. Although the [PDHS] requested that the Properties be made available to them for integrated sustainable human settlements, an agreement was reached between the DTPW and the [PDHS] that the [PDHS] withdraw the said request, in order to allow the DTPW to proceed with the disposal of the Properties, to create the necessary income for the construction and maintenance of social infrastructure for the Western Cape Government . . .

25. The Properties are therefore not required for any government purpose and can be disposed of.'

It must be said immediately that the passages in Mr. Mguli's letter to which I have already referred hardly sustain the suggestion to Cabinet that an amicable agreement had been concluded between the two departments.

[188] Finally, the submission dealt at length with the importance of the best value for money principles in GIAMA, and there was a thorough exposition of the various offers put up to the DTPW. On the evidence as presented to the Cabinet, there can be little doubt that it was a very good deal from a commercial point of view. On this point Mr. Hathorn SC submitted, however, that the decision to sell the Tafelberg site was predicated on a policy which saw the disposal of valuable land close to the CBD for maximum financial gain to the exclusion of other relevant considerations: it was argued that the Province had incorrectly assumed, on the basis of flawed financial modelling, that it was not possible to provide affordable housing in the inner city area.

[189] In the result, the Provincial Cabinet approved the sale of the Tafelberg site to the Day School on 11 November 2015, and on 20 November 2015 the MEC accepted and signed the Day School's offer. On 24 November 2015 the Day School was informed of the outcome of the tender process and notified that the confirmation of the offer was subject to a further statutory process, i.e. a 21-day period in terms of s3(2) of the WCLAA, in terms whereof interested parties could make written submissions in respect of the proposed disposal. To this end, on 11 December 2015, the DTPW published notices of intention to dispose of the property in terms of the said section and called upon all interested parties to submit such written representations.

[190] After the expiry of the prescribed 21-day period, the Province notified the Day School on 14 January 2016 that the sale had been confirmed and called for the 10% deposit payable in terms of the deed of sale.

ALLEGATIONS OF FLAWED PUBLIC PARTICIPATION AND THE MAY 2016 INTERDICT

[191] In the founding affidavit Ms. Adonisi observes that Ndifuna only became aware of the Cabinet's decision to dispose of the property late in January 2016. After taking legal advice Ndifuna addressed a letter to the Premier and the MEC, requesting reasons for the decision to declare the Tafelberg site as surplus in terms of GIAMA and to dispose of it.

[192] The request for reasons was based on s5(1) of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA"). On 1 April 2016 Ms. Gooch responded on behalf of the Province and articulated its position referred to earlier and which has remained consistent throughout: that the property became surplus by operation of law in June 2010 and that PAJA was therefore not applicable. Ms. Gooch went on to say that, notwithstanding the alleged inapplicability of PAJA, the DTPW would nevertheless furnish its reasons as soon as was reasonably possible. Ms. Adonisi says (and it is not disputed by the Province) that by the time the RTC application was launched, no such reasons had been furnished.

[193] RTC and Ndifuna held the view that the disposal process was flawed, both procedurally and substantively, and they decided to commence litigation to address the position. In particular, RTC held the view that the Province had failed to adhere to s3 of the WCLAA and that the public participation process initiated by the DTPW, through its notice of 15 December 2015, was fundamentally flawed. In the result substantially the same applicants in the RTC application launched an urgent application on 11 April 2016 to interdict the transfer of the property to the Day School, pending a renewed public participation process.

[194] The Province accepted that the 15 December 2015 notice did not comply with s3 of the WCLAA, in that it had not been published in all of the three languages of the Province – there was no publication in isiXhosa. Accordingly, on 5 May 2016 an order was granted by Dolamo J, by agreement between the parties, to the following effect:

194.1. The notices published in terms of s3 of the WCLAA were reviewed and set aside;

194.2. The MEC was directed to publish fresh notices in terms of s3 within 10 days of the date of the order;

194.3. Within one month from the close of the commentary period specified in such publication, the MEC was directed to notify the applicants in writing of the Cabinet's decision regarding whether or not to resile from the contract of sale with

the Day School and to furnish written reasons for its decision should that decision be not to resile from the contract;

194.4. If the Cabinet decided not to resile from the contract, the applicants could, within one month of receipt of the written notification from the MEC, institute proceedings for judicial review of that decision or any other action or decision by the Province;

194.5. The Province and the Day School undertook not to give or take transfer of the property until the expiry of two months after receipt by the applicants of the written notification of the Cabinet's decision as aforesaid.

THE PROVINCE'S REVISED FINANCIAL MODEL

[195] On 19 May 2016 fresh notices in relation to the proposed disposal of the property were published by the DTPW, with the date for submissions fixed as 9 June 2016. In the interim the sale of the property had become a matter of significant public interest, with various commentators on social and political issues and members of the public pointing to the failure of the Provincial government to deal with the legacy of apartheid spatial planning in the city centre. On 18 July 2017, the Province reported that approximately 5000 submissions had been received by the DTPW in response to its notice of 9 June 2016. As a result, it said the Cabinet was not able to consider the written representations within the time period stipulated in the order of Dolamo J.

[196] On 29 July 2016, the Cabinet determined that, in light of the wide range of comments that had been submitted to it, it was not in a position to come to a view in regard to whether to resile from the sale or not. It accordingly requested the DTPW to secure the preparation and presentation of a financial model with respect to social housing options on the Tafelberg site.

[197] The DTPW then prepared a financial model in relation to such social housing options and fresh notices were thereafter published inviting comments on such model during November 2016. Ndifuna and NASHO both submitted comments on the

Province's financial model, as well as alternative models for mixed-use developments, with cross-subsidisation for purposes of feasible social housing as part of the proposed development on the site. A total of 37 comments were received in relation to the proposed financial model.

CABINET'S DECISION NOT TO RESILE FROM THE SALE

[198] After the conclusion of an extended public participation process, the Cabinet took a decision on 22 March 2017 under the WCLAA not to resile from the sale of the Tafelberg site to the Day School. Prior to taking that decision, provincial officials and the legal adviser to the Province in the Office of the Premier made a presentation to the Cabinet. Although the substance of the decision was only formally conveyed to Ndifuna on 7 April 2017, a posting on the Province's website on 22 March 2017 made this fact public. I shall refer to the contents of that posting as they usefully summarise the decision.

[199] In the posting it was announced by the spokesperson for the Cabinet that the Woodstock Hospital site would be used for affordable housing 'within a mixed-income, mixed-use context'. It was further said that the Province envisaged developing the Helen Bowden site together with the larger Somerset Precinct, and that in so doing consideration would be given to 'the maximum number of affordable housing units [that could] be included in [such] development, in a way that is viable and rational.'

[200] In regard to the Tafelberg site the posting attributed to Cabinet the following by way of background to its decision not to resile.

'Cabinet further deliberated on whether or not to resile from the sale of the Tafelberg site, having received presentations from various departments and the full set of public comments the process has generated to date.

Cabinet accepted that a holistic approach to the utilisation of provincial assets, and the methods by which the Province is pursuing its legislative obligations and policies in that regard, is preferable to an ad hoc site by site determination.

Cabinet accepted that it cannot achieve all its strategic objectives on every single site.

On the basis of what was presented to Cabinet, including the current pipeline for affordable housing in the Metro, the two aforementioned decisions, legal advice from senior counsel, affordability risks, fiscal constraints in the current economic climate, Cabinet resolved that the Tafelberg site is not ideally suited to affordable housing, especially as the state subsidy cannot be utilised there under current national policy . . .'

[201] The 'state subsidy . . . under current national policy' upon which the Cabinet said it was unable to rely, is a reference to the subsidy which may be procured from National Government under the SHA in respect of an area declared as a 'Restructuring Zone' for purposes of erecting social housing projects. The posting continues as follows –

'The [SHA] requires an area to be declared as a Restructuring Zone in order for a Restructuring Capital Grant to legally be released by national government, for the subsidisation of social housing units.

These Restructuring Zones are designated by the National Minister of Human Settlements, following identification by a municipality. The National Minister must publish the declaration in the Government Gazette.

Without this declaration, the relevant national subsidy cannot legally be provided for the building of social housing units, and a financial model would need to be developed for viable social housing in the absence of a government subsidy. This may be possible given the size of the Helen Bowden property, and the scope this provides for cross subsidization.

Seapoint (sic) where the Tafelberg property is located, also falls outside of a Restructuring Zone. This is as per the advice of legal counsel to Cabinet, which was requested following this risk being pointed out during the course of public participation on the Tafelberg site . . .'

[202] Turning to the Cabinet decision itself, the following is recorded:

'1. Having taken into account the comments submitted out of the public participation processes applied in this matter to date, along with the recommendation of the custodian, the

legal advice received and the presentations by various officials, the Cabinet considered the following factors to be material during the course of its deliberations on whether or not to resile from the Tafelberg sale agreement:

1.1 The current proposed and future initiatives being undertaken by the DOHS in relation to the progressive realisation of the right to adequate housing by the citizens of the Western Cape, and specifically the pipeline of 40,000 affordable housing opportunities reported to cabinet by DOHS in this regard. In relation to social housing, specifically, the pipeline includes 10810 units at a cost of R1, 2 billion over the next 10 years in the metro and 14008 units at a cost of R1, 57 billion in the non-metro area of the Western Cape.

1.2 The Memorandum of Understanding between [PDHS] and the [DTPW], and the result thereof, i.e. the identification of 18 parcels of land by [the PDHS] for human settlement purposes, including but not limited to land within the City of Cape Town.

1.3 The prior decisions of Cabinet on 22 March 2017 in relation to the proposed use and/or disposal of the Woodstock Hospital site and the Helen Bowden Home site (both within the metro) as contained in the presentation by [the DTPW] in this regard. More specifically the request for a Cabinet that any proposed disposal and/or use of the Woodstock site (in whole or in part) be referred to Cabinet so as to enable it to ensure that affordable housing is best achieved on that site given its locality and size. Similarly with respect to the Green Point Helen Bowden site, that any RFP that is developed contain within it the requirement for the maximum quantum of affordable housing as will make the development of the site viable.

1.4 The identified legal risks in a social housing development under the auspices of the Social Housing Act on this site currently, including, inter alia:

1.4.1 The legal advice obtained from senior counsel pertaining to the comments made by the Phyllis Jowell Jewish Day School, in relation to the definition of a ‘Restructuring Zone’ in the Social Housing Act, read with the National Minister’s designations and the City’s currently identified Restructuring Zones. Counsel’s advice is that the Tafelberg

sites does not currently fall in such a zone as defined, rendering the availability of the restructuring capital grant unavailable to any social housing institution for a project on that site currently. The social housing proposals received to date as part of the public participation process presume a restructuring capital grant is available. Cabinet notes that the National Minister may be approached to amend the Restructuring Zone designations but, as of 22 March 2017, counsel's advice is that Sea Point does not fall within such a designated area.

1.4.2 That the current income bands and associated grants applicable to social housing projects are in the process of amendment. Such amendments have not, to date, come into operation. Necessary legislative amendments, to enable any social housing project in Sea Point or Green Point to benefit from a restructuring capital grant and increased income bands, are required and probable but as of the date of this Cabinet decision, neither of the necessary suite of amendments is in operation.

1.5 Whilst Cabinet accepts that social housing is notionally an option on any piece of land owned by the Western Cape Government, in addition to what has been set out above, the value of the land which has been achieved in this sale, the high construction costs acknowledged in the public participation process, the acknowledgement out of the public participation process that extensive cross-subsidisation is required to render the project financially feasible and the inherent land use restrictions which apply to this site, including, inter alia, heritage and zoning requirements, render this specific site sub-optimal for social housing.

1.6 The loss of injection of revenue of R135 million earmarked for other infrastructure required for the provincial government, in a climate of fiscal austerity and under a direct instruction from the National Treasury to optimise the use of its assets for, inter alia, revenue-raising measures.'

[203] I pause to mention at this stage that the question of the availability of a restructuring grant and the consent and co-operation of the National Minister were

evidently critical components of the Cabinet decision. These aspects were addressed fully by counsel in argument and I shall revert thereto in due course.

INVOLVEMENT OF THE NATIONAL MINISTER

[204] In the heads of argument filed on behalf of the National Minister, the involvement of that department of state at various junctures in the process of the disposal of the Tafelberg site is traversed. Suffice it to say at this stage that on 30 March 2017 the National Minister formally entered the fray, when she wrote to the Province emphasising the national objective that had to be achieved through the development of the property for social housing purposes.

[205] Having articulated the express intention to pursue such development in line with the Social Housing Policy and the SHA, the National Minister explicitly invoked s5 of IGRFA, stating the following:

> '2. Having followed the public discourse and engagement between the City of Cape Town, the provincial government and stakeholders, I believe that there is a national objective that can and must be achieved through the development of the property by providing social housing. In this regard, I intend to pursue the development of social housing in line with the Social Housing Policy and [the SHA]. Accordingly, I hereby invoke the Intergovernmental Relations Framework Act, 2005 in particular section 5 for this purpose. Kindly provide the details of the official in your official (sic) that may officially engage with my office on this matter.'

[206] This intervention by the National Minister drew a swift response from the erstwhile Premier, Ms. Helen Zille, who, on 5 April 2017, challenged the National Minister's basis for asserting her department's entitlement to develop social housing on the property, as well as the basis upon which the National Minister sought to challenge the Province's decision not to resile from the sale. While appearing to agree to engage with officials from the DHS in the interests of co-operative governance in relation to the sale of the property, the Premier took issue with the applicability of IGRFA:

'5. As regards your invoking of the [IGRFA] and in particular section 5 thereof, it is unclear as to the basis upon which you do so. This notwithstanding, the Provincial Government will, in the interests of co-operative governance have no difficulty engaging with you in respect of the decision that it has taken in respect of the disposal of the property, the reasons for its decision and the basis upon which you disagree with the decision and assert otherwise. Ms. Jacqui Gooch, our HoD in the [DTPW] (the current Custodian of the land in question) and Fiona Stewart in our legal services department are the relevant persons to whom any future correspondence and/or requests for engagement on this issue may be addressed.'

[207] In a letter dated 24 April 2017 the State Attorney, Pretoria responded on behalf of the National Minister and recorded that it appeared to their client that the Premier had accepted the National Minister's proposal to conduct an intergovernmental dispute resolution process, in order to resolve the dispute concerning the March 27 decision not to resile from the disposal of the property. The Premier was invited to agree to a court order referring the dispute for resolution in terms of an intergovernmental process, and regulating the further conduct of the matter in terms of the proposed draft order between the parties to the interdict proceedings in the application brought by Ndifuna.

[208] The following day the National Minister replied and emphasised that she had to act in accordance with the provisions of s3 of the SHA, as well as s3 of the Housing Act, and that she was accordingly obliged to ensure that social housing prerogatives were achieved and that the relevant legislation, regulations and policies were complied with by all parties.

[209] In relation to the challenge by the Premier as to the basis upon which s5 of IGRFA had been invoked, the National Minister identified the following issues which she alleged would be subject to resolution in terms of that act as intergovernmental disputes:[66]

[66] This is in fact the substance of the relief sought by the National Minister in these proceedings.

209.1. Whether or not the Province's decision to sell the property to the Day School complied with s 5 of GIAMA;

209.2. Whether or not the Province's decision to sell the property to a private entity disregarded its duty to provide social housing in terms of the SHA;

209.3. Whether or not the reasons advanced by the Province were rational *vis-a-vis* the constitutional and legislative requirements to provide for social housing; and

209.4. Whether or not the property fell within a restructuring zone, and if it did not, whether it was rational for the Province not to have approached the National Minister for a designation declaring it to be a restructuring zone which would advance the obligation to provide social housing.

[210] On 11 May 2017 the Premier replied to the National Minister stating that IGRFA could not be utilised to resolve a dispute which involved a private entity, in this case the Day School, and that the Province was, in any event, *functus officio* and its decision could only be set aside by a court of law.

'5. In order to determine whether the matter is justiciable, and hence qualifies as an intergovernmental dispute, one must enquire whether the matter is of such a nature that it would be competent to approach a court to decide the outcome by way of a competent order. It is, in other words, not enough for a sphere of government merely to raise concerns about a decision made by another sphere of government. While such concerns may of course be raised, and whilst there may be consultation about such concerns as envisaged by s5 of the IGRFA, no intergovernmental dispute results from this and chapter 4 of the IGRFA accordingly is not triggered.'

[211] In the meanwhile (and on 2 May 2017) the State Attorney, Cape Town (acting for the Premier) replied to the State Attorney, Pretoria's letter of 24 April 2017 on behalf of the National Minister. In that letter it was noted that the Premier denied that she had accepted the National Minister's proposal to hold an intergovernmental

dispute resolution process in order to resolve the alleged intergovernmental dispute. It was said that the Premier relied on the following reasons:

211.1. The decision taken by the Provincial Cabinet not to resile from the sale fell within its exclusive competence and not that of the National Minister;

211.2. The Provincial Government was *functus officio* and not at liberty to change the decision at the whim of the National Minister;

211.3. The Provincial Cabinet's decision was to confirm a contract with a private party, which was precluded from participating in the intergovernmental resolution process, but nonetheless had rights that would be affected thereby;

211.4. Should the Minister persist in her challenge to the Province's decision, she was required to bring an application to review same. It was further stated that the Province would in any event adopt the stance that the National Minister had no standing to do so, as she had no functional competence in relation to the decision taken.

The letter further indicated that the Province remained amenable to engage with the National Minister, in the interests of co-operative governance, in relation to resolving the issues identified by the National Minister in her letter of 25 April 2017.

[212] That then concludes the contextual and historical setting to the two applications upon which the Court is required to adjudicate this matter. I turn now to consider the approach to be applied in considering the applications for review of the impugned decisions.

THE CONTROL OF PUBLIC POWER UNDER PAJA OR THROUGH THE APPLICATION OF THE DOCTRINE OF LEGALITY

[213] There are two pathways to judicial control of state power vested in the Constitution. The primary route available to litigants wishing to assert the right to administrative justice under s33 of the Constitution, is via PAJA, which requires a

decision to constitute administrative action before an applicant has the requisite *locus standi*. The second route is reserved for the exercise of public power which does not arise from administrative action: it is based on the principle of legality.

[214] In *FUL*[67] Brand JA analysed the two avenues, reviewed the authorities and summarized the position as follows:

'[20] The domain of judicial review under PAJA is confined to 'administrative action' as defined in s1 of the Act. The definition starts out from the premise that 'administrative action' is -

> "any decision taken, or any failure to take a decision, by . . . a natural or juristic person . . . when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has direct, external legal effect . . ."'

[215] After considering the relevant jurisprudence in relation to the non-reviewability of decisions regarding the institution of prosecutions, the learned Judge of Appeal continued":

'[27] . . .

(d) Against this background I agree . . . that decisions to prosecute and not to prosecute are of the same genus, and that, although on a purely textual interpretation the exclusion in s1(ff) of PAJA is limited to the former, it must be understood to incorporate the latter as well.

(e) Although decisions not to prosecute are - in the same way as decisions to prosecute - subject to judicial review, it does not extend to a review on the wider basis of PAJA, but is limited to grounds of legality and rationality.

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[67] *NDPP and others v Freedom Under Law* 2014 (4) SA 298 (SCA) paras 28 – 29. The case involved a decision by the NDPP not to prosecute in circumstances where the definition of 'administrative action' expressly excludes (under s1(ff)) 'a decision to institute or continue a prosecution.'

[28] The legality principle has by now become well established in our law as an alternative pathway to judicial review where PAJA finds no application. Its underlying constitutional foundation appears, for example, from the following dictum by Ngcobo J in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) para 49:

> "The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution."

[29] As demonstrated by the numerous cases since decided on the basis of the legality principle, the principle acts as a safety net to give the courts some degree of control over action that does not qualify as administrative under PAJA, but nonetheless involves the exercise of public power. Currently it provides a more limited basis of review than PAJA. Why I say "currently" is because it is accepted that "[l]egality is an evolving concept in our jurisprudence, whose full creative potential will be developed in a context-driven and incremental manner" (see *Minister of Health NO and Another v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 614 . . .). But for present purposes it can be accepted with confidence that it includes review on grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute (see *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others* 2012 (3) SA 486 (SCA) paras 28-30).'

[216] Mr. Hathorn SC referred the Court to the decision of the Supreme Court of Appeal in *Scalabrini*[68] which, in my view, provides a useful summary of the manner in which a court might approach a legality review. In that matter, Schippers AJA observed that the decision regarding closure of the refugee reception centre in question was not reviewable under PAJA, but that it might nevertheless be assailable under the doctrine of legality.

'**The standard of review**

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[68] *Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others* 2018 (4) SA 125 (SCA). The case involved Government's decision to close a refugee reception office in Cape Town.

[27] The appellants accept, as they must, that the question whether a refugee reception office is necessary for achieving the purposes of the [Refugees] Act is quintessentially one of policy. It concerns the manner in which the state determines how it will discharge its international-law obligations contained in the Act. The number and locality of refugee reception offices involve an assessment of the need for such facilities; the number of refugee reception officers, refugee status determination officers and other staff required; and issues relating to administrative effectiveness and efficiency, budgetary constraints, and policies of the Department.

[28] Thus, a decision to close a refugee reception office in terms of s8(1) of the Act constitutes executive rather than administrative action, and is not subject to PAJA.

[29] In exercising his s8(1) power, the Director-General is nevertheless constrained by the constitutional principle of legality, namely that "the exercise of public power is only legitimate where lawful." Consequently, the impugned decision falls to be reviewed and set aside on the basis of the legality principle if it is not rationally related to the purpose for which the power was given; if the decision-maker failed to act in accordance with the empowering provision; if the decision-maker's failure to consider a relevant factor had an impact on the rationality of the entire process; or if the decision breaches the Constitution.' (Internal references omitted.)

[217] The review of a decision, as defined, under PAJA on the other hand must, firstly, meet the jurisdictional requirement of administrative action, as defined, and then, the impugned decision must fall within the ambit of the reviewable errors or irregularities listed in s6(2) of PAJA.

THE REVIEW GROUNDS RELIED UPON BY THE APPLICANTS

[218] As will appear from the relief sought in the draft orders set out at the beginning of this judgment, there is a fair degree of overlap between the initial review brought by RTC and the National Minister's application filed subsequent thereto. With reference to RTC's draft order the grounds of review may be articulated as follows.

[219] Firstly, RTC attacks the designation in June 2010 of the Tafelberg site as 'surplus' in terms of GIAMA.

[220] Secondly, it attacks the surrender by the erstwhile GIAMA users (WCED and PDHS) to the DTPW, which enabled the latter as custodian to embark of a process of disposal of the property under the WCPDP, the Regeneration Programme and ultimately the WCLAA to a private party, thereby eschewing an intention to retain ownership of the property for use as an affordable housing project.

[221] Thirdly, it complains that the decision of March 2015 to make the property available for acquisition on the open market, through a tender process which was intentionally loaded in favour of price, resulted in a scarce resource (state owned land close to the CBD) being lost for the development potential for affordable housing while the state retained ownership of the asset.

[222] Fourthly, RTC seeks to impugn the decision of the PDHS in August 2015 to (albeit reluctantly) relinquish its claim to use of the property for housing purposes and its initial objection to the sale thereof. It argues that this concession by the PDHS materially contributed to the view of the Cabinet in November 2015 that there were no obstacles under GIAMA to the sale of the property.

[223] Fifthly, there is the Cabinet decision itself in November 2015 in which it was decided to dispose of the property to the Day School under the WCLAA and to conclude a contract of sale with the Day School.

[224] Finally, there is the March 2017 Cabinet decision not to resile from the sale. RTC claims that this amounts to no more than an affirmation of the November 2015 decision.

[225] As I understood Mr. Hathorn SC's argument, RTC did not press for relief on the basis of the first 4 grounds of review set out above. The focus of the case, said counsel, was the reviewability of the November 2015 decision to sell the property, coupled with the March 2017 decision not to resile from that sale. I am in agreement with this concession by counsel: if these 2 decisions are set aside for the reasons advanced by RTC, it follows that the Province will have to go back to the drawing

board and take decisions afresh based on the Court's evaluation of the earlier components of the sale process.

[226] In addition to seeking review of these various decisions, RTC challenges the validity of Reg 4(6) and the proviso in Reg 4(1) of the WCLAA Regulations, published in October 1998, on the basis that they are unconstitutional and invalid. It says that this challenge is a stand-alone ground which would void the decision in November 2015 to sell the property.

DID THE DECISIONS TO SELL AND NOT TO RESILE FROM THE SALE AMOUNT TO ADMINISTRATIVE ACTION?

[227] The Province and the Day School adopt the stance that the first four decisions listed above do not constitute administrative action under PAJA, and contend, in any event, that any such reviews are time-barred under the 180-day period prescribed by s7 of PAJA. Those parties also take the view that the only relevant decision is that taken by Cabinet in March 2017.

[228] As I have said, Mr. Hathorn SC accepted in argument that the first 4 decisions might be set to one side for purposes of review, and that the decisions to sell and not to resile should constitute the focus of the Court's decision. I understood counsel to say that this did not imply that the first four decisions were legally irrelevant – they were important and necessary steps that were taken in the process of coming to the two reviewable decisions.

[229] Although both the Province and the Day School take the point in their respective heads of argument that the decisions, firstly, to sell and later, not to resile from the contract of sale, did not constitute administrative action under PAJA, the point was not strenuously advanced in argument by Mr. Fagan SC, while Mr. Farlam SC readily conceded that they were. In my view the concession was well made as the applicable authorities are clear on this point.

[230] The judgment of Nugent JA in *Grey's Marine*[69] is authority for the more general principle that decisions by public functionaries in relation to the disposal of rights in state-owned land constitute administrative action. The case in question involved a ministerial decision to conclude a lease in respect of state-owned land in Hout Bay harbour. In coming to his conclusion the learned Judge of Appeal was guided by the earlier decision of the Supreme Court of Appeal in *Bullock,*[70] in which Cloete JA held that the granting of a servitude over state land constituted administrative action.

[231] In both of those cases (as in the present instance) the authorities adopted the stance that the relevant ministerial conduct was no more than a policy decision, which did not constitute administrative action. The argument here seems to lose sight of the fact that the Province purported to act under the WCLAA and its Regulations, and that after concluding the sale it followed the public participation process mandated under Reg 4. It is axiomatic that such a process had to adhere to the principles of procedural fairness and the fairness of that process would stand to be evaluated under s33 of the Constitution and PAJA, the statute passed to protect the right to fair and just administrative action under the Constitution. Hence, when it was claimed by RTC that the public participation process did not comply with the regulations (in that one of the relevant notices was not advertised in isiXhosa), the Province did not quibble and forthwith agreed to the terms of the interdict application and a revised and extended public participation process.

[232] In *Military Veterans* [71] the Constitutional Court cited *Grey's Marine* with approval and confirmed that the definition of administrative action in PAJA embraced the following seven components:

232.1. A decision of an administrative nature;

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[69] *Grey's Marine Hout Bay (Pty) Ltd and others v Minister of Public Works and others* 2005 (6) SA 313 (SCA).

[70] *Bullock NO and others v Provincial Government, North West Province, and another* 2004 (5) SA 262 (SCA).

[71] *Minister of Defence and Military Veterans v Motau and others* 2014 (5) SA 69 (CC) para 33.

232.2. By an organ of state or a natural or juristic person;

232.3. Exercising a public power or performing a public function;

232.4. In terms of any legislation or an empowering provision;

232.5. That adversely affects rights;

232.6. That has a direct, external legal effect; and

232.7. That does not fall under any of the listed exclusions in the definition of administrative action in PAJA.

[233] Following *Grey's Marine* and *Military Veterans* there can be little debate that the decisions to sell and not to resile from the sale constitute administrative action. The decision to sell was made by the Cabinet on the advice of the MEC, in the exercise of public power conferred by legislation, in the course of administering state property *viz.* the WCLAA and the regulations promulgated pursuant thereto. Further, the decision was made with immediate and direct consequences for the Day School and had the further effect of permanently excluding the use of the property by the State for the benefit of the general public, as was the case in *Bullock.*

[234] When the Cabinet decided in March 2017 not to resile from the sale, it noted that:

'(i)t was of the view that a decision to uphold the contract of sale is rational, prudent and appropriate, and accordingly decides not to resile from the current contract of sale . . .'

[235] The language of the second decision is very much that of an administrative decision affirming a similar prior decision, in response to a process where the public was invited to persuade the self-same decision-maker that its earlier decision was wrong. Further, in the answering affidavit Ms. Gooch says (in regard to the March 2017 decision not to resile) the following:

'(T)he correct question is whether it was reasonable or irrational for the [Province] to have decided to dispose of the Tafelberg Properties to [the Day School], for that is the relevant administrative action.'

[236] Whichever way one looks at it (with the November 2015 decision as preliminary and the March 2017 decision as final, or with the latter as an affirmation of a decision already taken), both decisions are components of an administrative process governed by legislation and regulation, which sought to dispose of state-owned property to the benefit of the Day School, and to the detriment of members of the public who had an interest in the utilisation of the property for affordable housing. Manifestly then, the decisions were subject to s33 of the Constitution and the provisions of PAJA.

[237] There is a persistent refrain by the Province and the Day School, both in the answering papers and the heads of argument (which was persisted with in argument before us) as to the polycentricity of the Cabinet's decision to sell the property, and a call on the Court to exhibit due judicial deference in circumstances where the decision-maker was best placed to decide how to manage public resources. In the answering affidavit, for instance, Ms. Gooch says the following at paras 28 -29:

'Decisions resulting in the disposal of assets for the purposes of raising revenue are complex and polycentric and made on the basis of an assessment of many factors . . . The decision as to which assets should be sold is however pre-eminently one for the [Province] to make. It is a decision about the best application, operation and dissemination of public resources and about how public resources ought to be drawn upon and reordered.'

[238] The principle of judicial restraint in cases involving policy-based determinations is well established in our constitutional jurisprudence.[72] But, the application of the principle does not imply that a decision is not administrative action as defined under

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[72] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) paras 46 – 48; *National Treasury and others v Opposition to Urban Tolling Alliance and others* 2012 (6) SA 223 (CC) paras 65 – 66; *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* 2015 (5) SA 245 (CC) paras 44 – 45.

PAJA. Rather, it governs the approach to be adopted by a court in assessing whether (and how) it might interfere in any such decision.

[239] In the result, in my view, there can be no doubt that the decision to sell the property, and the subsequent decision not to resile, both constitute administrative action and that the Province was bound to observe the provisions of PAJA in the steps that it took to dispose of the Tafelberg property.

THE CHALLENEGE TO THE LEGALITY OF THE WCLAA REGULATIONS

[240] In the section of this judgment dealing with the approach to the vindication of socio-economic rights, I stressed the importance of participatory democracy as a basis for affording citizens the opportunity to hold government to account, through litigation, in their quest to advance constitutionally guaranteed rights.[73] As *Mazibuko*[74] emphasizes, the proper and adequate disclosure of information by the authorities is critical to enable interested parties to assess whether, and how, they might consider advancing the vindication of such rights.

[241] In their heads of argument, counsel for RTC referred to the decision of Goosen J in *Borbet*[75] in regard to the issue of public participation. With particular reference to the judgment of the Constitutional Court in *Doctors for Life*[76] Goosen J makes the following general comment in regard to the meaning and purpose of public participation within the local authority sphere:

'[19] . . . The obligation to encourage public participation at local-government level goes beyond a mere formalism in which public meetings are convened and information

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[73] See, for example, *Mazibuko* para 96.

[74] Para 71.

[75] *Borbet South Africa (Pty) Ltd v Nelson Mandela Bay Municipality* 2014 (5) SA 256 (ECP). The case involved a challenge by 5 large corporations doing business in Port Elizabeth against the municipal budget, and in particular the levying of electricity charges.

[76] *Doctors for Life International v Speaker of the National Assembly and others* 2006 (6) SA 416 (CC) para 129.

shared. The concept of "participatory democracy" as envisaged by the Constitution requires that the interplay between the elected representative structures and the participating community is addressed by means of appropriate mechanisms. It is this relationship to which the Constitutional Court speaks when it states that there must not only be meaningful opportunities for participation, but also that steps must be taken to ensure that people have the ability and capacity to take advantage of those opportunities.' (Internal references omitted.)

[242] And, while that case involved issues at the level of local government, I consider that the following approach is equally applicable in this matter, given that the decision of the Province to sell the property is essentially effective within the local sphere of government:

'[72] Although the yardstick to be applied in determining compliance with the obligation is undoubtedly the same, the nature of the obligation to facilitate public participation in decision-making at the local sphere of government is, as is clear from the discussion above, more extensive and far-reaching at local-government level than it is at provincial and national government levels. This is consistent with the scheme of different spheres of government as provided by the Constitution and is also consistent with the concept of participatory democracy that the Constitution is founded upon. It is, after all, at the local level that the scope for participation by members of the public is greatest. It is also at that level that the interests of directly affected communities can more readily be taken into account and promoted in the process of decision-making. The Constitutional Court's reference in *Doctors for Life International* to the historical context which animates our Constitution, namely the involvement of communities in organs of people's power in the struggle against apartheid, is instructive. These organs of people's power found most significant expression in struggles at a local-community level. Indeed it is those struggles and the mechanisms employed to conduct those local struggles that informed the very system of local government now provided for in our Constitution.' (Internal references omitted.)

[243] It is no doubt for this reason that the Provincial Legislature considered it necessary to include ss 3(2) - (4) in the WCLAA, which are clauses dealing with a public participation process in relation to any proposed disposal of provincial state land under s3(1) thereof. They read as follows:

‘3(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.

3(3) The Premier must, in addition to the notices to be published in terms of subsection (2), cause to be delivered to-

(a) the occupants, if any, of the provincial state land to be disposed of;

(b) the chief executive officer of the local government for the area in which the provincial state land to be disposed of is situated;

(c) the Western Cape provincial directors of the National Departments of Land Affairs and Public Works, and

(d) the Western Cape provincial director of the National Department of Agriculture, if the provincial state land is applied or intended to be applied for agriculture purposes,

a copy of the notice referred to in subsection (1), and must advise those persons that they may, within 21 days of the receipt of such notice, make written representations regarding the proposed disposal.

(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.

(4)(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.'

[244] Acting in terms of s10 of the WCLAA, the Premier of the Province issued the Regulations on 16 October 1998 and in Reg 4 the procedure to be followed in relation to the disposal of provincial state land is prescribed. Before I set out the contents of the Reg 4, it is necessary to refer to certain of the definitions in s1 of the WCLAA.

'(vii) "provincial state land" means any immovable property which vests in the Western Cape Provincial Government; . . .'

'(iv) "immovable property" includes any right in or over immovable property; . . .'

'(iii) "dispose" 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 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.'

[245] Reg 4 reads as follows.

'**Acquisition and disposal of provincial state land**

4(1) An *offeror*[77] shall:-

(a) complete and sign a written offer, and

(b) submit that offer to the Head of the *Component*[78] as a formal offer:

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[77] 'Offeror' is defined in the regulations as 'a person who wishes to contract with the *Province* for the acquisition or disposal of provincial state land'.

[78] 'Component' is defined in the regulations as 'the *Component* in the *Western Cape Provincial Government* responsible for administering the provincial state land portfolio'.

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

(ii) in the event of the Provincial 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 land to the *offeror* at that price.

(2) The Head of the *Component* or an official in the *Component* designated by him or her shall consider each formal offer, recommend whether or not it should be accepted further for consideration, and notify the *offeror* in writing accordingly: Provided that if an official is designated by the Head of the *Component*, that official shall report monthly in writing to the Head of the *Component* on all such recommendations.

(3) If an offer is accepted for further consideration-

(a) the land shall be valued in writing by an independent valuer, and

(b) a written report on the land shall be compiled by the *Component*, which shall include:-

(i) the full title deed description of the land;

(ii) the buildings or improvements, if any, of the land;

(iii) the current zoning of the land;

(iv) the value of the land;

(v) the current and intended uses of the land;

(vi) any legal restrictions pertaining to improvements or buildings on the land or the development of land;

(vii) the reasons why the offer was accepted for consideration, and

(viii) the financial aspects of the proposed transaction.

(4) In cases where the value of the land as determined by the independent valuer and the amount of the offer does not exceed:-

(a) R5 million, copies of the offer, the valuation and the *Component's* written report shall be submitted to the Head of the *Component* who after consultation with the Minister shall decide whether the offer is to be accepted and, if so, shall sign the written contract on behalf of the *Province*, subject to the provisos to sub-regulation (1), and

(b) R10 million, copies of the offer, the valuation and the *Component's* written report shall be submitted to the *Minister* who shall decide whether the offer is to be accepted and, if so, shall sign the written contract on behalf of the *Province*, subject to the provisos to sub-regulation (1):

Provided always that:-

(aa) if, in the case of a disposal, the value of the land as determined by the independent valuer exceeds the value of the offer, the offer shall be dealt with in terms of sub-regulation (5);

(bb) if, in the case of an acquisition, the value of the land as determined by an independent valuer is less than the value of the offer, the offer shall be dealt with in terms of sub-regulation (5), and

(cc) for the purposes of this sub-regulation the value on offer of lease shall be the total consideration payable by the lessee to the lessor over the period of the lease, excluding any renewal period.

(5) In cases where the value of the land as determined by the independent valuer or the amount of the offer exceeds R10 million or where the proviso to sub-regulation (4)(b) is applicable:-

(a) copies of the offer, the valuation and the *Component's* written report shall be submitted to the *Committee* for consideration;

(b) the *Committee* shall report in writing to the Provincial Cabinet on the offer;

(c) the Provincial Cabinet shall decide whether the offer is to be accepted, and

(d) if the Provincial Cabinet so decides, the *Minister* shall sign the written contract on behalf of the *Province*, subject to the provisos of sub-regulation (1).

(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 is, 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*.'**

[246] Those portions of Regulation 4 which I have emphasized by way of highlighting are challenged, by both RTC and the National Minister, as unconstitutional in that they are said to be *ultra vires* the empowering legislation and inconsistent with the right to just administrative action protected under s33 of the Constitution.

<u>"PROPOSED DISPOSAL"</u>

[247] Turning to the empowering provisions in s3 of the WCLAA, the use of the phrase 'proposed disposal' in ss3(2) is central to the argument advanced by the applicants. That subsection requires the Premier to give notice of such a proposed disposal in order to trigger the prescribed public participation process. Mr. Jamie SC argued that, applying a purposive interpretation of the provision, what the Provincial

Legislature contemplated was that such notice be given before any steps were taken to confer an entitlement on the offeror to acquire the land. In so doing, said counsel, the Legislature envisaged a process where the public participation and subsequent debate as to whether a disposal should take place preceded the conclusion of any contract.

[248] As set out earlier, the decision in *Goedgelegen* requires the Court to prefer a generous construction of s3 of the WCLAA in order to afford, inter alia, RTC 'the fullest protection of their constitutional guarantees' contemplated in the statute. And in so doing, regard must be had to the social and historical background to the legislation and its intended objectives.

[249] The context here is, importantly, the obligation on the Province to address the historical injustices perpetuated through the deprivation of the majority of our citizens of access to land. Indeed, and as pointed out earlier, the 2014 Provincial SDF listed 'spatial justice' as the first of its guiding principles. Further, the injunctions embodied in ss 25(5) – (8) of the Constitution must be considered. Finally, there is the Province's duty in promoting the right of access to adequate housing under s26 of the Constitution. As part of the Province's function in promoting access to these rights is the approach to public participation considered in *Doctors for Life*.

[250] From a purely linguistic perspective, 'proposed' is defined in the New Shorter Oxford English Dictionary to mean 'put forward for consideration or action', while the definition of 'propose' includes 'decide on or put forward.' Applying these definitions to the wording of the statute, the intention of the Legislature appears to have been to facilitate public participation in the process from the outset. This would make sense if one was dealing with an intended sale, lease or 'land availability agreement' in which the public might be interested. All the more so, in the circumstances of the present case, where interested parties might wish to persuade the Province that sought after state-owned land close to the Cape Town CBD could be made available for the provision of much needed affordable housing.

[251] In arguing this aspect of the application on behalf of RTC, Ms. de Villiers, stressed that the structure of the regulations, however, was to permit the entire disposal/acquisition process to take place before the public was invited to express a view thereon. Viewed in a contractual context the offer and acceptance process has been completed and the parties to the contract are *ad idem* on all the material terms of their bargain. What then was there to comment on, stressed counsel, when the disposal was already a done deal? It was submitted that the regulations appeared to place the cart before the horse.

[252] In his judgment in *Blom*[79]in the pre-constitutional era, Corbett CJ dealt with a party's right to be heard in relation to an administrative decision and, noting the "natural human inclination to adhere to a decision once taken", stressed that the "right to be heard after the event, when a decision has been taken, is no adequate substitute for a right to be heard before the decision is taken." In *Nortje*[80] Brand AJA stressed that the taking of a decision before hearing an interested party should be the exception rather than the rule.

[253] The rationale behind this line of reasoning is that it unfairly places a burden on the person seeking to participate in the public process that s/he must effectively persuade the decision-maker that it was wrong because it has already considered the matter and taken its decision.[81] This has the effect that the person is:

'placed in the situation where he or she has the *onus* of convincing the [decision-maker] to change his given decision . . . [The decision-maker] will, in a sense, be acting as an appeal tribunal in respect of his own decision and that, in my view, cannot be said to be a fair procedure.'[82]

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

[80] *Nortje en 'n ander v Minister van Korrektiewe Dienste en andere* 2001 (3) SA 472 (HHA) para 19. See also *South African Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd* 2007 (2) SA 461 (C) paras 23 & 27; Cora Hoexter *Administrative Law in South Africa*, 2nd ed at 384.

[81] Baxter *Administrative Law* (1984) at 587.

[82] *Magingxa v National Commissioner, South African Police Service, and others* 2003 (4) SA 101 (TKH)

[254] The facts of this case illustrate the unfairness of the prescribed procedure. After a protracted EOI process (during which the focus was on the private use of the land through a long term lease), a binding contract of sale was eventually concluded by the Cabinet with the Day School pursuant to authority and a further process which patently lacks transparency: I have referred above to the absence of any documentary proof from the Province of its decision in this regard.

[255] Thereafter, the 'proposed disposal' was advertised, as happens not infrequently, over the Christmas period, when most of Cape Town is in summer holiday mode. A period of 3 weeks was given in which objectors were required to consider the sale, access the documents from a provincial office (no doubt supported by skeleton staff over the recess), take advice and formulate their objections so as to persuade the MEC that the sale was not a good idea because consideration was, for example, not given to other uses for the land such as the provision of social housing.

[256] In taking the prescribed procedural steps the Province botched advertising requirements and, when challenged by RTC in that regard, readily accepted that its mistake constituted a material procedural flaw. Pursuant to the granting of the interdict on 5 May 2016, which was taken by agreement, the Province fixed a revised time-table for the public participation process, which resulted in a veritable deluge of objections by approximately 5000 interested parties on both sides of the divide. This had the consequence that the Province was unable to consider the objections within the allocated time and the time-frames were required to be extended.

[257] These uncontroverted facts demonstrate, in my view, that RTC was bound by a process which could not (and did not) afford it a fair opportunity to make representations to the Province regarding its intention to sell the Tafelberg site before the deed of sale with the Day School was concluded. In offering objectors an opportunity to have their say after the event, Reg 4 contemplates a situation in which the Province must be persuaded to resile from an otherwise binding contract for the sale of land. Such a process makes it difficult for an objector to, for instance, attempt

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at 111H-I.

to persuade the Province not to sell at all, as opposed to raising an objection to the terms of the sale itself e.g. with respect to price or payment terms. A fair procedure in the circumstances would, in my view, call for objections at an early stage of the process (and before the selection of the approved purchaser and the conclusion of a deed of sale), so that there would be a clean slate upon which all competing views could be inscribed and evaluated.

[258] In their written argument, counsel for the Province submitted that the impugned regulations do in fact provide for a system of public participation which was fair and transparent, albeit that such process comes after, rather than before, the sale agreement has been concluded. It was said, firstly, that the notice and comment procedure prescribed by Reg 4 was consistent with the provisions of ss4(1) and (3) of PAJA and should therefore not be set aside.

[259] The relevant subsections of PAJA read as follows:

'**4. Administrative action affecting public**

(1) In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether-

(a) to hold a public enquiry in terms of subsection (2);

(b) to follow a notice and comment procedure in terms of subsection (3);

(c) to follow the procedures in both subsections (2) and (3);

(d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow the procedure; or

(e) to follow another appropriate procedure which gives effect to section 3.

(2) . . .

(3) If an administrator decides to follow a notice and comment procedure, the administrator must -

(a) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

(b) consider any comments received;

(c) decide whether or not to take the administrative action, with or without changes; and

(d) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.

(4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from the requirements referred to in subsections (1)(a) to (e), (2) and (3).

(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance.'

[260] The WCLAA is legislation which pre-dates the promulgation of PAJA on 31 July 2002. In the result, the Premier could not have been guided by s4 in 1998 when he issued the regulations: at that stage he would have had to have been guided by the common law interpreted in accordance with principles under-pinning s33 of the

Constitution.[83] But when this Court is called upon to determine the constitutionality of Reg 4 it will look to PAJA, which is the legislation promulgated to give effect to the rights protected under s33 and determine whether the regulation in question passes constitutional muster.[84] *Cora Hoexter*[85] stresses the importance of public participation in the Constitutional era, observing that, where ss4(2) and (3) of PAJA are resorted to 'an administrator...is obliged to comply with the requirements of those subsections.'

[261] As I have said, counsel for the Province submitted, firstly, that the Cabinet decisions of November 2015 and March 2017 did not constitute administrative action and that the provisions of Reg 4 were thus not justiciable under PAJA. They further submitted that, in any event, the impugned regulations were not inconsistent with s4 of PAJA, but argued that, to the extent that they might be found to be, s4(1)(d) permitted such a deviation provided it was fair.

[262] I have already held that these decisions constituted administrative action and will therefore deal only with the alternative arguments advanced by the Province. The impugned regulations are, to my mind, inconsistent with the overall architecture of s4 of PAJA, which contemplates a public participation process before a decision is made. The complexities of the process introduced by Reg 4, which provides for all the relevant considerations to be taken into account by the administrator, a binding contract to be concluded (albeit with a contractually curious escape route for the Province[86] - what counsel dubbed 'a get out of jail free card') and then a public participation process to be advertised and responded to in a mere 3 weeks.

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[83] *Pharmaceutical Manufacturers Association of SA and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) paras 33 and 41.

[84] Cora Hoexter *op cit* at 59.

[85] At 78 *et seq.*

[86] Counsel were agreed that the clause was neither a suspensive nor a resolutive condition, with Mr Farlam SC, relying on *Premier, Free State, and others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35, suggesting it might be regarded as a "potestative condition". For present purposes that conundrum need not be resolved.

[263] In my view the prescribed procedure quite plainly puts the proverbial cart before the horse and places an unduly onerous burden on the objector to show the administrator that it was wrong. One only has to look what actually happened in this matter to appreciate the flaws inherent in Reg 4 – a decision with final and binding effect taken in November 2015 was held up by the notice and comment process for 17 months – a delay which could hardly be said not to have been prejudicial to the Day School, which no doubt had to bear the financial cost of keeping capital available to fund the deal.

[264] Counsel for the Province could advance no compelling argument to justify the unusual order of the procedure. In my view there is none. The WCLAA refers to a proposed disposal, thereby signifying an intention to conclude a written contract of sale (or, for that matter, a lease or any form of land availability agreement) in compliance with the relevant legal requirements and contemplates the public being afforded the opportunity to comment thereon before the decision is finally taken.

[265] Given that one is concerned here with the disposal of state-owned land, and having regard to the over-arching constitutional imperatives in relation to the redressing of the historical deprivation in relation to access to land ownership and housing, effective public participation in such a process is crucial and it must, of necessity, pass constitutional muster. Counsel for RTC referred to an article by Prof. Sandra Liebenberg[87] in which it was suggested that the achievement of social rights under the Constitution through a process of public participation emphasized the importance of affording such participants the 'opportunities to shape the meaning of rights in ways which are responsive to their lived experiences of poverty.'

[266] In *Matatiele Municipality No.2*[88] the Constitutional Court echoed this sentiment:

'[65] Before leaving this topic, it is necessary to stress two points. First, the Preamble of the Constitution sets as a goal the establishment of "a society based on

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

[88] *Matatiele Municipality v President of the Republic of South Africa (No.2)* 2007 (1) BCLR 47 (CC).

democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people". The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness". And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies.

[66] Consistent with our constitutional commitment to human dignity and self-respect, s118(1)(a) [of the Constitution] contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect".' (Internal references omitted.)

[267] In the result, I am persuaded that the impugned provisions of Reg 4 are *ultra vires* the empowering legislation and, furthermore, do not pass constitutional muster when measured against the relevant provisions of the Constitution and PAJA: the impugned provisions are procedurally unfair in that they do not afford interested parties a right to be heard before a decision to dispose of state land is made. The applicants have accordingly made out a case for a declaration of invalidity and the setting aside of those parts of the Regulations.

[268] Mr. Fagan SC's fall-back position on this part of the case dealt with the consequences of such a declaration of invalidity. Counsel pointed to the potentially disruptive effect of such a declaration and the consequences for the numerous disposals under the WCLAA which would have taken place since the promulgation of the act. The concern expressed by counsel is certainly a valid one and, as suggested by counsel for RTC in their heads of argument, such a declaration might have 'a domino effect' on other disposal decisions.[89] The Court was accordingly requested to

[89] *Corruption Watch NPC and others v President of the Republic of South Africa and others; Nxasana v*

craft an appropriate just and equitable order in terms of s172(1)(b) of the Constitution. I am of the view that it will be possible to make such an order and avoid the consequences alluded to. This will be incorporated in the order that the Court will ultimately make.

[269] The envisaged declaration of invalidity will void both Cabinet decisions and require the Province to recommence the disposal process under the WCLAA, (with its regulations duly amended) if it is so minded. That effectively is the end of the case in relation of the sale to the Day School and what remains is for the Court to deal with the IFRGA argument and the structural interdicts. However, before doing so, and in the event that the conclusion in regard to the invalidity of the regulations is not correct, it is necessary to deal with the other grounds of review advanced by the applicants.

IS THE NOVEMBER 2017 CABINET DECISION CAPABLE OF REVIEW?

[270] Like the attack on the unlawfulness of Reg 4, the attack on the Cabinet decision of 11 November 2015 ("the Minute") is a stand-alone ground for relief in this matter: if the decision is found to have been unlawfully taken, the enquiry leading to the March 2017 decision to resile is without any foundation. I have already referred to some aspects of the November 2015 decision in setting out the historical background and context and will now focus on the core of the decision.

[271] At the heart of the decision to sell the property is the raising of revenue to contribute to the PPP for the building of a new head office to accommodate the WCED. This is recorded in the introductory part of the Minute as follows:

'***Alignment with Provincial Strategic Goals***

The disposal of the Properties is in line with the Provincial Strategic Goals ***PSG2 & PSG4****:*

Improve education outcomes and opportunities for youth development.

Corruption Watch NPC and others 2018 (10) BCLR 1179 (CC) paras 32 – 34.

Enable a resilient, sustainable, quality and inclusive living environment.'

[272] Under the heading '***Priority Classification***' towards the end of the minute the following is noted.

'38. The proceeds of the disposal or will be used as a financial contribution towards the procurement of new Provincial office accommodation on Erf 172814 Cape Town . . . for officials of the WCG.'

Earlier the following was noted, under the heading '***Financial Implications***'.

'35. The Provincial Revenue Fund will be credited with an amount of **R135 000 000.00** (One Hundred and Thirty-Five Million Rand) should approval be granted for the disposal of the Properties to the Phyllis Jowell Jewish Day School NPC.'

[273] The Minute contains extensive details regarding compliance with the procedural steps prescribed by the WCLAA Regulations. I did not understand the applicants to rely on non-compliance with any such steps as constituting any basis for review. Rather, RTC relies on 5 grounds of review under PAJA and, if PAJA does not apply, it seeks to review in terms of the principle of legality on the basis that the Province's conduct was irrational.

[274] The principal review grounds under PAJA are said by RTC to be that the Cabinet decision of November 2017 was:

274.1. vitiated by a failure to comply with GIAMA and the constitutional, statutory and policy obligations to redress spatial injustice in central Cape Town;

274.2. unreasonable and irrational;

274.3. based on errors of law;

274.4. taken without complying with mandatory co-operative governance obligations; and

274.5. tainted by conflict of interest.

CONFLICT OF INTEREST

[275] The alleged conflict of interest was based on the appointment of the Twelfth Respondent, Mr. Gary Fisher, a private sector property developer active in the Sea Point area, as a Deputy Director-General in the DTPW during the period May 2011 to April 2014. The allegations in the RTC founding affidavit were based on an online report by the amaBhungane Centre for Investigative Journalism in July 2016, which suggested impropriety on the part of the Province, given that Mr. Fisher had a beneficial interest in a property development worth R92m located on Main Road, Sea Point, close to the Tafelberg site.

[276] The Province responded to the allegations by stating that Mr. Fisher had made a full disclosure to it of his interest in his property development business prior to his employment, and that he was involved, on behalf of the Province, only in the development of another provincial project on the site of the old Conradie Hospital in Pinelands. The Province refused RTC access to documentation in this regard and RTC did not take any steps under the Rules of Court to procure same.

[277] Mr. Fisher did not participate in the proceedings and in argument before us Mr. Hathorn SC did not press this ground of review beyond the submissions made in the heads of argument. In the circumstances I am of the view that the conflict of interest contended for has not been established on the papers and can be ignored as an independent ground of review.

THE APPLICATION OF GIAMA

[278] The attack on the Province's failure to comply with its obligations under GIAMA was advanced by both RTC and the National Minister and I shall deal with the submissions in that regard jointly. The point of departure is the reliance in the Minute on the provisions of GIAMA as constituting the legal foundation for the Province's decision to dispose of the property.

[279] The relevant extract from the Minute is to the following effect:

‘22. The Government Immovable Asset Management Act, No. 19 of 2007 (GIAMA) states that:

22.1 An immovable asset becomes surplus to the user if it does not support its service delivery objectives at an efficient level and it cannot be upgraded to that level;

22.2 When an immovable asset must be disposed of, best value for money must be realised;

22.3 Best value for money is defined as the optimisation of the return on investment in respect of an immovable asset in relation to functional, financial, economic and social return, wherever possible;

22.4 The Custodian, when it disposes of any immovable asset must consider whether the asset cannot be used in relation to the social development initiatives of government; and

22.5 Whether it cannot be used in relation to government’s socio-economic objectives including the alleviation of poverty, job creation and wealth distribution.

23. All Government Departments including the Department of Rural Development and Land Reform were consulted before a decision to dispose of the Properties was taken.

24. Although the [PDHS] requested that the Properties be made available to them for integrated sustainable human settlements, an agreement was reached between the DTPW and the [PDHS] that the [PDHS] withdraw the said request, in order to allow the DTPW to proceed with the disposal of the Properties, to create the necessary income for the construction and maintenance of social infrastructure for the Western Cape Government (WCG). Copies of the correspondence between the DTPW and the [PDHS] are attached . . .

25. The Properties are therefore not required for any government purpose and can be disposed of.

26. Taking into account the current market value of **R107 300 000** . . . and the offer of **R135 000 000** . . . that was received from . . . the Day School . . . for the purchase of the Properties, the WCG will succeed in achieving best value for money as set out in Section 5, the Principles of Immovable Asset Management of GIAMA.

27. The proposed disposal of the Properties to . . . the Day School . . . thus falls within the ambit of the aforementioned principles set out in GIAMA.'

[280] I did not understand either Mr. Hathorn SC nor Mr. Jamie SC to take issue with the fact that the disposal was made for 'the best value for money' as defined in s1 and required under s5(1)(e) of GIAMA. Rather, the thrust of the attack was on the conclusion arrived at by the Province that the property was not required for any government purpose and could thus be disposed of by way of private sale. Central to this argument is whether the property was properly regarded as surplus by the Province.

WAS THE TAFELBERG PROPERTY 'SURPLUS'?

[281] The determination as to whether the Tafelberg site was surplus turns on an interpretation of the relevant provisions of GIAMA. That exercise in turn requires an approach to purposive interpretation on the basis articulated earlier and, given that one is dealing with state-owned land, consideration of the positive obligations in respect of land reform imposed on the Province by s25(5) of the Constitution, buttressed by the injunction in s4(2)(a) of the WCLAA (the relevant provincial land administration law defined in s1 of GIAMA) that the disposal of such land must 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'.

[282] As appears from the extract from the affidavit of Ms. Gooch already referred to, the Province's position is that the Tafelberg site became surplus through operation of law in June 2010. This demonstrates, in the first place, that the Province did not, at that time, give express consideration to any of the questions which GIAMA required it to ask. Indeed, notwithstanding the production of many thousands of pages of documentation in this matter, there is nothing referred to by the Province which

suggests that in June 2010 the DTPW was even alive to the provisions of GIAMA. Secondly, it shows that the Province did not purport to act in terms of either its C-AMP or U-AMP. It appeared during argument to be common cause that in 2010 the DTPW had not compiled either type of plan and that there was therefore no internal policy documentation by which it might have been guided in its thinking.

[283] The 'surplus by operation of law' argument is in any event inconsistent with the common cause facts – that up until May 2014 (when the last tenant was evicted) the PDHS continued to use the Wynyard Mansions portion of the property for accommodation/housing purposes. Further, as the letter from the HOD of 26 March 2013 to the DTPW demonstrates, the PDHS maintained the stance that the property as a whole (including the school site) still supported the PDHS' service delivery objectives.

[284] And, when the HOD asserted this position in March 2013, he was not told that he was wrong because the property was surplus under GIAMA and the DTPW was thus entitled to deal with the property in terms of that statute. Rather, as the minutes reflect, the erstwhile MEC, Mr. Carlisle, told the meeting that the Tafelberg site was not available for human settlement development as it was prime land that could be sold for around R80m. It is clear from those minutes that as early as mid-2013 the property was earmarked for disposal because of its potential value, and that that was the only factor that the Province was considering. As Mr. Jamie SC put it rather euphemistically, 'the carrot was the cash'.

[285] However, before the decision to dispose of the property could be taken, s5(1)(a) of GIAMA required the user (in this case both the WCED and the PDHS) to decide, firstly, that the property did not support each user's service delivery objectives at an efficient level, and secondly, that the property could not be upgraded to that level of efficiency. As a matter of fact, the stance adopted by the HOD in March 2013 demonstrated that the PDHS *qua* user was indeed of the view that the entire property could be so upgraded, and, moreover, in the absence of any contrary decision, either by the WCED or the DTPW, the property was thus incapable of being regarded as surplus under GIAMA.

[286] The failure by the Provincial departments to take those decisions is not entirely surprising, given the fact that there were no U-AMPs in place and, further, because both the custodian and user departments appeared to be blissfully unaware of the existence of GIAMA, or at least of its mandatory requirements. The existence of such a U-AMP was a necessary tool[90] which the users were duty bound to utilise in coming to an informed decision, under s5(1)(a) of GIAMA, as to whether the properties supported their service delivery objectives efficiently or were capable of being upgraded to the required level.

[287] The absence of a U-AMP in this case was of particular relevance, because the Tafelberg site comprised two erven with different users. It is not inconceivable then that, had there been a U-AMP in place, it might have dealt with the use by each department of the whole site. So, for example, if the WCED was of the view that the school no longer met the requirements for efficient use under s5(1)(a), it might have made provision for the transfer of that part of the property to the other user for consideration of upgrading the property by the PDHS for housing in accordance with its C-AMP, or *vice versa.* I shall return to this point later when I consider s5(1)(f) of GIAMA.

[288] Allied to this point are the provisions of s8(d) of GIAMA which require that one of the components of a U-AMP must be 'an immovable asset surrender plan.' The rendering of a property as surplus would have to be informed by such a surrender plan, something which would have been material in this matter.

[289] In argument Mr. Fagan SC emphasized the fact that in August 2015 the HOD of the PDHS 'agreed', in the spirit of good governance and collegiality, to withdraw the department's interest in the property so keenly expressed and motivated by his

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[90] In s10(a) the U-AMP is described as 'the principal immovable asset strategic planning instrument which guides and informs **all** immovable asset management decisions by the user' (emphasis added), while s11 obliges a user (in peremptory terms) to 'give effect to its user immovable asset management plan and conduct immovable asset management in a manner which is consistent with this Act and its user immovable asset management plan.'

predecessor in March 2013. Counsel submitted that, as a fact, the user had effectively supported the disposal by withdrawing the PDHS' interest in the property thereby enabling a lawful disposal to be made under GIAMA and the WCLAA, as the property was by then surplus.

[290] The submission on behalf of the Province was further that, notwithstanding the absence of U-AMPs and C-AMPs, there had been substantial compliance with the relevant statute governing the disposal, *viz* the WCLAA. Counsel suggested that, in truth, GIAMA, which was later framework legislation, did not apply to the disposal in this matter. The submission is difficult to follow because in fact that is precisely how Cabinet made its decision in November 2015 – in the Minute there is express reference to compliance with GIAMA, with barely a word being said in regard to the WCLAA, other than to mention it as providing the 'Legislative Mandate' for the decision.

[291] In any event, the withdrawal of the PDHS' interest in the property came at a very late stage of the process, and long after the Province had taken a decision in principle to dispose of the property on the open market for the maximum amount obtainable. By August 2015 the DTPW had already commenced the offer process under the WCLAA and the PPC had made its recommendation under the same statute. And, although Mr. Mguli put up the white flag on behalf of the PDHS, he did so in circumstances where his own department persisted in its view that the property was suitable for development to achieve its target market for social housing.

[292] In my view, the process that was followed by the Province did not comply with the requirements of GIAMA, which require a user to make its decision in accordance with its U-AMP that an asset was surplus before it is surrendered to the custodian. Once that has happened the custodian in turn must take stock of the position in terms of its own C-AMP before determining that the property is surplus. Once again the analogy of the horse and cart comes to mind: in my view it is impermissible for the custodian to decide to dispose of an asset while the user still has an interest in the continued use of it and the property has not been declared surplus.

[293] The Province advanced a further argument in relation to its entitlement to sell the property even if it was not surplus. A distinction was sought to be drawn between ss4(2) and 13(3) of GIAMA[91] on the basis that the former does not refer to surplus immovable property, while the latter expressly does. The argument was to the effect that, limiting the Province's powers to dispose only of land that was surplus as defined in GIAMA, constituted an unwarranted and unworkable restriction on its ability to sell immovable assets for the purpose, for example, of raising revenue. It was further submitted that such an interpretation would amount to an arbitrary deprivation of Provincial land in terms of law that was not of general application.

[294] Mr. Hawthorn SC's reply on this point sought to demonstrate that the Province had fundamentally misunderstood GIAMA, which he said had to be read contextually and purposively, both with regard to the objects of that act and the obligations placed on the state and the provinces *qua* property owners under ss25(4) – (9) of the Constitution.

[295] It was said that s4(2) was an introductory provision at the beginning of GIAMA under the heading 'Relationship between and responsibility of custodian and user' which, in general, empowered a custodian to acquire, manage and dispose of an immovable asset. S13(3), on the other hand, it was pointed out, falls under the heading 'Functions of custodian and accounting officer of custodian' and is a

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[91] '4(2) A custodian –

(a) . . .

(b) may –

(i) . . .

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

'13(3) A custodian may dispose of a surplus immovable asset –

(a) by the allocation of that immovable asset to another user; or

(b) subject to the State Land Disposal Act, 1961 . . . and any provincial land administration law, by the sale, lease, exchange or donation of that immovable asset or the surrender of a lease.'

subsection which provides that a custodian may dispose of a surplus immovable asset by the allocation thereof to another user or, subject to any applicable statute, to sell, lease, exchange or donate it to a third party. Thus, it is only if such asset is surplus and surrendered by the user to the custodian that the latter may dispose of it.

[296] I agree with Mr. Hathorn SC that this is the sensible and practical way to give the two provisions a purposive meaning in the same statute. If the Province's interpretation was adopted, this would permit it to pick and choose whether it needed to comply with the system of safeguards carefully put in place in GIAMA, whose architecture is inward-looking to commence with: the intention being that immovable property should first be considered for use by other departments of State before being offered for sale on the open market. Such an approach makes sense given that it would avoid a department selling off valuable land and then having to incur expenditure at market related prices to buy in other land which it needed. The analogy of recycling second-hand goods within the family before selling them comes to mind.

[297] The age-old adage 'They're not making land anymore' is appropriate in considering what the State may do with its land – a most valuable resource which enjoys constitutional protection and must not be disposed of without sound reason. In this context, GIAMA is the over-arching legislation which gives effect to the strict controls imposed on the disposal of State land, while the WCLAA is the statute which prescribes the procedural mechanisms to be adhered to in the Western Cape.

[298] It follows, in my view, from the application of s13(3) of GIAMA that the Tafelberg site could only be sold on the open market if it was surplus as contemplated under that act. And, as the analysis above demonstrates, the Province did not take the requisite steps to procure the status of the land as surplus before it set about disposing of it. The entire disposal process undertaken by the DTPW, going back to 2011 with the High Level Scoping Report, followed by the WCPDP and the EOI, was unlawful, as the Tafelberg property was not surplus and had not been surrendered by the users to the DTPW. The disposal took place in the absence of the mandatory

jurisdictional facts and was accordingly unlawful. On this basis, too, the Cabinet decision of November 2015 falls to be set aside.

WHAT OF ALLOCATION TO ANOTHER USER?

[299] There was a second string to RTC's bow. It was submitted that even if the Tafelberg site was surplus under GIAMA, the disposal was still unlawful, as the property should not have been sold on the open market before an assessment had been made under that act as to whether it could have been used to advance the social development initiatives of the Province (which included land reform) through the allocation of the land to another user. The argument was based on a reading of the general principles of immovable asset management and in particular s5(1)(f)[92] of GIAMA, read with s13(3)(a) which has been set out above.

[300] In the Minute at para's 22.4 and 22.5 the Cabinet recites a paraphrasing of the wording of ss5(1)(f)(ii) and (iii), but it does not say whether it heeded the injunction inherent in those sections and, if it did, what it considered and what conclusions it arrived at. Similarly, Ms. Gooch makes only the bald allegation in the answering affidavit that the requirements of s5(1)(f) were met by the Province and that consideration was given thereto: she offers no documentary proof or comment in that regard.

[301] This lack of detail in the Province's case is an important strut in RTC's case. Firstly, as already noted, there were no U-AMPs or C-AMPs in place which might

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[92] '5(1) The following are principles of immovable asset management:

(a) – (e)

(f) in relation to a disposal, the custodian must consider whether the immovable property concerned can be used –

(i) by another user or jointly by different users;

(ii) in relation to social development initiatives of government; and

(iii) in relation to government's socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth.'

have guided the Province in its decision-making in 2010-2011. To stress the point made earlier, the disposal procedure was made outside of the statutory constraints of GIAMA and manifestly no consideration could have been, or was, given to the allocation of the asset to another user.

[302] When the prospect of the PDHS making use of the property for housing was raised by the HOD in March 2013, his proposal was dismissed without more by Mr. Carlisle, whose only interest then was the price that the property could fetch. This stance by a political functionary (and its implicit rejection of the considerations embodied in s5(1)(f)) was echoed later by Mr. Carlisle when he made the 'No RDP in the CBD' comment. Clearly, there was a clear divergence of approach between the politicians and the departmental officials steeped in the knowledge of the Province's needs and obligations.

[303] In any event, had the Province considered the disposal from the outset in terms of ss5(1)(f) and 13(3)(a) of GIAMA, read with s4 of the WCLAA, it would have been bound to consider whether the property could be used by another user, or jointly by more than one user. In so doing it was bound to have regard to government's social development initiatives and its socio-economic objectives, which include land reform, black economic empowerment, job creation, poverty alleviation and the redistribution of wealth. It did not do so even though, firstly, s4(1) of its own provincial statute expressly obligated it to co-ordinate its policy of land reform with both the national and local spheres of government, and, secondly, where s4(2) thereof determined the objectives of such co-ordination to include the national commitment to land reform and the rationalisation of its 'custody, administration and disposal of provincial state land.'

[304] Applying a purposive and contextual interpretation to GIAMA and the WCLAA, the Province would have appreciated that when the Tafelberg site indeed became surplus to the use of the WCED (as it now contends), it was required to assess whether the property could be used by another department in the Province, or, for that matter, at national or local government level, so as to advance the social initiatives of government.

[305] It would further have understood that it was mandatory for the DTPW to conduct such assessment rigorously, and if it eventually concluded that the property was readily capable of being used by another department (for example, the PDHS), it was duty bound to consider disposal of the property only in exceptional circumstances, and then too in circumstances where it did so to meet compelling social needs. By way of example, one might consider the use of the proceeds to build a much needed clinic or for the erection of affordable housing as meeting those needs. The Province has not sought to justify the sale of the property on any such basis in this case.

[306] The approach discussed above, in respect of the approach to surplus property under GIAMA, meets the requirements of s25(5) of the Constitution, promotes the purport and objects of the Bill of Rights (particularly with regard to land reform and the redistribution thereof), is beneficial to the advancement of socio-economic rights and does not only not run counter to the objects of GIAMA and the WCLAA, but positively advances them.

[307] The disposal by the Province of the Tafelberg property to the Day School on the assumed basis that it was surplus under GIAMA, was in breach of the provisions of both GIAMA and the WCLAA, was unlawful and is therefore reviewable on this ground too.

[308] These findings of reviewability render it unnecessary to consider the other grounds advanced by RTC. It is also strictly not necessary to make any findings in regard to the reviewability of the Cabinet's decision not to resile. However, in the event that the finding in regard to the unlawfulness of the disposal in November 2015 is wrong, I deal now with this aspect of the case.

IS THE CABINET DECISION IN MARCH 2017 NOT TO RESILE FROM THE AGREEMENT REVIEWABLE?

[309] In their heads of argument, counsel for RTC advanced the grounds of attack on this decision as follows:

309.1. Non-compliance with GIAMA;

309.2. The factors which Cabinet considered material in making the decision;

309.3. The viability and feasibility of social housing; and

309.4. The land cost per unit justification.

[310] During the 2016-2017 financial year the DTPW adopted a C-AMP which did not include the Tafelberg site. Due to the alleged confidentiality thereof the C-AMP was not discovered in terms of Rule 53, but an arrangement was made with the State Attorney, Cape Town in terms whereof RTC's attorneys were permitted to inspect it subject to confidentiality undertakings. The key findings of the inspection are contained in an affidavit by Ms. Mandisa Shandu of RTC's attorneys dated 2 February 2018. The affidavit is detailed as to the perceived short-comings in the DTPW's C-AMP, but now is not the time to comment thereon. I shall deal with just a few of Ms. Shandu's observations.

[311] In the correspondence leading up to the inspection, the State Attorney sought to explain, says Ms. Shandu, that the DTPW's practice was to draw up its C-AMP on the basis of information provided to it by the various users in the form of their respective U-AMPs. The DTPW would then supplement the U-AMPs by adding information at its disposal relating to assets which had been acquired by (or vested in) the Province during the same period. This practice, observed Ms. Shandu, had the consequence that the Tafelberg properties relinquished to the DTPW by the WCED and the PDHS during the course of the year of compilation had simply 'fallen through the cracks', as she put it.

[312] In the answering affidavit, Ms. Gooch disputed the metaphor resorted to by Ms. Shandu, pointing out that the C-Amp was 'a work in progress' and that when it was compiled in respect of the 2016/17 year, the Tafelberg property had 'simply not yet been included' in the C-AMP. Ms. Gooch does not say why it was not included, given the express intention to dispose thereof in terms of the 2015 Cabinet decision, and

the steps which led up to it from at least 2013 onwards, when the Regeneration Programme had been adopted and the Tafelberg property added to that programme. And, if there was a decision as alleged by the Province in March 2015 to dispose of the property, why was it not then added to the C-AMP? The obvious answer seems to be that there was no C-AMP in place at the time these decisions were made and that the disposal was therefore effected in breach of the mandatory provisions of GIAMA.

[313] When the decision not to resile was taken in March 2017 the status of the C-AMP had not changed: it was still defective to the extent that it did not include the Tafelberg property. Consequently, the same statutory breach which vitiated the 2015 Cabinet decision persisted and led to the decision not to resile being similarly flawed.

[314] In addition, the absence of a C-AMP which covered the Tafelberg property in 2017 had the effect that the Cabinet, when it considered whether to resile or not, did not take into account (as required under s13(3) of GIAMA) whether the property could be allocated to another user, or sold, leased, exchanged or donated to a third party, nor could it have considered whether its proposed course of action advanced any of the social development objectives described in ss5(1)(f)(ii) and (iii) of GIAMA.

[315] If regard be had to the minute signed by the Premier on 3 April 2017 ("the Premier's minute") which recorded the decision of the Cabinet not to resile, it will be noted that there too the Province did not record that it had had any regard to the requirements of GIAMA or the WCLAA. Rather, the Cabinet listed a number of 'material factors' which it considered pursuant to the public participation process resorted to under s3 of the WCLAA, and commented thereon. It is necessary to go into some detail in that regard.

'MATERIAL FACTORS' CONSIDERED BY THE CABINET WHEN DECIDING NOT TO RESILE

[316] As already noted, the public participation in the reconsideration of the November 2015 decision was extensive and protracted. Much was said by opponents

to the disposal about the Province's failure to consider the site for affordable housing. As a result, Cabinet took the view that in order to come to a rational decision on the issue, further investigation was called for and it asked for a financial model to be prepared so that it could determine the feasibility of social housing on the Tafelberg site. Financial models were prepared on behalf of the Province, the Day School, NASHO and Ndifuna. Save for the Day School, these showed that social housing was feasible on the site.

[317] The Cabinet minute has been set out in full above and will not be repeated here. From the Minute it will be noted that the Cabinet listed various material factors which it considered when deciding not to resile from the sale. The Cabinet held the view, inter alia, that the development of social housing on the property was risky, due to the uncertainty regarding finance from national government. It is against this background that the Minute must be considered.

DOES SEA POINT FALL WITHIN A RESTRUCTURING ZONE AS CONTEMPLATED UNDER THE SOCIAL HOUSING ACT?

[318] From the Minute, at para 1.4.1, it can be seen that the Cabinet held the view that the fact that the property did not fall within an identified reconstruction zone ("RZ"), as defined under the SHA, constituted a legal risk in pursuing any social housing development on the Tafelberg site. Relying on counsel's advice in that regard the Cabinet came to the conclusion that the much needed reconstruction grant ("RCG"), which was required to be made available by the DHS for such social housing, would not materialise and thus any such project was still-born due to a lack of funding.

[319] Before this Court counsel for the Province attacked the RTC application on 2 flanks with respect to the RZ issue. Firstly, it was argued that the proclamation of the RZs for the Cape Peninsula in December 2011 was only provisional in nature and therefore could not be relied upon. In this regard there are two Government Notices issued by the DHS which were the subject of the debate.

[320] The first, Notice No 848 of 2011, was issued in Government Gazette 34788 of 2 December 2011 and was entitled 'Provisional Restructuring Zones'. The document contained the following headnote:

'The Department of Human Settlements hereby publishes for public information the following provisional restructuring zones in terms of the Social Housing Policy, the Guidelines and the Social Housing Act, 2008 (Act No 16. of 2008): . . .'

The notice listed a number of RZ's in 6 provinces, including the Western Cape where the following designations were made in respect of the City of Cape Town, which was the only area in the province to be allocated RZ's:

- 'CBD and surrounds (Salt River, Woodstock and Observatory)
- Southern Near – Claremont, Kenilworth and Rondebosch
- Southern Central – Wakelake (sic) – Steenberg
- Northern near (sic) – Milnerton
- Northern Central – Bellville, Bothasig, Goodwood and surrounds.'

[321] A second proclamation, Notice No. 900 of 2011, was issued in Government Gazette No. 34839 of 15 December 2011. This Notice, which applied only to the Western Cape, was headed 'Correction Notice' and recorded that Notice No. 848 was corrected through the substitution of the 5 areas previously designated with the following:

- 'CBD and surrounds (Salt River, Woodstock and Observatory)
- Southern Near – Claremont, Kenilworth and Rondebosch
- Southern Central – Wakelake (sic) – Steenberg
- Northern near (sic) – Milnerton

- Northern Central – Bellville, Bothasig, Goodwood and surrounds
- South Eastern – Somerset west (sic), Strand, Gordons bay (sic)
- Southern – Strandfontein, Mitchells Plain, Mandalay and surrounds
- Eastern – Brackernfell (sic), Durbanville, Kraaifontein, Kuils River
- Cape Flats – Athloe (sic) and surrounds (Pinelands to Ottery)
- Far South – Fish Hoek, Simonstown.'

[322] I should point out, too, that a further Notice (No. 390 of 2017, Government Gazette No. 40815) was issued by the DHS on 28 April 2017 under the heading 'Restructuring Zones', noting that it too was being published for public information. The table containing the RZ's for the Western Cape lists 11 rural municipal areas from Plettenberg Bay in the east to Saldanha Bay in the west. There is no mention that the designation is provisional and no areas in the Cape metropolitan area are contained in the Notice. In any event, the Notice post-dates the Cabinet decision in this matter.

[323] The second part of the Province's attack related to the interpretation to be attributed to the RZ described in both notices as 'CBD and surrounds (Salt River, Woodstock and Observatory)'. It was said, firstly, that 'surrounds' could not and did not physically include Sea Point, and, secondly, that such 'surrounds' to the CBD were intended to be limited to Salt River, Woodstock and Observatory.

[324] Evaluation of the arguments must commence with the provisions of the SHA. In her address on behalf of the SHRA, Ms. Webber took the Court through the SHA and explained its application with reference to the facts at hand. It was not in issue that the SHRA had *locus standi* in the case and I did not understand there to be much issue with the analysis presented on its behalf either. I shall accordingly not repeat what has already been stated above in the section dealing with the general understanding of social housing.

[325] The SHRA, which was established in terms of s7 of the SHA, whose aforementioned long title highlights its obligation '(t)o establish and promote a sustainable social housing environment' and also 'to define the functions of national, provincial and local governments in respect of social housing' and 'to allow for the undertaking of approved projects by other delivery agents with the benefit of public money . . .', is the agency of national government responsible for the implementation of a 'social housing programme' which is defined in s 1 of the SHA as 'the national housing programme for social housing, instituted by the [National Minister] in terms of s3(4)(g) of the Housing Act, 1997.'

[326] In terms of the definition of 'social housing'[93] in s1, an approved social housing project can only be constructed in an approved 'restructuring zone'[94] (the RZ referred to above). The identification of such a RZ is a municipal function under s5(d)(i) of the SHA and thereafter, under s3(1)(f), the Province must submit the RZ's so identified to the National Minister for designation as such.

[327] The prior designation of a RZ is key to any social housing programme for it is vital to the provision by the State of an RCG, which is advanced by the DHS under s18 of the SHA, for the purposes of providing the capital necessary to fund the project in question. In the result, the identification of land suitable for social housing is a co-operative and integrated process that spans all three spheres of government, and it is axiomatic that consultation in relation to the promotion and achievement of social housing is required at all of the said three spheres. As I have said, the applicants contend that the 'Cape Town and surrounds' RZ, per definition, includes Sea Point. The City and the SHRA agree with this definition while the Province does not.

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[93] The definition has already been set out above in the section dealing with the understanding of social housing.

[94] In s1 a '**restructuring zone'** is defined to mean 'a geographic area which has been –

(a) identified by the municipality, with the concurrence of the provincial government, for purposes of social housing; and

(b) designated by the Minister in the *Gazette* for approved projects; . . ."

[328] I shall commence the enquiry with a purely literal interpretation. The New Shorter Oxford English Dictionary does not carry a definition of 'surrounds' as such, but 'surround' (which appears to be a synonym therefor) is defined to include 'the area or place around a place or thing; the vicinity, the surroundings, the environment . . .' Another synonym for 'surrounds' (which is often used in the same context) is 'environs' which is defined in the Shorter Oxford as '(t)he district surrounding a place, [especially] an urban area.'

[329] Applying that interpretation to the geography involved here, it will be noted that if one were to look at a plan view of the city centre, the Sea Point area in which the property is located is closer (distance wise as the proverbial crow flies) to the CBD than, for example, Observatory.[95] But one cannot access the Sea Point area directly from the city centre because of the geography presented by the mountain: between the CBD and Sea Point lies the rump of Lion's Head and Signal Hill. One must therefore follow the curve of the foothills of the mountain along Ocean View Drive, High Level Road or Main Road to reach Sea Point. So, I suppose it might be argued by some that Sea Point cannot be regarded as a 'surrounding suburb' like Woodstock (which is the first suburb one encounters when travelling eastwards out of the city centre) because it is not contiguous to the CBD. But then, neither is Observatory which is located beyond Salt River and University Estate, neither of which is contiguous to the city centre either.

[330] On the other hand, the inner city suburbs of Bo-Kaap (also known as Schotschekloof and on the southern slopes of Signal Hill), Gardens, Tamboerskloof, Oranjezicht, District Six, Vredehoek and Devils Peak (all of which nestle between the foothills of Table Mountain and the southern side of the CBD) undoubtedly surround the city centre – in fact, they are colloquially referred to as the 'City Bowl'.

[331] The conundrum then is what the City intended to convey by the use of the term 'surrounds' in relation to the CBD, when it presented the RZ designation to the

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[95] Attached to this judgment as Annexure A is a map of the central Cape Town area produced by RTC's experts.

Province for approval in 2010, and what the Province intended the phrase to mean when it put up the designation to the National Minister for gazetting at the end of 2011.

THE CONTEXT RELEVANT TO THE DESIGNATION OF THE 2011 RZ's

[332] As already stated, given that one is dealing with legislation intended to advance the rights protected under ss 25 and 26 of the Constitution, the term must be interpreted contextually and through the prism of the Constitution so as to comply with the injunction in s39(2) thereof to 'promote the spirit, purport and objects of the Bill of Rights.'[96] This will of necessity involve consideration of the context in which the Notices were issued, but the point of departure in relation to the interpretation of the RZ's remains the empowering legislation – the SHA – and in particular the principle to which reference has already been made (in s2(1)(i)(iv)) thereof, *viz* to promote the integration of housing development into inner city areas. That is a guiding principle which will inform the contextual setting.

[333] The affidavit of Mr. Pogiso Molapo on behalf of the City provides useful contextual detail in relation to the determination of the RZ's. At the time of deposing to his affidavit in July 2018 Mr. Molapo was the Manager for Social Housing and Land Restitution in the City's Transport and Urban Development Authority, and, on account of the more junior positions he held previously in relation to social housing, was well acquainted with the City's approach to social housing over a period of the previous 11 years or more. He was in a position to depose to direct knowledge of a number of facts relevant to this matter.

[334] In July 2010 Mr. Molapo, then employed in the City's Directorate of Land and Forward Planning, prepared a report for the erstwhile Executive Mayor, Ms. Patricia de Lille, entitled 'Areas to be Added to the Current Social Housing Restructuring

[96] *Fraser* para 43; *Makate* paras 87 – 88.

Zones.'[97] The document reflects that it was approved by the City's Housing Portfolio Committee on 31 May 2010 and was also vetted by Mr. Molapo's seniors.

[335] The purpose of the report was given as follows:

'This report seeks approval of the Additional Areas to be included to our current Social Housing Restructuring Zones',

while the following was provided by way of an Executive Summary:

'In terms of the Social Housing Act, 16 of 2008, Social Housing Projects can only be implemented in Approved Restructuring Zones, otherwise they will not receive Social Housing Grant Funding from National Government. Municipalities are responsible for Demarcating Restructuring Zones in their area of jurisdiction which they must submit via Provincial Government to National Government for Promulgation. In 2007, the City of Cape Town demarcated certain areas as Restructuring Zones (**Annexure A)**. Recently these demarcated areas have been found to be inadequate and new areas contained in **Annexure B**, are proposed to be added to the current Restructuring Zones.'

[336] Under the heading '***Motivation'*** Mr. Molapo explained in the report that the City had been involved in social housing projects with three SHI's (SOHCO, CTCHC and Communicare) and listed the names and localities thereof. With reference to Annexure B to the report, Mr. Molapo said the following:

'The Areas in Annexure B meets the criteria for Restructuring Zones but were left out in the initial process of demarcating restructuring zones. This report seeks to add these areas to our current restructuring zones areas.'

[337] Annexure A to the report bore the heading:

'**APPENDIX 1: PROVISIONAL RESTRUCTURING ZONES – CITY OF CAPE TOWN**',

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[97] The report is included in Mr Molapo's affidavit on behalf of the City as *Annexure PM 2* and will be referred to as such in this judgment. Annexure PM 2 is reproduced herein replete with its grammatical and syntactical errors.

and continued as follows:

'In accordance with the resolutions:

1. of MEC

2. Of the MAYCO of the City of Cape Town

3. and endorsement by the National Department of Housing

The areas in the Table below are designated as within a areas inhe table below as Provisional Restructuring zones as defined in the interim policy. All three parties in signing this part of the agreement acknowledge that these areas are the only areas which can access the available Social Rental housing subsidy in accordance with the interim social housing policy. These shall remain in force as Restructuring Zones until and unless all three parties sign agreed re-designation of the areas or the social housing policy on Restructuring Zones superseded by other relevant legislation or policy.'

[338] Then followed a table with the following columns and entries:

	Spatial Areas	**Key Social/ Economic Node**	**Transport Access Route**	
			Rail	**Road Corridors**
1.	**CBD and surrounds** (Salt River, Woodstock and Observatory)	CBD	Southern Metro Line to CBD and Southwards to Simonstown	Main Road Taxi Route
2.	**Southern Near** –	CBD,	Southern Metro Line to CBD and	Main Road

	Claremont, Kenilworth, Rondebosch	Kenilworth	Southwards to Simonstown	Taxi Route
3	**Southern Central** – Westlake – Steenberg	Westlake – Blue Route-Capricorn	Southern Metro Line to CBD and Southwards to Simonstown	Main Road Taxi Route M3 and M5
4	**Northern Near** – Milnerton	CBD	Southern Metro Line to CBD and Southwards to Simonstown	Main Road Taxi Route M3 and M5
5	**Northern Central** – Bellville, Bothasig, Goodwood and surrounds	Bellville, Epping	Metro Line	N1 + Voortrekker Road

[339] Annexure B to the report bore the heading:

'Proposed Areas to be added to the Cape Town Restructuring Zones'

and contained a table in similar format to Annexure A. For present purposes I shall only record the spatial areas listed therein:

'6. South Eastern – Somerset West, Strand, Gordons Bay

7. Southern – Strandfontein, Mitchells Plain, Mandalay and surrounds

8. Eastern – Brackenfell, Durbanville, Kraaifontein, Kuils River

9. Cape Flats – Athlone and surrounds (Pinelands to Ottery)

10. Far South – Fish Hoek, Simonstown

11. Northern – Parklands and surrounds.'

[340] Before turning to Mr. Molapo's narrative in his affidavit in respect of these annexures, I should point out that it is obvious that the report and annexures have been sloppily compiled. Aside from the obvious spelling and syntactical mistakes, there are other errors of detail. For example, Spatial Area 4 (Northern Milnerton) is manifestly not served by the Southern Metro Railway Line, nor the M3 and M5 highways and there is no Main Road in Milnerton: the principal arterial routes are Koeberg Road and Otto du Plessis Drive. It is also arguable that the key economic nodes might be Paarden Eiland, Montague Gardens and Century City, rather than the CBD.

[341] Mr. Molapo's affidavit is comprehensive and suggests a clear understanding of the SHA and social housing in general. The document runs to some 35 pages and I am therefore obliged to quote selectively therefrom for purposes of addressing the question at hand.

'27. Already, before the coming into force of the SHA, the City had a social housing programme in place and had concluded agreements with various SHI's. To this end the City identified five areas to be earmarked for social housing pursuant to an interim policy that had been agreed to by the then MEC, the Mayco of the City as well as being endorsed by the national Department of Housing. There was agreement that these areas could access the available social rental housing subsidy in accordance with the then interim Social Housing Policy. These areas constituted the RZs proclaimed in Government Notice 848 dated 2 December 2011 as provisional RZs and which was subsequently substituted with the RZs contained in Notice 200 dated 15 December 2011.

28. I prepared the report which informed the City's approval of the RZs as gazetted on 15 December 2011, a copy of which is annexed marked "**PM 2**". It is apparent from the motivation that the City was intent on pursuing a strategy to facilitate the provision of rental accommodation in these areas for persons of low income. Three partnership agreements had been concluded with SHIs to achieve those goals. I explained that the City had a number of social housing pipeline projects in the planning stage and that the City wanted a number of RZs to be added to enable the City to increase its pipeline project to assist more people in a number of areas not included in the initial proclamation. I indicated that the areas in Annexure B had been left out in the initial process of demarcating RZs and that there were pipeline projects being earmarked in various areas. Though one of the pipeline project identified was located in Bo-Kaap, it was not necessary for the City to seek Bo-Kaap's inclusion as a RZ because it had already been included in the RZ identified as "Cape Town CBD and surrounds (Salt River, Woodstock and Observatory)".

29. The phraseology "and surrounds" was specifically used by the City to ensure that no area surrounding an economic hub, for example, the CBD, would be specifically excluded. Any suggestion to the contrary is denied. In other words the City would have the flexibility to identify land for the purposes of being able to apply for RCG funding in relation to any development that falls into the "'surrounds" as identified above. This related to the following areas:

29.1 CBD and surrounds (Salt River, Woodstock and Observatory);

29.2 Northern Central - Bellville, Bothasig, Goodwood and surrounds;

29.3 Southern – Strandfontein, Mitchells Plain, Mandalay and surrounds; and

29.4 Cape Flats - Athlone and surrounds (Pinelands to Ottery).

30. Social housing developments located in "surrounds" have taken place with the assistance of RCG funding. For example:

30.1 The <u>Belhar Gardens Housing Project</u> falls into the surrounding area of Bellville . . .

30.2 The Elsiesriver social housing development also is located in the Northern Central RZ in the area surrounding Goodwood . . .

30.3 The Glenhaven social housing development is located in the Northern Central RZ in the area surrounding Bellville . . .

31. Funding from SHRA was obtained in relation to all of the aforementioned housing developments. This is demonstrative of the City's motivation for applying for the RZs without clearly demarcated boundaries. It allowed areas surrounding economic nodes to be eligible for grant funding. More stringently demarcated RZs would have the knock-on effect of ultimately defeating the objects sought to be achieved by RZs. In this regard the surrounding area, as contemplated by the City is even more extensive than what is contemplated by Dr. Odendaal's "central Cape Town".[98]

32. In addition, the reference to Salt River, Woodstock, Observatory was intended to be illustrative rather than dispositive. To the extent that it is now contended that the identification of this RZ is impermissibly vague, this is denied and will be addressed in legal argument. None of the role players as a matter of fact regarded it as being vague, until raised in relation to the dispute which forms the subject of this application.

33. Pursuant to the memorandum that I prepared, on 28 July 2010 it was resolved that the areas listed in Annexure B, as recommended, be approved by the City as RZs. This was forwarded to the Province and then sent to the office of the national Minister of Human Settlement (sic), whereafter it was gazetted. No one, even at this juncture, regarded the inclusion of "surrounds" as being too vague to be gazetted.

34. At all material times the City (and other role players, including the provincial Department of Housing . . . regarded the 2011 notices as having legal efficacy and RCG funding was accessed from SHRA pursuant thereto. Prior to the dispute in relation to the Tafelberg site, no one had taken issue with this approach, and as far as the City was concerned, when the motivation for RZs had been done it was at all material times contemplated that as far as the CBD RZ was concerned it included - and was not necessarily limited to - Sea Point, Green Point, Oranjezicht, Vredehoek, District Six, Observatory, Salt

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[98] This is a reference to the expert evidence of Dr Odendaal regarding the geographical extent of what she considered to be 'central Cape Town'.

River, Woodstock, Maitland, Walmer Estate and University Estate, even though a number of these areas were not specifically mentioned in the gazette.

35. It was also not contemplated by the City that these RZs would only be gazetted as "provisional RZs". It is apparent from the gazette that the RZs relate to areas so designated in all the major metropolitan areas [in South Africa]. The City has understood the initial RZs to have been promulgated as provisional in the sense that the City could then add further RZs, which it then did. These RZs were unrelated to the RZs so designated in the Gazette promulgated on 28 April 2017. The latter only related to non-metropolitan areas and cannot be regarded as substitutes for the RZs already gazetted. The 2017 gazetted (sic) does not relate to the City at all.

36. I cannot speak for the other parties but when SHRA allocated the funding in 2011 for the assessment of the viability of the Tafelberg site, it was consistent with, at the very least, my view at that time as the representative of the City and that of Catherine Stone, the former Director for Spatial Planning & Urban Design that there was no difficulty in SHRA doing this, because the Tafelberg site formed part of the CBD RZ. This is consistent with the views which Ms. August, from the provincial DHS, relayed to the Premier. As far as I am aware, there was agreement that such study should be conducted.

37. . . .

38. After reservations were expressed and legal opinions obtained casting doubts on the Tafelberg site falling within a demarcated RZ, the City decided to take steps in relation thereto to avoid any uncertainty being created so that developments in RZs not be compromised. On 28 March 2017 the national and provincial governments were informed of the City's intent to have Cape Town in its entirety declared as a RZ so that affordable housing opportunities could be provided wherever suitable land is available. The media release is annexed marked "PM 4". In this way the City's position could not be doubted and the presence or absence of RZs could not be invoked as an impediment to the City being able to access RCG funding. This statement arose because of the view expressed that Sea Point did not form part of the RZs, as proclaimed. It was thus simply a step to remove any ambiguity that may exist that the CBD and surrounds as a RZ does not include areas such as Sea Point.

39 . . .

40 . . .

41. In summary, at all material times the City regarded the 2011 Government Notice 848, as corrected by Government Notice 900, as providing for RZs in the metropolitan area. The City disagrees with the interpretation that the 2011 Gazettes should be regarded as "provisional" and the 2017 Gazette as final. The effect of such an interpretation would defy what the City, province and the national Minister intended with the 2011 classification. Moreover, the 2017 Gazette relates to entirely different areas premised on different recommendations that did not emanate from the City and is not a substitution of the 2011 Gazette. If this interpretation is found to be correct then there would be no RZ in the City at all, and all the major metro areas in the country would have no access to funding under the SHA, for areas which fall within the RZs as contemplated in 2011. Argument that this interpretation is misconceived will ensue at the hearing.'

[342] I did not understand any of the Provincial functionaries who deposed to affidavits to challenge the factual allegations made by Mr. Molapo in his affidavit. Certainly, if the PDHS' Ms. August disagreed with the assertion that the City, the Province and National Government were *ad idem* as to the immediate applicability of the RZ's, and whether the Tafelberg site fell within the surrounds of the CBD, one would have expected her to say so. She did not.

[343] Mr. Fagan SC relied heavily on the fact that the Notice published on 2 December 2011 contained the explanatory headnote that the restructuring zones were 'provisional' and were being published for 'public information'. So, the argument went, the RZ's were only provisional and could not be regarded as binding. That argument is, in my view, not sustainable for a variety of reasons. Firstly, as Annexure JG 32 to Ms. Gooch's affidavit demonstrates, on 29 June 2010, the erstwhile MEC for Housing, Mr. Madikizela, and his officials in the PDHS all supported the City's designation of the RZ's. Importantly, Mr. Molapo's report of May 2010 was annexed to the Province's motivation to the National Minister for the declaration of the RZ's in the City. There is nothing ambiguous in that report about the status of the proposed RZ's and that is the uncontroverted evidence of Mr. Molapo in these proceedings.

[344] Secondly, as Mr. Molapo points out, funding from the SHRA was advanced in 2011 for a preliminary study into the suitability of the property for social housing. The SHRA would not have done so if the property did not fall within a RZ and thereby qualified for a RCG: in such circumstances a study would have been a pointless waste of public resources. Thirdly, as Mr. Molapo explains, the designation was provisional only to the extent that it was the intention of the City to add more zones to its original determination. That intention did not mean that the declared zones (including 'Cape Town (and surrounds)') would later fall away or be revised. But Mr. Molapo goes further in his affidavit, stating that all the interested parties were in agreement that the notice had legal efficacy and that they acted upon it. Accordingly, in the absence of countervailing evidence from its officials (which would manifestly have been available to it), it is not open to the Province to seek to attack this assertion in argument.

[345] It is apparent from a reading of both December 2011 Notices that they were, once again, the product of sloppy drafting and inelegant use of language, but they are what they are and the Court must make the best that it can thereof. One could hardly seek to argue, for instance, that the obvious misspelling of 'Brackernfell' or 'Athloe' in the second Notice, voided it as there was then reference to non-existent places. The Notices must be afforded a generous interpretation so as to give them meaning which will advance the constitutional right to housing under s26 of the Constitution. If one does so, thereby eschewing the approach of 'black-letter law' interpretation, which no longer finds application in our constitutional jurisprudence, and if one seeks to interpret the Notices in the context of the compelling, unchallenged evidence of Mr. Molapo, there can be little doubt that the argument advanced by RTC must prevail.

[346] In the result, I am satisfied that it has been conclusively established by RTC that the Tafelberg site falls within a designated restructuring zone as contemplated in the SHA. It is therefore entitled to the declaratory relief sought in para 14 of the draft order ultimately handed up by Mr. Hathorn SC. This finding leads to the further conclusion that the Cabinet erred in not holding so when it considered whether to resile from the sale to the Day School. Had the Cabinet properly considered the law in the context of the correct facts, it would have come to the further conclusion that

the Tafelberg site qualified for a restructuring grant as contemplated under the SHA and that the absence thereof presented no impediment to the consideration of a social housing development on the site.

[347] The issue of the availability of the RCG was material to the argument advanced by RTC and other proponents in favour of social housing on the Tafelberg site and, accordingly, material to the Cabinet's decision not to resile from the deed of sale on the basis set out in para 1.4.1 of the Premier's Minute. This constitutes a material error on the part of the Province in coming to its conclusion not to resile and that error accordingly renders the decision not to resile reviewable under ss6(2)(d) and 6(2)(e)(iii) of PAJA.[99] That finding renders it unnecessary to decide upon the other grounds of review put up by RTC and the National Minister in relation to the decision not to resile. There is, however, one further aspect which requires consideration in relation to that decision.

WAS THERE AN OBLIGATION ON THE PROVINCE TO CLARIFY THE UNCERTAINTIES?

[348] The obvious question that arises from the Premier's Minute, is whether the alleged uncertainties with which the Province was confronted when considering whether to resile or not, were capable of being addressed? The formulation of those uncertainties in the Minute leads one to the obvious question – 'But why didn't you ask for clarification?'

[349] The SHA in general, and the guiding principles in s2 and Chapter 2 thereof in particular, define the roles and responsibilities of the three spheres of government and stress the necessity for co-operation between these principal role-players in the field of social housing. Furthermore, Mr. Molapo's evidence and the annexures to his affidavit demonstrate the link the erstwhile MEC for Human Settlements played between the City and DHS in relation to the proclamation of the 2011 RZ's.

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[99] See *Airports Company South Africa v Tswelokgotso Trading Enterprises CC* 2019 (1) SA 204 (GJ) para 8 and, further, the cases referred to in footnote 7 thereof.

[350] This begs the question why the Province took no steps to clarify the uncertainties which evidently troubled it? Its own MEC for Human Settlements and his functionaries would pre-eminently have been in a position to assist but, if not, why did Cabinet not direct enquiries to the DHS and the National Minister to clarify the alleged provisionality of the 2011 Notices and the extent of the RZ declared under 'Cape Town and surrounds'? The obvious reason seems to be that it did not want to be privy to the true facts. That would be demonstrative of *mala fides* and render the decision reviewable under s6(2)(e)(v) of PAJA.

[351] However, since this was neither pleaded nor argued by RTC, the Court is precluded from pursuing such a line of enquiry. But what the failure to ask these questions does show is that the Province brought itself within the ambit of s6(2)(e)(iii) of PAJA on this basis too, given that relevant considerations which were readily capable of being established were not considered.

[352] In RTC's supplementary founding affidavit Ms. Adonisi refers to additional documents which were discovered by the Province in terms of Rule 53, and specifically to a transcript of the meeting at which the Cabinet considered whether to resile from the sale or not. She points out that the transcript reveals that the aforesaid Ms. August, the Director of Affordable Housing in the PDHS, 'specifically alerted the cabinet to the fact that there was, at the time of the decision being made, a specific opportunity for changes to restructuring zones to be effected expeditiously.'

[353] Similarly, in the affidavit put up by the SHRA in the National Minister's application, its CEO Mr. Rory Lee Gallocher (who expressed an unequivocal view that the Tafelberg property fell within the designated 'Cape Town and surrounds' RZ and thus qualified for a RCG) said the following in relation to the Province's proposition that the property did not fall within the RZ:

'112. But even if the Province were correct that the Tafelberg site fell outside of the existing restructuring zone, this cannot justify its decision or render it reasonable.

112.1 It is not uncommon for provinces and municipalities to identify and propose additional restructuring zones for expansion of the social housing programme. SHRA and the [DHS] then consult with the provinces and municipalities on their identified proposed restructuring zones.

112.2 The SHRA and [DHS] are generally extremely receptive of requests by municipalities and provinces to earmark areas as restructuring zones. This is particularly so when, as in this case, the site in question meets the requirements of a restructuring zone and must simply be classified as such to be developed as a social housing programme or project.

112.3 In other words, the concept of restructuring zones is not intended as obstacle (sic) to the development of social housing, as the approach of the Province in this case might suggest. On the contrary, while the approval of a restructuring zone commences with a decision from the municipality in terms of its municipal planning functions, it is a collaborative effort and is intended to promote the application of the Social Housing Act and the availability of social housing.

113. In the circumstances, if the restructuring zone issue were an obstacle at all for the use of the site for social housing, one would have expected the Province to consult with the City, the [DHS] and the SHRA on whether the restructuring zone could be extended to include the area in which the Tafelberg site is located.

113.1 Had that been done, the SHRA would certainly have vigorously supported the extension of the restructuring zone to include the area in which the Tafelberg site is located. It would have been surprising if the City or [DHS] adopted any a (sic) different view.

113.2 But the Province did not do so. It appears to have made no efforts at all to determine whether the restructuring zone could be extended (or a new restructuring zone proclaimed) to cover the Tafelberg site.

113.3 Indeed, the Province itself recognised in the reasons that it offered for the decision that the ‘National Minister may be approached to amend the Restructuring Zone Designations’. However, it offers no explanation at all as to why it did not do so.

113.4 Instead, it chose to use the fact that the site was (in its view) outside a restructuring zone as a basis to refuse to use the site for social housing. This was in breach of the Province's obligations.'

[354] In their heads of argument on behalf of the National Minister counsel referred at length to the record of the deliberations of the Cabinet referred to above. They highlight the fact that the meeting of the Cabinet on 22 March 2017 was attended by, *inter alia,* Ms. Gooch and the legal adviser in the Office of the Premier, Ms. Fiona Stewart, both of whom made presentations to the meeting. Ms. Stewart advised the meeting of the advice that the Province had received from Mr. Fagan SC, in an opinion requested in 2017 for the purposes of informing the decision whether to resile or not.

[355] Ms. Stewart informed the meeting that the advice received from counsel in relation to the 'CBD and surrounds' question was to the effect that the surrounds were limited to Salt River, Woodstock and Observatory. She did, however, point out to the meeting that there was disagreement expressed by City officials as to the meaning of 'surrounds' and she went on to say that it was in any event open to interpretation as to whether Sea Point fell within the definition of 'CBD'. It appears to have been Ms. Stewart's understanding (which coincided with that of counsel) that the remote geographical location of Sea Point – 5km by road from the CBD – was what made it difficult to include it in the definition of the CBD on any reasonable interpretation. She also based her view on the fact that social housing projects had previously been approved in all areas save for the area under consideration, namely the Main Road Sea Point Precinct, leading her to conclude that the area in question did not fall in a RZ.

[356] Ms. Stewart went on to inform the Cabinet that there was no doubt that the RZ's were about to be amended, due to problems that had arisen in relation thereto, and that she had little doubt that such amendment might incorporate far wider areas. She frankly informed the Cabinet that, on the issue as to the definition of 'CBD and surrounds' she could not offer a decisive answer one way or the other saying that it was open to interpretation – 'I cannot offer a 100% answer one way or the other.' It

cannot be disputed then that the Cabinet decision not to resile was taken in light of the ambiguity pointed out to it by its advisers, together with knowledge on the part of the Cabinet and the Premier that there was likely to be an imminent amendment to the list of present RZ's, which might well include Sea Point expressly within a designated RZ.

[357] Counsel for the National Minister also referred the Court to the fact that Ms. August had informed the Cabinet that, at a meeting with the DHS a week earlier, the latter had requested that any changes to potential RZ's be 'fed through as soon as possible, so that it can link to the current gazetting that the National Minister is about to do for the non-metro [RZ's]'. Cabinet was thus advised of the imminent opportunity for an adjustment to the Cape Town RZ because there was a process in place which was 'kind of happening at a National level and I also have to say that the City agrees that they have indicated that they would change the [RZ] because it was always intended that Sea Point be included in terms of the history of that particular Tafelberg site.'

[358] Reverting to the hypothetical question posed earlier of Cabinet – 'But why didn't you ask for clarification?' – there is no demonstrable answer forthcoming out of the evidence placed before the Court. Rather, Cabinet chose to ignore the realities of the situation: it knew that its own advisers were not *ad idem* on 'Cape Town and surrounds' – either as to the intended extent of the surrounds or whether Sea Point fell within the CBD; it knew that the City (which is the initiator of any process to declare a RZ) held a diametrically opposed view on that issue; it knew that there were moves afoot which would clarify, once and for all, whether the Tafelberg site fell under a RZ; and it knew that it was open to the Province to participate in that process.

[359] Yet, the Provincial Cabinet did not seek clarity from those who could provide the answers (its own MEC for Human Settlements and the City), nor did it await the imminent outcome of the National Ministerial process. Rather, it made a decision in circumstances where it had failed to properly interrogate a factor which it considered material to its determination of the decision to resile and that failure impacted on the

rationality of the entire process.[100] On that basis, the decision not to resile from the sale must be regarded as irrational and is liable to be reviewed on this basis too.

[360] I shall revert to RTC's application for a *mandamus* and supervisory interdict later in this judgment and turn now to consider the relief sought by the National Minister.

BACKGROUND TO THE NATIONAL MINISTER'S CASE

[361] The background facts relied upon by counsel for the National Minister in their argument are, in the main, set out above in relation to RTC's application. To that I would add the following. In May 2011 (and after Mr. Carlisle had announced that the Tafelberg property had been added to the Regeneration Programme) a meeting was convened in Cape Town at which the PDHS, the City and various NGO's were present. It was then agreed that a number of properties, including Tafelberg, would be investigated for purposes of establishing whether they met the requirements for inner-city commercial development in terms of the Regeneration Programme. So much for the professed uncertainty in 2017 as to whether Sea Point fell under 'the CBD and surrounds.'

[362] Pursuant to that agreement various pilot studies were undertaken, including an urban design report in October 2011 by an organization known as 'City Think Space', which concluded that the site was suitable for a mixed-use development comprising business, retail, restaurant and at least 155 residential units.

[363] During the following month, November 2011, NASHO presented a feasibility study to the Province in relation to the Tafelberg property and the Woodstock Hospital site, which was also being considered for a social housing development. Counsel for the National Minister highlighted the following aspects of the NASHO study:

363.1. Although the utilisation of the Tafelberg property for social housing purposes through a long term lease arrangement would yield minimal income for

[100] *Scalabrini* para 29.

the Province, the on-going maintenance expenses in respect of the property would be eliminated and there would be long-term social benefits. These included meeting the Regeneration Programme's social objectives, the avoidance of gentrification costs and the increase in the land value.

363.2. The Tafelberg and Woodstock Hospital sites should be retained in public ownership in order to realise social objectives, and other properties with more commercial appeal (such as the Artscape Precinct on the Foreshore) should be utilised to realise immediate income objectives, namely the funding of budgetary shortfalls within the DTPW.

363.3. NASHO also emphasized that the housing gap in Cape Town was greater than anywhere else in the country, thereby rendering Cape Town the most segregated city in the country. Social housing was proposed as the best vehicle in order to achieve social cohesion and spatial integration while addressing the high demand for rental properties in Cape Town at that time.

363.4. On 26 September 2012, NASHO, in conjunction with the Cape Town Partnership, addressed correspondence to the Premier in support of the utilisation of the Tafelberg property for social housing purposes.

[364] These facts demonstrate that from an early stage in the discussions relating to the disposal of the property, social housing was very much on the agenda. We know too that in March 2013 the HOD in the PDHS urged the DTPW to consider the use of the property for social housing, believing that it was suitable for such a project. Importantly, we have the remark in May 2013 by Mr. Carlisle at the meeting with his Cabinet colleague, Mr. Madikizela, that the Tafelberg property was not available for consideration as a housing development and his firm stance in April 2014 in the interview with Mr. Kramer that there would be 'No RDP in the CBD.' All of these events demonstrate that there was significant interest in and lobbying for the use of the Tafelberg site for affordable housing, that the Province was alive thereto and that it was routinely opposed thereto.

[365] Mr. Jamie SC also stressed the fact that on 18 May 2015 the PDHS and DTPW concluded a Memorandum of Understanding ("MOU") which was governed by the so-called 'Standard Operating Procedures for the Release of Immovable Properties in Custodianship of the [DTPW] and [PDHS]' ("the SOP"), and highlighted the following extracts from the SOP:

'C. The Departments wish to allocate certain provincial State land under the custodianship of the DTPW, for human settlement development and to collaborate with each other in this regard;

D. The Provincial Cabinet has approved such collaboration in principle;

E. The Departments have concluded a memorandum of understanding that will form the basis for the collaboration between them in order to make the identified provincial State land available to the market for human settlement development purposes.

1.2. When DTPW identifies properties that can possibly be made available for human settlement or properties it considers as surplus properties, it will first consult the other provincial user Departments to determine whether those Departments have a need for such properties. If none of the other provincial users have a need for such properties, DTPW will approach the [DHS] in writing to request [DHS] to consider such land to be made available for human settlement development. If [DHS] agrees to such properties being made available for human settlement development, the process of obtaining approval to release the property for human settlement purposes will be initiated.'

[366] As I have already demonstrated earlier in this judgment, the DTPW paid lip-service to the SOP when it commenced the EOI phase of the disposal of the Tafelberg site. It was only at a much later stage, and after the Day School had been identified as the prospective purchaser, that the PDHS was prevailed upon to agree to withdraw its interest in the property.

DEVELOPMENTS AFTER THE COURT ORDER OF 5 MAY 2016

[367] Subsequent to the agreed court order of 5 May 2016, the DTPW purported to publish (on 13 May 2016) a fresh notice calling for public comment on the proposed

sale to the Day School. As part of that process the prospect of social housing on the site was raised.

[368] On 29 July 2016 the Provincial Cabinet resolved that it was:

'not able to meaningfully consider the rationality of comments that have been submitted in terms of the re-opened public participation process, without a full financial model with respect to the implications of the construction/development of social housing units on the said site and that this has accordingly now been requested.'

[369] Accordingly, the Cabinet requested a full financial model from the DTPW regarding the implications of the construction and development of social housing on the property, in order that it could properly consider the responses to the second notice. Having concluded its financial model, on 18 November 2016 the DTPW published a notice in Provincial Gazette no. 7703 advertising the model, affording access thereto and inviting public comment thereon by 30 January 2017.

[370] The National Minister's counsel pointed out that the financial model that was so published was a concise document of some three pages, in which it was concluded that the cost of providing social housing on the property exceeded the cost of developing comparative schemes.

[371] In February 2017 NASHO submitted its representations (a 16-page document) to the Province in response to the November 2016 notice and commented positively on the prospect of social housing, claiming that its model showed:

'that both the Province and the City can achieve a win-win (sic) in which a large proportion of the site is protected for social housing but integration is achieved with sectional title units for sale, the school site is maintained for the original proposal for a private school. The new community is also developed and social cohesion is supported under the expert knowledge and social commitment of a credible and experienced SHI. In doing so the Province will forfeit a relatively small part of the capital sum they hope to achieve from an outright sale but they will ensure the use of the site in the longer term for its important social and economic development and urban regeneration objectives.'

[372] The Day School made representations on the financial feasibility of social housing on 15 February 2017 and RTC did likewise on 15 March 2017 – both sets of representations being lodged after the designated closing date. The former sought to demonstrate why a social housing project was unaffordable while the latter went the other way.

[373] As already pointed out, the Cabinet decision not to resile from the sale was taken on 22 March 2017 and made public on 4 April 2017. In the intervening period, and on 30 March 2017, the National Minister wrote the letter already referred to, in which she emphasized the national objective that had to be achieved through the development of the property for social housing. Stating that her intention was to pursue that objective through the implementation of the Social Housing Policy and the SHA, the National Minister then invoked s5 of IGRFA, by stating, as we have already seen, that she had been following the public discourse and engagement between the various stakeholders and that she was then obliged to intercede. The subsequent exchanges between the Premier and the National Minister have also been set out earlier in this judgment. The response by the Premier to the National Minister's application is at various levels.

[374] Firstly, there is the relief sought by the National Minister for a declaratory order that the Province's failure to inform and consult National Government of the intention to dispose of the Tafelberg site, constituted a contravention of the Province's obligations under Chapter 3 of the Constitution and hence under IGRFA. The Province's response to this assertion is that there was simply no legal duty on it to consult and engage with National Government prior to disposing of immovable property which belongs to it – a sort of 'I can do what I want with my property provided I comply with the WCLAA' stance.

[375] Secondly, there is the relief claiming a further declaratory order that there is an intergovernmental dispute between all three spheres of government within the ambit of s1 of IGRFA, relating to the sale (or intended sale) of the Tafelberg site. The response to this is that the grounds advanced for the declaratory order are effectively

traversed by the review relief sought by the National Minister in addition to the IGRFA relief.

[376] Thirdly, the National Minister seeks an order directing the Province and the City to engage with her and the DHS in a dispute resolution process, as contemplated under chapter 3 of the Constitution and as regulated by IGRFA. The response to this from the Province is that the duty of engagement in such a process is only obligatory if the relief in the first two prayers is competent.

[377] Fourthly, in the original notice of motion the National Minister sought interdictory relief against the Province *pendent lite*, so as to ensure that the Tafelberg property was not transferred to the Day School pending finalisation of the intended dispute resolution process, alternatively the final determination of this application. That relief was partly covered by para 6 of the order of Dolamo J of 5 May 2016 to which the parties agreed: the MEC, the Premier and the Day School undertook not to give and take transfer of the property until the expiry of two months after receipt by RTC and the National Minister of the decision not to resile.

[378] Given the fact that the court order contemplated time frames for the filing of any review applications in the event that the Province decided not to resile, and given that those time frames were ultimately complied with, there is an undertaking in place which renders this relief moot at this stage.

[379] Lastly, there is the relief sought in prayer 4 of the draft order. I have already explained how the correct state of affairs was established: that relief has accordingly fallen away. I shall proceed to deal with the National Minister's application shortly, but before I do so it is necessary to consider the legislation (and the interpretation thereof) which underpins it.

CHAPTER 3 OF THE CONSTITUTION

[380] Chapter 3 of the Constitution is entitled 'Co-Operative Government' and comprises just two sections, which read as follows:

‘**40. Government of the Republic**

(1) In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated.

(2) All spheres of government must observe and adhere to the principles of this Chapter and must conduct their activities within the parameters that the Chapter provides.

41. Principles of co-operative government and intergovernmental relations

(1) All spheres of government and all organs of state within each sphere must –

(a) preserve the peace, national unity and the indivisibility of the Republic;

(b) secure the well-being of the people of the Republic;

(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;

(d) be loyal to the Constitution, the Republic and its people;

(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;

(f) not assume any power or function except those conferred on them in terms of the Constitution;

(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and

(h) co-operate with one another in mutual trust and good faith by –

(i) fostering friendly relations;

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) co-ordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.

(2) An Act of Parliament must-

(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and

(b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.[101]

(3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

[381] In *Premier, Western Cape*[102] the Chaskalson P discussed the purpose, and the approach to the interpretation, of Chapter 3:

'[50] The principle of co-operative government is established in s40 where all spheres of government are described as being "distinctive, interdependent and interrelated". This is consistent with the way powers have been allocated between different spheres of

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[101] The promulgation of IGRFA in August 2005 occurred pursuant to this constitutional injunction.

[102] *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC). The case involved a challenge by the Province to the constitutional validity of certain amendments to the erstwhile Public Service Act of 1994.

government. Distinctiveness lies in the provision made for elected governments at national, provincial and local levels. The interdependence and interrelatedness flow from the founding provision that South Africa is "one sovereign, democratic State", and a constitutional structure which makes provision for framework provisions to be set by the national sphere of government. These provisions vest concurrent legislative competences in respect of important matters in the national and provincial spheres of government, and contemplate that provincial executives will have responsibility for implementing certain national laws as well as provincial laws.

[51] . . .

[52] . . .

[53] The national government is also given overall responsibility for ensuring that other spheres of government carry out their obligations under the Constitution. In addition to its powers in respect of local government, it may also intervene in the provincial sphere in circumstances where a provincial government "cannot or does not fulfil an executive obligation in terms of legislation or the Constitution". It is empowered in such circumstances to take "any appropriate steps to ensure fulfilment" of such obligations.

[54] The provisions of chap 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of government co-operate with each other to secure the implementation of legislation in which they all have a common interest. The co-operation called for goes so far as to require that every reasonable effort be made to settle disputes before a court is approached to do so.

[55] Co-operation is of particular importance in the field of concurrent law-making and implementation of laws. It is desirable where possible to avoid conflicting legislative provisions, to determine the administrations which will implement laws that are made, and to ensure that adequate provision is made therefor in the budgets of the different governments.

[56] Principles of co-operative government and intergovernmental relations are dealt with in s41 of the Constitution. In addition to provisions setting common goals for all spheres of government requiring co-operation between them in mutual trust and good faith, including avoiding legal proceedings against one another, s41(1)(g) requires that:

> "All spheres of government and all organs of State within each sphere must . . . exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere."

This provision reflects a requirement of [Constitutional Principle] XXI that:

> "The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces."[103]

[57] Section 41(1)(g) is concerned with the way power is exercised, not with whether or not a power exists. That is determined by the provisions of the Constitution. In the present case what is relevant is that the constitutional power to structure the public service vests in the national sphere of government.

[58] Although the circumstances in which s41(1)(g) can be invoked to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively. The functional and institutional integrity of the different spheres of government must, however, be determined with due regard to their place in the constitutional order, their powers and functions under the Constitution, and the countervailing powers of other spheres of government.' (Internal references omitted.)

[382] In the *Certification case*[104] the Constitutional Court, in commenting on the ambit of Constitutional Principle XXII, observed that the principle of co-operative governance does not diminish the autonomy of any given sphere of government. Rather, its purpose is to recognise the place of each independent sphere within the whole sphere of governance and, importantly, the necessity for co-ordination between

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[103] See *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 236 *et seq.*

[104] Para 292.

such spheres so as to ensure the functionality of the sphere of governance as a whole.

[383] In summary then, Chapter 3 makes it mandatory for all spheres of government to co-operate with each other in order to ensure the implementation of legislation and policies in which they have a common interest. That co-operation takes place within 'a constitutional structure which makes provision for framework provisions to be set by the national sphere of government.'[105] I understand this to mean that where there is, for instance, national legislation that requires implementation at a provincial level by a provincial department, a minister in national government is entitled to raise the issue with the province and 'set the agenda', as it were.

WHAT IS IN DISPUTE?

[384] In this matter, given the provisions of Part A of Schedule 4 to the Constitution, both the national and provincial spheres of government have concurrent legislative competence and functionality in respect of housing. As I understand the case for the National Minister, she relies, in general, on the powers and obligations imposed on her under the Housing Act to advance the general principles applicable to housing development and, more specifically, the functions and responsibilities with which she is charged under s3 of the SHA, to have a say in the sale of the Tafelberg property to the Day School.

[385] The Province, on the other hand, relies on its defined roles and responsibilities under s4 of the SHA to resist the National Minister's interference, claiming that the sale was lawfully conducted under the WCLAA, that GIAMA was not applicable to the property and that the disposal of the property is in any event a 'done deal' with an outside party in respect whereof the National Minister manifestly has no interest. In other words, the Province adopts the position that the sale of the property is none of the National Minister's business and that there is therefore nothing to talk about.

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[105] *Premier, Western Cape* para 50.

[386] It is as well, therefore, to commence by reciting the respective statutory roles and responsibilities of these two spheres of government under the SHA:

"**3. Roles and responsibilities of national government.**

(1) National government, acting through the Minister must –

(a) create and uphold an enabling environment for social housing, by providing the legislative, regulatory, financial and policy framework for the delivery of social housing;

(b) ensure compliance with its constitutional responsibilities;

(c) address issues that affect the growth, development or sustainability of the social housing sector;

(d) establish with provinces and municipalities institutional capacity to support social housing initiatives;

(e) institute and fund the social housing programme as a national housing programme to promote the development and supply of social housing stock for low to medium income persons;

(f) designate restructuring zones submitted by provinces and identified by municipalities and specifically provided for in a municipality's integrated development plan contemplated in section 25 of the Local Government: Municipal Systems Act, 2000 . . . and may, where appropriate, after due notice in the *Gazette*, withdraw such designation;

(g) establish capital and institutional investment grants;

(h) . . .

(i) . . .

(j) determine norms and standards to be adhered to by provinces and municipalities . . .'

4. Roles and responsibilities of provincial government

(1) Every provincial government, through its MEC, must-

(a) ensure fairness, equity and compliance with national and provincial social housing norms and standards;

(b) ensure the protection of consumers by creating awareness of consumers' rights and obligations;

(c) facilitate sustainability and growth in the social housing sector;

(d) mediate in cases of conflict between a social housing institution or other delivery agent and a municipality, if required;

(e) submit proposed restructuring zones to the [National] Minister;

(f) monitor social housing projects to ascertain that relevant prescripts, norms and standards are being complied with;

(g) approve, allocate and administer capital grants, in the manner contemplated in the social housing investment plan, in approved projects;

(h) ensure that the process contemplated in paragraph (g) is conducted efficiently;

(i) administer the social housing programme, and may for this purpose approve –

(i) any projects in respect thereof; and

(ii) the financing thereof out of money paid into the accredited bank account of the province . . .'

[387] It will be seen that the sections in question predicate a situation, broadly speaking, where the sphere of national government is responsible for the high-level planning, financing and initial implementation of social housing policy, while the sphere of provincial government is responsible for the identification of appropriate zones where this form of housing can be located, the procurement thereof by recommendation to the DHS for the declaration of RZs, the conclusion of agreements with SHIs to establish the designated projects, and ultimately the provision of the necessary finance to cover the cost thereof through the availability of RCGs, which in turn are sourced through National Government.

[388] Against that background, and given that there are distinct areas of responsibility and obligation accorded to each sphere of government under ss3 and 4 of the SHA, it might have been expected by the Legislature that the room for conflict between the national and provincial spheres was rather limited – after all, both spheres are enjoined to pursue the general principles articulated under s2 of the SHA, which commences with the injunction that they ought both to give priority to the needs of low and medium income households, and then proceeds to set out a number of guiding principles under which that statutory goal should be achieved. But, as the facts of this case already set out demonstrate, there is indeed room for disagreement, both at the overarching level of policy and planning as well as at the more fundamental level of application and implementation of the SHA.

[389] Reduced to its bare minimum, the current dispute centres around a demand from the National Minister that she was entitled to be consulted by the Province prior to its decision to sell the property to the Day School, and a retort from the Premier that the property was an immovable asset which could be disposed of by the Province at its discretion, provided only that it complied with the WCLAA, which the Premier claimed was the only regulatory instrument applicable to the disposal. I shall deal with the substance of the dispute hereunder.

[390] There is no issue between the National Minister and the Province that, if there is indeed a dispute between the two spheres of government in relation to a matter of mutual constitutional interest, such as housing, such an intergovernmental dispute falls to be resolved under IGRFA. I shall thus briefly outline the IGRFA principles and procedure applicable in the circumstances.

THE APPLICATION OF IGRFA

[391] In terms of s4 of IGRFA the object of the legislation is:

"to provide within the principle of co-operative government set out in Chapter 3 of the Constitution a framework for the national government, provincial governments and local governments, and all organs of state within those governments, **to facilitate co-ordination in the implementation of policy and legislation**, including –

(a) coherent government;

(b) effective provision of services;

(c) monitoring implementation of policy and legislation; and

(d) realisation of national priorities." (Emphasis added)

[392] S5 of IGRFA enjoins all spheres of government, in conducting their affairs, to achieve that object of the act by:

'(a) taking into account the circumstances, material interests and budgets of other governments and organs of state in other governments, when exercising their statutory powers or performing their statutory functions;

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

(i) direct contact; or

(ii) any relevant intergovernmental structures;

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

(d) avoiding unnecessary and wasteful duplication or jurisdictional contests . . .'

[393] In s1 of IGRFA an 'intergovernmental dispute' is defined as:

"a dispute between different governments or between organs of state from different governments concerning a matter-

(a) arising from –

(i) a statutory power or function assigned to any of the parties; or

(ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law, and includes any dispute between the parties regarding a related matter; . . .'

[394] In Part 5 of the 'Intergovernmental Dispute Prevention and Settlement: Practice Guide: Guidelines for Effective Conflict Management'[106], an intergovernmental dispute is described as follows:

'a specific disagreement concerning a matter of fact, law or policy in which a claim or assertion of one party is met with a refusal, counter-claim or denial by another'

and which

[106] Published under IGRFA in GN491 in Government Gazette 29845 of 26 April 2007.

'[i]mplies a specific impasse on which the parties cannot agree, rather than a broad and general disagreement about a problem . . .'

[395] In the event that such an intergovernmental dispute arises it must be resolved in accordance with Chapter 4 of IGRFA which is entitled 'Settlement of Intergovernmental Disputes.' Under this Chapter, s40 imposes a positive duty on the parties to such a dispute, firstly, to make every reasonable effort to avoid any dispute in the exercise of their respective statutory powers and/or functions, and, secondly, to settle such a dispute without resorting to judicial proceedings. Thereafter, and in the event that the dispute is persisted with, IGRFA provides for a procedure which has the hallmarks of alternate dispute resolution. It is not necessary to detail them for present purposes, other than to state that a degree of comity and mutual respect is expected of the parties.

[396] Finally, s45 of IGRFA deals with the institution of judicial proceedings and precludes any sphere of government from instituting such proceedings:

'unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful.'

DID THE DHS HAVE AN INTEREST IN THE SALE?

[397] At first blush one might be inclined to be dismissive of the National Minister's professed interest in the sale: after all the Province was involved in the sale of state land registered in its name, and the obvious national departments which come to mind in that context for the purposes of potential consultation are the Department of Public Works and the Department of Agriculture, Land Reform and Rural Development, to whom reference is made in s3(3)(c) of the WCLAA.[107] I say 'potential consultation', because it is the local office of each of those national departments at which the provincial legislation required notice to be given of an anticipated disposal.

[107] The Department of Agriculture, Land Reform and Rural Development is understood to be the current incumbent of the portfolio of 'Land Affairs' referred to in that section.

[398] On the other hand, if one were to consider the disposal through the lens of GIAMA (which we know the Province did not) then the Minister of Public Works (as the national minster responsible for the enforcement of that statute) might be said to be the person with whom consultation might be required.

[399] But it seems to me that a purposive interpretation of Chapter 3 of the Constitution would not be achieved by adopting a constrained approach to the reading of the statute being applied by the Province. The proper approach, as advocated in cases such as *Goedgelegen* and *Scribante*, is to 'prefer a generous construction over a merely . . . legalistic one' and to avoid a 'blinkered peering at an isolated provision.'

[400] From as early as 2013 both the MEC and the functionaries in the Province (both the DTPW and the PDHS) knew that there was public interest in the utilisation of the site for affordable housing – the HOD in the PDHS had made this clear in his letter of 26 March 2013, while the MEC himself had responded to this interest in April 2014, by dispelling the notion of the Province providing any form of affordable housing in central Cape Town ('no RDP in the CBD'). It has to be said therefore that affordable housing (in whatever form) was very much on the table for negotiation, but was ignored by the Province prior to its November 2016 decision to sell to the Day School.

[401] However, when the Province embarked on its revised public participation process after the order of Dolamo, J in May 2016, it changed tack and specifically undertook an investigation into the feasibility of social housing on the Tafelberg site. The consequences of this investigation informed the Province's decision not to resile from the sale. And, in its reasons supporting that decision, the Province not only had doubts about the financial viability of such a project, but also raised issues indicating uncertainty around specific aspects of social housing: the status of the RZs, the extent of 'Cape Town and surrounds' and the potential non-availability of RCG capital.

[402] In *Grootboom*[108] Yacoob J observed that 'national government bears the overall responsibility for ensuring that the State complies with the obligations imposed

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[108] Para 66.

upon it by s26' of the Constitution. The learned judge went on to deal with the implementation of the State's housing programmes and said the following –

"[68] Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing program. Recognition of such needs in the nationwide housing program requires it to plan, budget and monitor the fulfilment of immediate needs of the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper cooperation between the different spheres of government."

[403] When the judgment in *Grootboom* was delivered it was in response to an application brought to procure shelter for the poorest of the poor and, in addition, the SHA was not yet on the statute book. But, given that the Constitutional Court was then concerned with the housing obligations of the State at a general (or macro) level, there is no reason not to apply this injunction from the apex court in relation to the issue of social housing. The SHA's stated objects and principles are no less demanding than the requirements in respect of low cost housing and, after all, as Yacoob J pointed out in *Grootboom*[109], the Constitution itself allocates powers and functions amongst the different spheres of government and, in respect of housing, this is designated as a function of both the national and provincial spheres.

[404] To the extent that the National Minister may have been in a position to address the areas of concern or uncertainty raised by the Province on behalf of her Department, she could, and should, have been consulted by the Province. After all, the injunction in the SHA required both the National Minister and the Province to act in the interests of parties who were the subject of that act, as contemplated under ss5(b) and (c) of IGRFA, an act, as I have said, which envisages comity rather than shunning the other side. And, such an approach may have afforded an opportunity to resolve the conundrum I posed earlier – 'But why didn't you ask?'

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[109] Para 39.

[405] The National Minister was criticised by counsel for the Province for delaying her intervention until very late in the day – too late, in fact, as the Province would have it. I do not agree. The National Minister's *locus standi* to assert a dispute on behalf of the DHS, as contemplated under IGRFA, only arose when the Province decided not to resile, thereby turning its back on any solution to the social housing shortage in the inner-city under the SHA. Prior to that, any intercession by the National Minister would have been premature and the Premier would have been entitled to adopt the stance that there was no dispute justiciable under IGRFA, as the Province was still conducting its feasibility study in order to assess the potential cost of social housing on the property.

[406] But once the Province confirmed its earlier decision to sell, the National Minister was in a position to enquire into that decision on behalf of the DHS, given her statutory obligations and duties under the SHA and the broader umbrella of the Housing Act, and the concomitant obligations and duties of the PDHS under the SHA which included, *inter alia*, the duty to promote 'social, physical and economic integration of housing development into existing urban and inner-city areas through the creation of quality living environments'.[110]

[407] In summary, the case for the National Minister in seeking relief under IGRFA is that the DHS and the Province are organs of State, within the national and provincial spheres of government respectively, and that there was a dispute between these organs of State regarding the Province's failure to inform, or consult with, the DHS prior to making the decision to dispose of the property and, further, a failure by the Province to co-coordinate its actions with those of the national department or its agencies (including the SHRA), or to take into account their material interests in the property and the potential disposal thereof.

[408] The National Minister accordingly contends that there is a dispute 'arising from a statutory power or function assigned to any of the parties'[111] and that there is no

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[110] See s2(1)(i)(iv) of the SHA.

[111] See the definition of 'intergovernmental dispute' in s1 of IGRFA.

other statute (or forum) which regulates the settlement of such a dispute between the two spheres of government. The National Minister argues further (and she is supported in this regard by the City) that the declaration of a dispute under IGRFA could have been avoided had the Province engaged with the National Minister, her department and the City in relation to the key decisions pertaining to the disposal of the property by employing the informal mechanisms provided for in IGRFA.

[409] I agree with the National Minister's contentions in this regard. The dual competencies in respect of housing granted by the Constitution to both the national and provincial spheres of government emphasize the necessity for co-operative governance in that critical area of social upliftment. In conclusion on this issue, I can do no better than to return to *Grootboom:*

'[82] All levels of government must ensure that the housing program is reasonably and appropriately implemented in the light of all the provisions in the Constitution. All implementation mechanisms and all State action in relation to housing falls to be assessed against the requirements of s26 of the Constitution. Every step at every level of government must be consistent with the constitutional obligation to take responsible measures to provide adequate housing.'

[410] In the circumstances, I am satisfied that there was a dispute as contemplated under IGFRA between the DHS and the Province, and that the existence of such dispute was properly raised by the National Minister, on behalf of her Department, with the Premier, acting on behalf of the Province.

WAS THE PREMIER ENTITLED TO DECLINE TO ENGAGE WITH THE NATIONAL MINISTER IN RELATION TO THE DISPUTE RAISED?

[411] The exchange of correspondence already referred to between the Premier and the National Minister on this issue suggests, firstly, ambivalence and ultimately, a change of stance on the part of the Premier. Initially, it appears, in the letter originating from her office on 5 April 2017, that the Premier was not averse to Provincial officials engaging with representatives of the DHS in relation to the sale of

Tafelberg, although she did express reservations about the formulation of a dispute under IGRFA.

[412] However, after a further exchange of correspondence, the Premier (then corresponding through the offices of the State Attorney, Cape Town on 2 May 2017) made it clear that she did not believe that a case had been made out for the determination of a dispute under IGRFA. She did not suggest any further avenues for meaningful engagement with the DHS, claiming that the Province was *functus officio* and that in any event the matter was before the court in terms of the RTC application.

[413] It seems to me that in responding to the National Minister, the Premier did not adequately take heed of what the Constitutional Court had said in earlier Chapter 3 litigation in which she had been involved. In *Minister of Police*[112] Moseneke DCJ, with reference to the earlier ruling of the Constitutional Court in *National Gambling Board*[113]that at the heart of Chapter 3 was the duty of organs of State to avoid litigation, made the following observations regarding the Premier's duties under IGRFA:

'[62] The second contention [by the applicants] was that, although the premier was acting within the powers given to a province, and did not have to declare a dispute, she was still obliged by s41(1)(h)(iii) and (iv) [of the Constitution] to inform other organs of state and consult them on matters of common interest as well as to coordinate actions. She had to co-operate adequately with other branches of government before appointing the Commission. There is no doubt that the premier, acting for the province, had the obligation to consult the minister and the commissioner [of Police] before the province appointed a commission into the policing function . . .

[63] . . .

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[112] *Minister of Police and others v Premier of the Western Cape and others* 2014 (1) SA 1 (CC). The case involved the entitlement of the Premier to appoint a commission of enquiry to investigate policing in Khayelitsha, a decision which was challenged by national government.

[113] *National Gambling Board v Premier, KwaZulu Natal and others* 2002 (2) SA 715 (CC)

[64] It must be added that spheres of government and organs of state are obliged to respect and arrange their activities in a manner that advances intergovernmental relations and bolsters co-operative governance. If they do not do so, they breach peremptory requirements of the Constitution. And yet, more and more disputes between or amongst spheres of government or organs of state end up in courts and in this court, in particular. The litigation is always at the expense of the public purse from which all derive their funding . . . Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their co-operative governance obligations well before resorting to litigation.' (Internal references omitted.)

[414] It seems to me that in this matter the Premier, at the very least, did not comply with her primary duty under ss40(1)(a) and (b) of IGRFA, a duty which is sourced in s41(1)(h)(iii) of the Constitution. In that regard she was required, firstly, to avoid an intergovernmental dispute in the exercise of her statutory powers and the exercise of her statutory functions, and secondly, to attempt to settle such a dispute without resorting to litigation.

[415] The facts to which I have already referred establish that the Province made no reasonable effort to engage with the City and seek clarity from it on the existence and/or extent of the RZs and, flowing therefrom, the availability of any RCGs for social housing. Had the Province complied with its obligations under s41(1) of the Constitution it would, in all probability, have established from the City and/or the DHS that the Tafelberg site fell within an area that was regarded as being part of an existing RZ, but which in any event would imminently be declared to be so. And, if all three spheres of government had co-operated as the Constitution demands of them, the issue might have been resolved by the National Minister being requested to amend the RZ designations, thereby paving the way for RCG funding which would have lessened the Province's financial burden.

[416] That the Province was alive to this possibility appears clearly from the Premier's minute, and yet the Province has not afforded this Court a reasonable explanation for its failure to follow this route, thereby failing to comply with the Constitutional injunction in relation to co-operative governance or the relevant provisions of IGRFA.

[417] The structure of IGRFA is such that spheres of government who are not in agreement with each other on matters of mutual interest, are encouraged to engage with each other, whether formally or informally, or through an intermediary, and only proceed to litigation as a matter of last resort. S41(2) of IGRFA is instructive in that regard:

'41(2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.'

Yet the Premier took no steps in that regard in response to a reasonable request from the National Minister. Rather, the Premier rejected the National Minister's request, effectively placing reliance on special defences such as *functus officio* and *sub judice* rather than engaging with her on the merits.

[418] In the result I am driven to conclude that the Premier was not entitled to avoid her constitutional duty to engage with the National Minister, and that it is mandatory for this Court to pronounce upon the Province's breach of the Constitution in terms of the first prayer for constitutional relief sought by the National Minister in her application. In no longer seeking relief under prayers 2 and 3 of the notice of motion (the prayers which have been struck through in Mr. Jamie SC's draft), the National Minister has, in my view correctly, recognised that it would be futile to order engagement with the Premier under IGRFA in circumstances where the decision to sell is sought to be to be set aside.

[419] The relief sought by the National Minister in relation to the review of the decision to sell the property, the invalidity of the WCLAA Regulations and related relief, has been addressed in RTC's application and need not be addressed further in regard to the National Minister's application. Although it will amount to a duplication of the relief granted against the Province, for the sake of good order it is necessary to grant an order in each application, given that the matters were not consolidated but merely heard together for the sake of convenience.

[420] On the basis of the conclusions of reviewability that I have arrived at in both applications, it is not necessary to consider granting any relief other than the setting aside of the sale and declaring the Regulations to be unconstitutional to the extent contended. What remains to be dealt with is the declaration of the breach of constitutional obligations and the supervisory interdict and related relief sought by RTC against the Province and the City, and by the National Minister against the Province, and it is to that which I now turn.

THE BASIS FOR THE RELIEF SOUGHT BY RTC REGARDING THE ALLEGED BREACH OF CONSITUTIONAL OBLIGATIONS

[421] The relief sought by RTC in prayer 1 of its draft order is for a declaratory order that the MEC, the Premier, the City and the MEC: HS are held to be in breach of their respective obligations under ss25 and 26 of the Constitution, while the second prayer seeks a mandatory interdict that these respondents be directed to comply with such obligations. The third, fourth and fifth prayers contemplate supervisory interdicts against such respondents to ensure judicial oversight in relation to their compliance with the *mandamus* sought in prayer 2. I will refer collectively to these prayers as 'the constitutional relief.'

[422] An application for appropriate relief in constitutional matters is not controversial. There is a long list of cases[114] in which both the Constitutional and High Courts have considered the type of remedy which is appropriate in cases where

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[114] See, for example, *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC); *TAC* ; *Sibiya and others v Director of Public Prosecutions, Johannesburg, and others* 2005 (5) SA 315 (CC); *Nyathi v MEC for the Department of Health, Gauteng and another* 2008 (5) SA 94 (CC); *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009 (4) SA 222 (CC); *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Social Security Agency and others* 2014 (4) SA 179 (CC); *Mwelase and others v Director-General, Department of Rural Development and Land Reform and another* 2019 (6) SA 597 (CC); *S v Z and 23 similar cases* 2004 (4) SA BCLR 410 (E); *Strydom_v Minister of Correctional Services and Others* 1999 (3) BCLR 342 (W) and *Kiliko and Others v Minister of Home Affairs and Others* 2007 (4) BCLR 416 (C).

there has been a breach of a party's constitutional obligations, and have granted, inter alia, supervisory interdicts to ensure adequate compliance with orders of invalidity. The courts have stressed the need for an effective remedy in such circumstances, the point of departure being s172(1) of the Constitution, which is to the following effect:

'**172. Powers of courts in constitutional matters.**

(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.'

[423] In *Fose*[115]Ackerman J set the jurisprudential context for an order under s172:'

'[W]ithout effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.'

[424] In *TAC*, when confronted with an argument that it lacked the power to grant a supervisory interdict, the Constitutional Court did not hesitate to hold otherwise, mindful of the contention that it might be said to be in breach of the separation of powers principle:

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[115] Para 69.

'[99] The primary duty of Courts is to the Constitution and the law, "which they must apply impartially and without fear, favour or prejudice". The Constitution requires the State to "respect, protect, promote, and fulfil the rights in the Bill of Rights". Where State policy is challenged as inconsistent with the Constitution, Courts have to consider whether in formulating and implementing such policy the State has given effect to its constitutional obligations. If it should hold in any given case that the State has failed to do so, it is obliged by the Constitution to say so. Insofar as that constitutes an intrusion into the domain of the Executive, that is an intrusion mandated by the Constitution itself . . .

"[106] We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a Court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction . . .

[113] South African courts have a wide range of powers at their disposal to ensure that the Constitution is upheld. These include mandatory and structural interdicts. How they should exercise those powers depends on the circumstances of each particular case. Here due regard must be paid to the roles of the Legislature and the Executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, Courts may – and, if need be, must - use their wide powers to make orders that affect policy as well as legislation.' (Internal references omitted)

[425] In his final judgment delivered in the Constitutional Court, *Mwelase*, Cameron J grappled with the separation of powers principle and the impact that an order under s172 may have on it. By way of summation the learned Justice ultimately had the following to say in respect of the powers granted to a court under s172:

'[65] This court has held that the Labour Court, although not expressly so invested, enjoys jurisdiction to strike down a statute on the ground of constitutional invalidity. By parallel reasoning, it follows that the Constitution affords the Land Claims Court extensive powers, when deciding a constitutional matter within its power, to "make any order that is just and equitable". Any order that is just and equitable! That is no invitation to judicial hubris. It is an injunction to do practical justice, as best and humbly, as the circumstances demand.

And it is wrong to understate the breadth of these remedial powers, as Madlanga J eloquently reminds us in *Mhlope*:[116]

> "The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do."' (Internal references omitted.)

[426] When considering these *dicta* it is important to bear in mind the distinction between the powers given to a court under ss172(1)(a) and (b). In terms of the former the court is obliged to ("must") grant a declaration of inconsistency with the Constitution in the event that the conduct of an organ of state is in breach of its constitutional obligations. S172(1)(b), on the other hand, is cast in wide and discretionary terms ("may") and the relief which may be granted thereunder is, to repeat the words of Cameron J in *Mwelase* and Madlanga J in *Mhlope*, to 'ensure practical justice' and to 'afford an equitable remedy' to the litigants before the court.

[427] In *Rail Commuters*[117] O'Regan J explained the distinction as follows:

'[106] I have concluded that Metrorail and the Computer Corporation bear an obligation in terms of the SATS Act interpreted in the light of the Constitution to ensure that reasonable measures are taken to provide for the safety and security of rail commuters on the rail commuter service they operate. In this Court, they both denied that they bore such an obligation. The first form of relief that is sought by the applicants is declaratory. Section 172(1)(a) of the Constitution states that this Court must declare "any law or conduct that is inconsistent with the Constitution" to be invalid to the extent of its inconsistency. It is a special constitutional provision, different to the common-law rules governing the grant of declaratory orders. It does not mean, however, that this Court may not make a declaratory

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[116] Para 83.

[117] *Rail Commuters Action Group and others v Transnet Ltd t/a Metrorail and others* 2005 (2) SA 359 (CC). The case involved the safety of rail commuters using the suburban train services provided by Metrorail.

order in circumstances where it has not found conduct to be in conflict with the Constitution. Indeed s38 of the Constitution makes it clear that the Court may grant a declaration of rights where it would constitute appropriate relief:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

Unlike under s172(1)(a), the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief. The principles developed at common law, and under the provisions of the Supreme Court Act,[118] will provide helpful guidance to consider whether such a declaratory order should be made, though of course the constitutional setting may at times require consideration of different or additional matters.

[107] It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declarator, a court will consider all the relevant circumstances.

[108] It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.

[109] In this case, Metrorail and the Commuter Corporation denied, in error, that they bore obligations to protect the security of rail commuters. Given the importance of that obligation in the context of public rail commuter services, it is important that this court issue a declaratory order to that effect. The applicants also sought an order in which this Court would put Metrorail and the Commuter Corporation on terms to take steps to implement that order. While such an order is no doubt competent, I am not persuaded that it is an appropriate order

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[118] Since repealed and replaced by the Superior Courts Act, 10 of 2013.

in the circumstances of this case. There is nothing to suggest on the papers that Metrorail and the Commuter Corporation will not take steps to comply with the terms of the order.' (Internal references omitted.)

[428] In Footnote 100 of *Rail Commuters* O'Regan J refers to the judgment in *Islamic Unity*[119] where Langa DCJ explained the difference between the common law and constitutional approach to a declaration of rights:

'[9] In terms of s19(1)(a)(iii) the High Court has the power, in its discretion, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that the person seeking the order cannot claim any relief consequential upon the determination. In this case the applicant sought an order declaring that clause 2(a) is inconsistent with s16(1) of the Constitution and without force or effect. The High Court was not being asked to "enquire into and determine" applicant's rights, but to exercise its powers in terms of s172(1)(a) of the Constitution and to declare clause 2(a) invalid.

[10] A Court's power under s172 of the Constitution is a unique remedy created by the Constitution. The section is the constitutional source of the power to declare law or conduct that is inconsistent with the Constitution invalid. It provides that when a Court decides a constitutional matter, it *must* declare invalid any law or conduct inconsistent with the Constitution. It does not, however, expressly regulate the circumstances in which a Court should decide a constitutional matter. As Didcott J stated in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1997 (3) SA 514 (CC) para 15]:

> "Section 98(5) [of the Interim Constitution] admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration."

[11] In determining when a Court should decide a constitutional matter, the jurisprudence developed under s19(1)(a)(iii) will have relevance, as Didcott J pointed out in the *JT Publishing* case. It is, however, also clear from that judgment that the constitutional setting

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[119] *Islamic Unity Convention v Independent Broadcasting Authority and others* 2002 (4) SA 294 (CC).

may well introduce considerations different from those that are relevant to the exercise of a Judge's discretion in terms of s19(1)(a)(iii).' (Internal references otherwise omitted.)

[429] Against that jurisprudential backdrop counsel for RTC advanced their argument in favour of the constitutional relief as follows. Firstly, it was argued that the housing programmes implemented by the Province and the City since the commencement of the constitutional era have not been balanced and flexible, having made no provision for a significant segment of society to progressively realise the right to housing under s26 of the Constitution. That significant segment was defined as that group of people in need of affordable housing (as opposed to RDP/BNG housing) in central Cape Town.

[430] Then it was said that there had been a significant break-down in relations between the Province, on the one hand, and the City and the DHS on the other, as regards the provision of affordable housing in and around central Cape Town ('CBD and surrounds'). Lastly, it was contended that both the City and the Province had failed to discharge their respective obligations to implement reasonable programmes by providing for access to land to enable the delivery of social housing by SHI's.

[431] Drawing on the authorities referred to above (and others) counsel submitted that there were some distinct themes that emerged. In the first place, it was observed that all of the cases referred to involved vulnerable groups of people, such as refugees, the homeless, children and social grant beneficiaries. Next, it was noted that in a number of instances there was serial non-compliance by the relevant organs of State with their respective constitutional obligations, a refusal to act on recommendations, or a well-held expectation that the organs of State in question would fail to abide by or comply with a court order.

[432] Finally, counsel submitted, in all the situations that had been referred to there was no easy or immediate solution to address the unconstitutional state of affairs – substantial compliance was likely to take time. To attain that goal existing practices would need to be revisited, reconsidered, replaced where necessary and then implemented under judicial supervision. This, it was said, was the only practical

means to ensure that the constitutional breach would be rectified as promptly as possible.

[433] Turning to the facts at hand it was submitted, firstly, that the individuals most directly affected by the failure of the state to make affordable housing available in central Cape Town, were vulnerable people. Referring to certain of the applicants it was pointed out that, for example:

433.1. Ms. Adonisi worked as a nurse at a hospital in the CBD and lived in degrading conditions in the basement of a block of flats;

433.2. Ms. Ntutela, who had lived and worked in Sea Point for 25 years before being forced out through poor health to Nyanga (a township on the periphery), was the mother of a learner who had to travel a long distance to attend her school of choice, Sea Point High;

433.3. Ms. La Hane, a 71-year-old pensioner and a former resident of Wynyard Mansions, had lived in Sea Point since 1974 before being relocated to Sanddrift, some 15km away, and whose grandchildren (for whom she cared) attended schools in the inner-city.

Indeed, the plight of loyal domestic workers, carers and employees in the service industry and the like, in and around Sea Point, with respect to adequate accommodation, is long-standing and pervasive.[120]

[434] The next point advanced on behalf of RTC was that both the Province and the City had, for the better part of 25 years, disregarded their obligations to address spatial apartheid and injustice. In fact, it was said that these spheres of government were party to policies which had exacerbated the problem. It was said that the problem was so extensive and entrenched, that there was no quick-fix solution and the attainment of full compliance with the constitutional injunctions was likely to take a

[120] *Berman Brothers Property Holdings (Pty) Ltd v Madikana and others* [2019] 2 All SA 685 (WCC).

long time. The Court was thus urged to craft a suitable remedy so as to enable RTC to hold the authorities to account.

[435] Mr. Hathorn SC stressed that the purpose of the supervisory relief was to ensure that the right of access to adequate housing, by persons who qualified therefor, was realised on a progressive basis in central Cape Town. He said that RTC did not ask for a detailed and intrusive mandatory interdict, nor did it want the Court to prescribe to the Province or the City how to discharge their constitutional obligations. Relying on s237 of the Constitution[121] counsel stressed that the applicants merely wished to ensure that effective measures were implemented without undue delay.

THE SOURCE OF THE CONSTITUTIONAL OBLIGATIONS RELIED ON BY RTC

[436] At a more general level, RTC bases its application on the approach to the pursuit and vindication of socio-economic rights traversed in the early part of this judgment. Cases such as *Grootboom* and *Mazibuko* provide the foundation to this argument and I will not repeat the *dicta* already cited.

[437] Turning to the applicable legislative and policy instruments, RTC commences its attack under ss25 and 26 of the Constitution, and the rights which devolve therefrom in the Housing Act, the SHA and SPLUMA. The applicable policy instruments are said to include the National Urban Development Strategy of 1995, the DHS' Urban Development Framework of 1997, the WCPDP of 2010, the Provincial SDF of 2014, the City's Guide for Spatial Development of 1996 and the City's SDF of 2012.

THE PROVINCE'S OBLIGATIONS

[438] As I attempted to demonstrate earlier, with reference to the affidavit of Ms. Gooch, the Province was alive to the problem of spatial apartheid and its obligation to promote racial integration within, inter alia, the wider metropolitan area of the City. Of

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[121] '**Diligent performance of obligations**

237. All constitutional obligations must be performed diligently and without delay.'

course the Province's obligations were not limited to the City – it has responsibility for towns and villages in the rural areas of the Western Cape too. But for present purposes the Court needs only to focus on the Metro.

[439] Conceding that it has an obligation to address past imbalances, and that these are nowhere near to being redressed, the Province seeks refuge for its shortcomings in the very words of the Constitution, by stressing that this ideal can only be realised progressively, the implication being that it will hopefully get there in time. This approach has to be considered in the context of the opening remarks of Mr. Fagan SC in his address to the Court, which were to the effect that the Province has limited budgetary resources available to it and that it has to allocate its funding from National Government carefully. I pause to remark *en passant* that these submissions were made in a pre-COVID 19 world, and I have little doubt that the reallocation of resources into the health sector currently will be said to constitute a major drain on the Province's resources.

[440] But what is of concern about the approach of the Province, is the apparent disharmony one sees between the frank admissions of its departmental functionaries (such as Ms. Gooch from the DTPW and the erstwhile HOD in the PDHS, Mr. Mguli) as to the necessity for a programme addressing affordable housing generally, on the one hand, and on the other hand, the uncompromising attitude of its political functionaries that there is no room for poor people in central Cape Town ('no RDP in the CBD'), notwithstanding the plea from a Cabinet colleague (Mr. Madikizela) for a move in that direction.

[441] The official line from the Province bears the hallmark of the entrenchment of apartheid spatial planning and a seemingly blunt refusal to engage with the problem. This is highlighted by the pursuit of an enormous sum of money at all costs, ostensibly to address 'social imperatives', but in truth to erect a new building in the Provincial Precinct of the CBD in partnership with a private investor.

<u>THE CITY'S OBLIGATIONS</u>

[442] Turning to the City, there are candid admissions in the evidence of Mr. Mbandazayo that the City recognises that it is confronted with a highly fragmented society, which continues to exist along racial lines, and that the footprint of apartheid still stretches far and wide. Tellingly, Mr. Mbandazayo accepts that the City has fallen short in this regard.

[443] In her address to Court, Ms. Bawa stressed that the City found itself between a rock and a hard place. It wanted to promote social housing as a component of its overall housing service delivery, but was often having to deal with issues at the periphery where there was a constant clamour for land from the poorest of the poor who required land for informal settlements, not to mention the regular land-grabs of vacant ground which have seriously imperilled the orderly development of informal and low-cost housing.

[444] I do not think it would be unfair to the parties to say that social housing, which after all only became a constitutional imperative with the passing of the SHA in September 2009, has not featured high up on anyone's to-do list. On the other hand, to seek to hold the parties to account for their non-compliance with SPLUMA is unfair, given that that statute only came into operation in 2015, which is really towards the end of the Tafelberg disposal process. But SPLUMA is the very legislation that seeks to advance the breaking down of the barriers of apartheid spatial planning, and both the Province and the City are duty bound to implement it to the best of their abilities. While they may not have done so in the past, they are obliged to do so, both presently and in the future

[445] In summary then, it is fair to say that the framework legislation is in place, at both provincial and municipal level, for consideration of a programme aimed at advancing social housing under the SHA, and that all spheres of government (including national government which owns vast tracts of land close to the CBD) need to shoulder responsibility therefor in advancing the rights of the poor under ss25 and 26 of the Constitution.

A CHANGE OF POLICY ON THE PART OF PROVINCE?

[446] It would appear that the public interest engendered by the focus on the sale of the Tafelberg site, might have spurred some parties on to re-assess their stance on the provision of affordable housing in and around central Cape Town. For example, while the Province has set its face against the development of the Tafelberg property for affordable housing, it has started talking about the development of other areas in that regard.

[447] First, there is the Somerset Hospital precinct (which incorporates the Helen Bowden Nurses Home Site[122]) which is said to be an area which offers development opportunities for mixed-use housing, which will be financed by cross-subsidisation. That much is evident from para 1.3 of the Cabinet decision of 22 March 2017 which is repeated for the sake of convenience:

'1.3 The prior decisions of Cabinet on 22 March 2017 in relation to the proposed use and/or disposal of the Woodstock hospital site and the Helen Bowden Nurses Home site (both within the metro) as contained in the presentation by DOTPW in this regard. More specifically the request by Cabinet that any proposed disposal and/or use of the Woodstock site (in whole or in part) be referred to Cabinet so as to enable it to ensure that affordable housing is best achieved on that site given its locality and size. Similarly with respect to the Green Point Helen Bowden site, that any RFP that is developed contain within it the requirement for the maximum quantum of affordable housing as will make the development of the site viable.'

[448] In addition, in para 1.5 (which has been set out above) the Cabinet made non-specific reference to the promotion of social housing, while at the same time expressing financial concerns that allegedly plagued such developments.

[449] The EOI document issued under the WCPDP in March 2014 referred to the intended release of provincial state land for development purposes in and around the CBD. Reference was made therein to the Alfred Street Complex, Top Yard, Helen Bowden and the Tafelberg site, all of which were said to present property

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[122] Helen Bowden is a disused nurses' home adjacent to the Somerset Hospital on the western periphery of the V&A Waterfront and appears currently to be unlawfully occupied.

development opportunities under specific criteria, one of which was that the Province would retain ownership of the land. And yet we know that the Province did not abide by that criterion when it sold the Tafelberg site. Tellingly, it has never explained this change of policy. The EOI also stated that, at that stage, the Province owned further properties in and around the CBD, and that these would be released incrementally for development. Unfortunately, we do not know the current status of these proposals.

THE CITY'S APPROACH TO AFFORDABLE HOUSING

[450] Considering the affidavit of Mr. Molapo it is apparent that the City's approach to social housing is more advanced than that of the Province. By way of introduction, Mr. Molapo gives the following background information:

'**B. SOCIAL HOUSING, HOUSING AND THE CITY**

11. The purpose of social housing is to provide good quality rental housing at rentals affordable to people earning low to medium incomes. Through this process, social housing will contribute to the economic, social and spatial integration of the City.

12. Over the past 20 years the City has developed and maintained in conjunction with social housing institutions ("SHIs") and other government entities mixed income and/or fully subsidised social housing developments. In fact the City's programme preceded the [SHA].

13. Currently, the social housing programme is directed at developing affordable rental accommodation in areas where bulk infrastructure (sanitation, water, transportation) may be under-utilised, and as such improving urban efficiency. It is aimed at households with income levels between R1500 and R15000 (depending on the particular development).

14. As is apparent from the affordable housing prospectus, annexed to the third respondent's answering affidavit marked "LDK15", the City seeks to leverage the land which it has available - being those well-located parcels of development land - and to open them up to the social and affordable housing development companies so that they can develop these areas and provide a range of affordable housing opportunities

to residents in the City who qualify. Invariably this will be housing apartments / high density flats that are built generally on City-owned or State-owned land, in partnership with City-accredited SHIs. It will also include gap housing, as well as other housing options to cater for different income bands so that they may be provided with housing opportunities.

15. The City endeavours to create the conditions for the SHIs to carry out their functions in the social housing sector. In addition, to incentivise development, the City will offer a waiver or reduction in development charges; discounted land costs; waving of planning and building charges; rates exemption or rebates; and, assistance with the necessary planning approvals process. The success thus of this approach is dependent on how SHIs are able to undertake the contemplated developments.'

[451] Mr. Molapo then highlights a number of affordable housing projects which the City has facilitated since 1990, including a number of properties which were the subject of land claims. Some of these have been referred to earlier. He also points out that the City regards an area such as Maitland as part of the 'CBD and surrounds' and refers to a social housing project which was being implemented there at the time that he deposed to his affidavit in July 2018.

[452] Mr. Molapo further refers the Court to various tracts of land in and around the City which are suitable for housing in general, and affordable housing in particular. He illustrates how the co-operation of national and provincial government is critical to the release of these parcels of land for development and the problems encountered by the City in that regard:

'16.7 In the 1990s the military scaled back its operations leaving land identified as Erf 81 Tamboerskloof, vacant. The owner of the land is the national Department of Defence. It is an inner-City site ideally suited for affordable housing, including social housing. A pre-feasibility assessment has been undertaken and shared with the national Department of Public Works ("DPW") and has been endorsed by the Planning and Environment Portfolio Committee. Despite being placed on the agenda for attention of the Intergovernmental

Working Group ("IWG")[123] the matter has not been concluded and this group has now become defunct. In 2015 the Human Rights Commission was even asked to assist but this has not resulted in the land being made available for housing. This is one of the issues in relation to which the City would welcome the intervention of the National Minister of Human Settlement in any intergovernmental process as the lack of land being released for affordable housing is the biggest impediment to such being developed.

16.8 . . .

16.9 The City purchased land from Propnet/Transnet for inclusion with adjoining City land for the much anticipated "Salt River Market" mixed use development, including social housing. This process commenced in 2012. Proposals were received by the closing date of 27 February 2018. Communicare is the recommended SHI and the process is currently being finalised.'

[453] Later in his affidavit, Mr. Molapo refers to the problem of access to state-owned land"

'89. One of the perennial difficulties which the City faced in attempting to obtain land from other organs of state is a lack of recognition that it is as equally important to allocate land for housing as it is for other governmental objectives, irrespective of the location of the land and the value of the land.

90. In the context of social housing, in the long term it would mean that the housing stock is available to poor households in perpetuity so the cost incurred is to be taken into account over generations of households and not simply the short term. There are also issues of short-term costs versus long-term costs and one of the factors that is taken into consideration relates to transport subsidies for households having to commute for long distances to work opportunities, as well as the socio-economic and environmental costs perpetuating those patents.'

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[123] The witness points out that the IWG was established in 2013 by the national Director-General of Public Works and was specifically tasked to fast-track the release of vacant and under-utilised public land for development.

[454] In relation to unsuccessful endeavours by the City to obtain access to the large stretches of unproductive land which are located close to the CBD and beyond, Mr. Molapo refers to the following sites"

'92.1 In respect of the Culemborg site[124] which is owned by Transnet an extensive planning exercise has been undertaken by Transnet to consider the possibility of the redevelopment of the entire precinct. The City has participated therein advocating that a significant portion thereof be used for social housing but to date it does not form part of Transnet's plans for the land.

92.2 In relation to Wingfield[125], which is regarded as a large under-utilised piece of State land. Depending on which assumptions are accepted, this ranges from 90 to 152 ha. It is held by DPW and partially used by the South African National Defence Force. It has the ability of yielding between 10 000 to 17 000 housing opportunities together with supporting land uses. The City has made several efforts over a considerable number of years to obtain access to this land for housing. There have been a number of formal requests to the national government. Property valuations have been conducted, site planning exercises and motivations for its release. (sic) Its use after the Olympic Games (as then proposed by the then Olympic Bid Proposal) would have resulted in 5000 low income housing units. In 2009 a formal request to the Housing Development Agency . . . was made to unlock it for housing development. In 2014 a renewed request was made to the DPW via the Intergovernmental Task Team ('IGTT") . . .

92.3 Erf 1117 in Table View[126] is 104 ha in size and owned by the DPW. It is in the centre of a fast-growing urban corridor. Repeated efforts have been made by the City to have access thereto for purposes of creating housing opportunities. An informal area known as Happy Valley is located thereon which requires services. A formal request has been made to

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[124] This is a vast stretch of redundant railway land which runs adjacent to the area south of the N1 freeway in the vicinity of the junction with the N2 on the Foreshore.

[125] This is a large stretch of under-utilised land to the south of the N1 freeway in the vicinity of the interchange with the N7. It was earmarked, at one stage, for the location of an Olympic village and stadium when Cape Town lodged its failed bid to host the 2004 Olympic Games.

[126] This is a suburb located on the eastern shore of Table Bay near Bloubergstrand and adjacent to the R27 West Coast Road.

the DPW via the IGTT, but to date there had (sic) been no formal decision made by the national government in relation to the release of this land.'

[455] The evidence on behalf of the City thus establishes that there is a significant surfeit of under-utilised state-owned land, both in close proximity to the CBD and further out. Mr. Molapo bemoans the red tape which the City has repeatedly encountered in attempting to gain access to such land and also alludes to the cost thereof as one of the perennial stumbling blocks:

'18 The City has no difficulty with the approach of using appropriate state owned land, where it is made available, or where the City can purchase available land for social housing purposes, as well as other associated spatial integration goals for the municipality at large. In fact, the City will welcome any land which is suitable for such purposes, and it is for that reason that the Executive Mayor[127] indicated that if the City were given the Tafelberg site it would develop the site (or part thereof) for social housing. But not at a cost to the City of R135 million for the land as this would be to the detriment of other services.'

[456] Mr. Molapo is critical of the Province's Regeneration Programme, and in particular of the fact that the City's involvement therein was limited to the furnishing of technical input, such as planning advice:

'44 . . . There was no purpose served for the City to request that any of the land which formed the subject matter of the Regeneration Programme be transferred to the City for any municipal purpose, or even that it be reserved for social housing, given the objectives of the Regeneration Programme.'

He also observes that the City was not consulted by the Province in relation to its intention to dispose of the Tafelberg site at market value, the implication being that the City would have preferred a different method of valuation so as to enable it to consider acquiring the property and establishing a social housing project in Sea Point.

[457] Mr. Molapo's 35-page affidavit is thorough and detailed, but for the avoidance of further prolixity I shall limit further reference thereto. Suffice it to say that the City

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[127] The witness was referring to Ms. Patricia de Lille.

says that, in respect of the Tafelberg site, it was led to believe at an early stage of the disposal process that the Province was seriously considering an affordable housing option there. Yet, in about 2012/13, says Mr. Molapo, it appeared to the City that there was an inexplicable shift in approach on the part of the Province in which, to use the mixed metaphor employed by Mr. Jamie SC, 'the carrot was the cash.'

[458] This deviation by the Province from its stated intent, said Mr. Molapo, led to the City abandoning any further interest in Tafelberg:

'57. The City was not consulted prior to the provincial DHS withdrawing its request for the Tafelberg site. I was not aware that this reservation had been withdrawn until some considerable time thereafter.

58. However, once it was clear that a tender would be issued, I alerted the respective SHIs to prepare themselves for these tenders if they were interested, and to identify private sector partners and make joint ventures, so that they may be in a position to meet the provincial DTPW's anticipated requirements.

59. There was thus no point in the City pursuing the Tafelberg site for its objectives because if the provincial DTPW was not prepared to make it available at the request of the provincial DHS, it was not likely to do so at the request of the City. Besides which, it was not one of the sites that the City had budgeted to purchase especially not at the price it would obviously realise on the open market. This is a difficulty faced in relation to all of land located near the CBD when sold in the open market.'

[459] In RTC's supplementary founding affidavit Ms. Adonisi refers to various remarks made in 2017 by the erstwhile Executive Mayor of Cape Town, Ms. Patricia De Lille, suggesting that the City had had a change of heart in respect of apartheid spatial planning. She attaches to that affidavit, inter alia, statements made on 13 September 2017 by Ms. De Lille and the City's erstwhile Mayoral Committee ("MAYCO") Member for Transport and Urban Development, Mr. Brett Herron, both of which proclaimed a new dawn in respect of the City's commitment to affordable housing.

[460] Ms. De Lille's statement included the following remarks:

'The City has turned the corner in its approach to affordable housing and to reversing the legacy of apartheid spatial planning and forced removals which saw the majority of Capetonians of colour moved to settlements away from the inner-city, excluding them from economic opportunities.'

[461] In a further annexure to the supplementary founding affidavit Ms. Adonisi refers to an interview with Mr. Herron conducted by an NGO called 'GroundUp' in October 2017. In the interview Mr. Herron was asked to comment on the statement which he had made on 13 September 2017, to the effect that the City had made a '180-degree change in its approach to affordable housing.'

[462] Mr. Herron's response is recorded as follows.

'Since 1994, like most other local governments in South Africa, Cape Town focused on delivering the maximum possible number of housing opportunities. This usually meant building RDP settlements where it was easiest to do so: large, cheap pieces of land on the outskirts of the city. While important, this did not address the spatial legacy of apartheid, and actually perpetuated exclusion. The shift is that we are starting to consider the location of what we are providing and cater for people overlooked by previous housing policies.'

[463] When asked by GroundUp what had prompted this shift, Mr. Herron explained:

'We've spoken about the legacy of apartheid planning for a long time, and made commitments to address it, but those commitments have fallen short in pursuit of high numbers of low-cost housing. But where development takes place, and what development takes place, needs to change if we are to have a more equitable, efficient city. After the 2016 local elections Mayor De Lille pledged to tackle Cape Town's apartheid spatial legacy, and we've taken a number of steps to do so since then, notably adopting the Transit-Oriented Development (TOD) Strategic Framework and forming the Transport and Urban Development Authority (TDA), the institution driving this new process.'

[464] When GroundUp asked Mr. Herron why it had taken the City so long to take action in relation to well-located affordable housing, he replied as follows:

'That's hard to answer. I'm not sure. The parcels of land that we've just released are City owned, and always were. It wasn't a difficult process. I think the focus was just on providing high numbers on the outskirts, like I've said.'

This explanation was echoed by Ms. Bawa SC in her address to the Court.

[465] And to a suggestion that the City had made an about-turn as a consequence of pressure from, inter alia, RTC, Mr. Herron had the following to say:

'We had already begun moving in this direction, but we must give them credit for introducing public debate around affordable housing in Cape Town and raising awareness about the issue.'

[466] In the City's answering affidavit Mr. Mbandazayo takes issue with the issue of the alleged change of direction on the part of the City, stating, like Mr. Molapo, that affordable housing had long been part of the City's housing agenda. The difference, however, between the City and the Province seems to be that the City owns limited tracts of land in central Cape Town and surrounds, whereas the Province has far greater access to state-owned land which can be utilised for affordable housing.

EXCURSUS: THE INVOLVEMENT OF MS DE LILLE

[467] The papers show that, as mayor, Ms. De Lille was vocal in her support for affordable housing in the City. For example, on 6 February 2014 she personally wrote a letter to the erstwhile Head of State, President Zuma, entitled 'The Provision of Low Cost Housing in Cape Town'. In that document Ms. De Lille drew the President's attention to the shortage of suitable available land for housing in the City and referred to two stretches of land owned by the South African National Defence Force, *viz.* Wingfield and Youngsfield.[128] Assuring the President that:

[128] This is an old military base located to the east of the M5 motorway close to the southern suburb of Ottery.

'The City of Cape Town is committed to the provision of decent housing and the creation of vibrant, integrated human settlements. The release of over eighty-seven hectares for the express purpose of housing provision would go a long way to fulfilling this objective, in line with defined national human settlement outcomes. It needs to be further emphasised that these two land parcels [are] close to transport routes, economic opportunities and a range of other government services such as schools and medical facilities, . . .'

and that:

'This matter is becoming increasingly urgent as the City is currently engaging with a variety of community, party political and other organisations, who are growing increasingly impatient with the delay over the finalisation of the future use of these two land parcels. On such occasions we are pains (sic) to emphasise the proactive steps the City has taken in an attempt to release this land for housing, and have stated that the decisions ultimately rests (sic) with national government.'

Ms. De Lille urged the national government to facilitate the speedy release of these parcels of land. It is obvious that her plea fell on deaf ears.

[468] As the affidavit of Mr. Molapo demonstrates, Ms. De Lille was a proponent of an affordable housing option at Tafelberg and in February 2017 pledged the support of the City in that regard. At the time that she was the Executive Mayor of the City, Ms. De Lille was a member of the Democratic Alliance. In October 2018 Ms. De Lille left the Democratic Alliance, and formed the Good Party in December 2018. In May 2019, as a member of that party, she was appointed as the Minister of Public Works by President Ramaphosa[129] and still holds that post in the National Cabinet. For the sake of good order I should point out that Mr. Herron also left the Democratic Alliance and joined the Good Party in December 2018. He is the Secretary-General of the party and now serves as a member of the Western Cape Provincial Legislature.[130]

[469] Ms. De Lille is thus effectively the seventh respondent in the RTC application. She did not occupy that post when this litigation commenced and the erstwhile

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[129] Mail & Guardian Online (30 May 2019): "*How Auntie Patty became Minister De Lille".*

[130] www.brettherron.co.za

Minister of Public Works did not seek to respond to, or intervene in, this matter. No order is sought by RTC against the Minister of Public Works and no order can thus be made against that office. But Ms. De Lille is presently *ex officio* in a position to give consideration to (and even promote) the outcome of the demands she made of President Zuma – not only in respect Wingfield and Youngsfield, but also in respect of the Military Road site in Tamboerskloof and the various other parcels of land held by the DPW in and around the CBD (e.g. Top Yard and Alfred Street), which Mr. Molapo considered might be utilised for affordable housing.

[470] I have specifically made reference to the seventh respondent in the RTC application because it is clear from, inter alia, Ms. De Lille's letter to President Zuma, and Mr. Molapo's affidavit, that the national Department of Public Works has a key role to play in any future affordable housing development in the City in securing the release of under-utilised state-owned land. These are of course matters for consultation on issues of common interest between the various spheres of government and no court can prescribe to the relevant departments how they should engage with each other – that would violate the separation of powers doctrine. But, as the earlier discussion of Chapter 3 of the Constitution and the statutory obligations under the Housing Act and the SHA demonstrate, co-operation and consultation on matters of mutual interest under s41(1)(h) of the Constitution are constitutional imperatives which a court can enforce, under IGRFA, in the event that organs of State fail to comply with their obligations when called upon by one another to do so.

IS AN ORDER UNDER S172 WARRANTED IN THE PRESENT CASE?

[471] I referred above to *TAC*[131] where the basis for the consideration of appropriate relief in constitutional cases was discussed by the Constitutional Court. The *ratio* of the judgment is clear: where a court is satisfied that an organ of state has failed to give effect to its constitutional obligations, the Constitution enjoins the court to say so. Such a situation might arise where the court finds, for instance, that the substance of a particular policy is unreasonable or that the implementation thereof by such organ is

[131] Para 99.

unreasonable, in which event the court must make a declaratory order under s172(1)(a). But, the court may also consider granting relief under s172(1)(b), which might include a supervisory interdict either together with, or independent of, such a declaratory order.

[472] In *Grootboom* Yacoob J summarised the position as follows:

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

[473] What is the constitutional right that has allegedly been infringed here? Counsel, for both the Province and the City, argued that an individual (or a group for that matter) did not have a right to demand that the State provide it with social housing in central Cape Town or its surrounds. That submission is correct as a general proposition, but it seems to me to miss the point. As the Constitutional Court noted in *Mazibuko* [132] (with reference to *Grootboom*) what the court considers when there is a challenge in respect of a socio-economic right, is the obligation imposed on the State to take reasonable legislative and other measures progressively to realise the right in question, *in casu*, the right afforded under s26 to adequate housing.

[474] In *Grootboom* the position was explained thus with specific reference to the s26 right:

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[132] Para 46 *et seq.*

'[35] The right delineated in s26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant.[133] This difference is significant. It recognises that housing entails more than bricks and mortar. It requires 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, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in s 26. **A right of access to adequate housing also suggests that it is not only the State who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The State must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.** (Emphasis added)

[36] In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the State's primary obligation lies in unlocking the system, providing access to housing stock and a legislative framework to facilitate self-built houses through planning laws and access to finance. Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups. The poor are particularly vulnerable and their needs require special attention. It is in this context that the relationship between ss26 and 27 and the other socio-economic rights is most apparent. If under s27 the State has in place programs to provide adequate social assistance to those who are otherwise unable to support themselves and their dependents, that would be relevant to the State's obligations in respect of other socio-economic rights.

[37] The State's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural

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[133] This is a reference to the International Covenant on Economic, Social and Cultural Rights to which the *amicus curiae* referred the Court in that matter.

area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.

[38] Subsection (2) speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However ss(2) also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined by three key elements that are considered separately: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources".' (Original text's internal references omitted.)

[475] How is this *ratio* in *Grootboom* applicable to the instant case? As Mr. Hathorn SC pointed out, the State has discharged its legislative duty under s 26(2) by passing the Housing Act (as the primary statutory instrument) and the SHA (which targets a large and clearly defined group of working people who earn between R5000 and R15 000 per month), so as to afford that group the right to pursue access to affordable housing.

[476] The next question is whether the executive arm of state (in this case the Provincial Cabinet) has put in place suitable policies to enable the beneficiaries of the rights afforded under the SHA to assert access to those rights. As the evidence unequivocally establishes, the answer to that question must be a firm 'No'. At the time this application was launched by RTC, there was no policy put in place by the Province to enable working people to access affordable housing under the SHA, whether in central Cape Town 'and surrounds' or elsewhere in the Metro. I do not include the City in this part of the debate because, while it does attract obligations under the SHA, it does not have functional competence in regard to housing: that is the obligation of the national and provincial spheres of government.

[477] Has the Province offered any reasonable explanation for its failure to implement the provisions of the SHA, which specifically saddles it with such an obligation? The only reason that it seems to advance (through Ms. Gooch in the answering affidavit) is that the right is achieved progressively over time, and that the Province has not yet arrived at that point in time. In argument, Mr. Fagan SC took the

point further by referring to the Province's limited resources, and the importance of its obligations to fund health and education in the Province.

[478] The limitation on provincial funding allocated by National Treasury, however, is no reason not to draw up a policy in respect of affordable housing, so as to at least have a blueprint to begin with. Further, given the Province's access to land in central Cape Town and beyond, and its obligation to promote spatial justice through the integration of the city's neighbourhoods under, inter alia, SPLUMA, there is every reason to demand of it that it plan for the future and draw up such plans and policies. As Mr. Hathorn SC stressed in his reply, the progressive realisation of the right to affordable housing is further infringed when the Province expressly precludes any access to such a right in the CBD, as Mr. Carlisle so bluntly put it in his discussion with Mr. Kramer in April 2014, and which Mr. Grant confirmed a couple of months later.

[479] Whether the measures taken by both the Province and the City in relation to the progressive realisation of that right are reasonable will, according to *Grootboom*, be determined by context. That context includes considerations such as:

479.1. The fact that the CBD is the economic hub of Cape Town, where a vast number of its working class residents earning in the requisite salary band for affordable housing are employed;

479.2. The lack of an adequate railway service and inadequate public transport which working people must use to travel to work in the CBD;

479.3. The extensive travelling time required and expense which such people are put to in order to earn relatively modest salaries in the CBD;

479.4. The scarcity of affordable land in the CBD for the purposes of affordable housing development;

479.5. The availability of a sizable immovable property portfolio which the Province owns, or can access via national government, and utilise;

479.6. The historical anomaly that today central Cape Town is less diversified that it was 50 years ago under apartheid, when areas such as District 6, De Waterkant/Loader Street, Woodstock and Salt River were reserved for occupation by Coloured and Indian people;

479.7. The fact that Cape Town is generally recognised as one of the most spatially divided cities in the world; and

479.8. The admissions by both the Province and the City that they have not made provision for such policies.

[480] Considering the evidence presented by all sides – RTC, the Province and the City – it is evident to this Court that the Province's policies in relation to the reversal of apartheid spatial planning, and the promotion of social housing are, to all intents and purposes, non-existent. Indeed, counsel for the Province was unable to refer the Court to any clear policy in that regard. To be sure, a policy which provides for affordable housing in and around central Cape Town, taking into account, inter alia, the provisions of the Housing Act, the SHA and SPLUMA, will contribute materially to the breaking down of the barriers left behind by apartheid spatial planning.

[481] As I have said, while the Province acknowledges that it is obliged to address apartheid spatial planning and also to promote affordable housing, its policies, generally, in relation to the use of land available to it are haphazard and reactive, and ultimately lack rationality. Similarly, the absence of a clear policy in relation to the implementation of its obligations under the SHA lacks rationality. A shortage of money to achieve the long term goals is no excuse for the absence of a policy *per se.*

However, the implementation of such a policy may be constrained by resources,[134] but that is a different enquiry.

[482] Turning to the lack of rationality in its policies around the use of land available to it, the Province does not explain why it abandoned the fundamental principle of the Regeneration Programme – the retention of ownership in its properties – in favour of a policy of outright disposal. And, when it made the decision to sell the Tafelberg site, the DTPW did so secretively and without any documentary recordal thereof. Then, as the Court has found, it failed to apply the fundamental principle under-pinning GIAMA, by first offering the Tafelberg site to another user in the Province. Rather, at a very late stage of the disposal process the DTPW effectively arm-wrestled the PDHS into submission, purportedly in the interests of departmental comity. This is an example of its reactive response to a feasible proposal in favour of affordable housing, which is unexplained.

[483] But most concerning to the Court is the Province's *volte face* in March 2017 (after it had been alerted to the possibility of litigation by RTC's challenge to the November 2015 sale), when it suddenly announced that it was considering social housing options in central Cape Town. Against a backdrop of evidence which establishes unequivocally that the Province's view for at least the previous decade had been that affordable housing belonged on the urban periphery – the edges of the Metro – rather than in close proximity to central Cape Town, and that well-located state-owned land in that area should be disposed of by private treaty so as to extract maximum financial return, it finally came up with a response to the clamour for social housing closer to the CBD.

[484] As the affidavit of Ms. Gooch demonstrates, on 22 March 2017, and shortly before it took the decision not to resile from the sale to the Day School, the Cabinet decided to request that any proposed disposal of the Woodstock Hospital site be referred to it, so that it could consider whether affordable housing could be best achieved on that site given its locality and size. Cabinet simultaneously made a

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[134] *Grootboom* para 46.

related decision in respect of the Helen Bowden site, by deciding that any request for a proposal to dispose of the site should contain a requirement that the maximum quantity of affordable housing units be considered.

[485] But even then, the Cabinet did not expressly say that affordable housing would be located on the Helen Bowden site. Rather, it was said that it would consider this as an option, and then suggested that such housing might be included in the overall development of the Somerset Precinct, which includes a number of unused buildings and land in the area between Helen Bowden, the Somerset Hospital and the Cape Town Stadium. Seemingly, the Cabinet jettisoned the idea of applying for an RCG for such a development, intending to rely rather on cross-subsidisation. This seems to suggest that the valuable sea-facing land on which Helen Bowden is located (with its much sought-after expansive views over Table Bay) would be sold to a developer to extract maximum value, and that the proceeds of that sale might be utilised to develop affordable housing further back. If this is what it is planning, why does it not articulate it in a clearly formulated policy for all to see?

[486] Then, as Mr. Molapo's affidavit reveals, in November 2017 the Cabinet decided that the development of affordable housing on the Helen Bowden site would be led by the Province. This was followed by the Cabinet resolving, on 6 December 2017, to dispose of 12 of the erven which made up the Woodstock Hospital site to the City for social housing purposes, at a price of R5.1m, which was said to be substantially below the market value of R9m. This is a notable shift away from the Province's earlier stance that it would only dispose of the property at market value, which was around R30m.

[487] RTC claims that these decisions reflect a significant change in policy on the part of the Province in relation to affordable housing close to the inner city. I am in agreement with that assessment. In my view, what these more recent decisions on the part of the Province demonstrate is that:

487.1. the 'no RDP in the CDB' policy advanced by Mr. Carlisle, and

487.2. the subsequent affirmation thereof by Mr. Grant, when he opined that the financial model for affordable housing in the inner city was 'simply not possible to apply', and

487.3. the implementation of the Regeneration Programme on the basis of its policy to extract the best possible price for inner-city properties,

have been abandoned in favour of a more inclusive approach, which recognises the importance of reversing spatial apartheid incrementally by giving consideration to the development of affordable housing on land available to the Province.

[488] The abandonment of its earlier policies in relation to land use has not been explained by the Province to the Court. This implies a lack of transparency on its part, which runs counter to the principles applicable to reasonableness as one sees in, for instance, *TAC*[135] and *Mazibuko,*[136] where the Constitutional Court required of organs of State that they account fully and openly for any policy changes brought about.

[489] The Province's failure to take the Court into its confidence is troubling. Does it recognise that it was in the wrong before, and has it made a genuine attempt to redress the injustices of the past, or has it capitulated to social activism and political pressure and attempted to obfuscate in broad and unspecific terms what should be seen as a clear change of policy?

[490] Of particular concern to the Court is the dissonance which has been exposed between the political functionaries in the Province, and the departmental functionaries who are required to advise on and implement their policies. One sees senior officials like Messrs Mguli and Molapo, who are to be presumed to know the inner workings of their respective housing departments, being side-lined and/or ignored when crucial decisions are taken. Evidently their knowledge and experience was not regarded as helpful or worthy of consideration. Or perhaps they were regarded as obstructive to the designs of the political functionaries?

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[135] Para 123.

[136] Paras 161 – 162.

[491] The considerations which I have referred to are of concern to the Court in evaluating the Province's failure to discharge its constitutional obligations. Given the relative ease with which policies were side-stepped or redesigned, the Court would want to be assured that, going forward, the Province has clear policies in respect of the use of state land for the promotion of affordable housing and that, in the pursuit of transparency, it can be relied upon to adhere to those policies.

[492] Importantly, as the facts of this case demonstrate, extensive consultation would no doubt be required in perfecting such a policy, and a court would want to be assured that all three spheres of government pursue an integrated and consolidated approach to bring about the necessary changes and implementation of a constitutionally compliant social housing policy, with the common intention of breaking down the barriers of spatial apartheid. This would notionally require consultation and co-operation between the Province and national departments such as the DHS, DPW, Treasury and Agriculture, Land Reform and Rural Development (to just name a few that come to mind) on the one hand, and between the Province and the City, on the other hand.

[493] In my view the only feasible way to achieve this constitutional objective is to subject both the Province and the City to the statutory interdict sought by RTC, so that the design and implementation of a comprehensive, inclusive social housing policy in the context of the use of both state-owned and municipal land in and around central Cape Town is constitutionally compliant under the SHA, and is capable of assessment and monitoring by the courts. In so doing, the Court is conscious not to trench upon the powers and duties of the executive arm of government and it does not intend to tell the Province or the City how to formulate such a comprehensive policy.[137] All the role-players who will be required to participate in such an exercise will know their obligations and can look to this judgment for guidance in that regard.

[494] As far as the City is concerned, I am of the view that the evidence put up on its behalf, particular by Mr. Molapo, establishes that it has done what it could over the

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[137] *TAC* paras 113 – 114.

years to provide affordable housing to the community. It has been hamstrung by the availability of suitable land at an affordable price and, notwithstanding its repeated requests to both national and provincial government to make such land available to it (or to facilitate such availability), it has drawn the short straw every time. In that respect one need look no further than Ms. De Lille's request to President Zuma and the City's expression of interest in the Tafelberg site for the provision of affordable housing.

[495] The City seems to have attempted to do as best it could in circumstances where, as Mr. Molapo put it, 'the levels of co-operation among the various role-players have largely dissipated.' The City is said to have been involved in the provision of social housing for some 25 years now[138] but, as the interview with Mr. Herron shows, its service delivery in that regard has been focused on housing needs at the periphery or in areas where apartheid spatial planning is entrenched – for example in traditionally Coloured neighbourhoods on the Cape Flats such as Belhar and Elsies River.

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

[497] In the result, I am of the considered view that, while the constitutional infringement by the City has been less pronounced than that of the Province, and that such non-compliance has been explained – the City has played open cards with the Court at all material times – the evidence does establish that in 2017, and after RTC

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[138] It claims to have been involved therein long before the promulgation of the SHA.

and others began applying pressure on the authorities to come up with a solution for affordable housing closer to central Cape Town, the City changed course radically.

[498] Those former members of the MAYCO who more recently recognised the necessity for an about turn in policy in relation to affordable housing, have moved on and the Court would want to be assured that the City remains consistent in the declared intentions of MAYCO in that respect. Certainty in this regard is achieved through a supervisory interdict and a *mandamus*, which requires both the City and the Province to co-operate in their planning and subsequent policy decisions, and for the Province to include the necessary consultations with the DHS and other national departments as part of its policy planning process.

RELIEF ULTIMATELY SOUGHT IN THE RTC APPLICATION

[499] In the draft order handed up to Court, in which the original relief is refined somewhat, RTC asks this Court, firstly, to grant an effective remedy under s172 of the Constitution. In the words of Cameron J in *Mwelase*[139] the instruction in s172(1)(b) 'is an injunction to do practical justice, as best and humbly, as the circumstances demand', while *Rail Commuters*[140] permits the court to issue a declaratory order, with or without a *mandamus* and a supervisory order. As I have said, I shall refer to this as 'the constitutional relief'.

[500] In the second place RTC asks for the review of a number of alleged administrative decisions. These commence with the decision in 2010 by the Province to designate the Tafelberg property as surplus under GIAMA, followed by the decision of the WCED in the same year to surrender the property to the DTPW, and the latter's decision in 2015 to dispose of the property in the open market. Then there is the decision in August 2015 by the PDHS to surrender the property to the DTPW, followed by the November 2015 Cabinet decision to sell the property to the Day School. To the extent that these decisions are all time barred under PAJA, an

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[139] Para 65.

[140] Para 107.

extension of the 180-day period under s7(1) of that act is sought. Finally, on the review front, the decision of the Cabinet not to resile from the sale of the property, taken on 22 March 2017, is sought to be set aside. I will refer to this as 'the administrative relief'.

[501] Thirdly, RTC seeks a number of mandatory orders, in the form of interdicts which direct the Province and the Cabinet to take into account certain defined facts and considerations when re-assessing the future use or disposal of the Tafelberg property, including the issue of affordable housing. This will be referred to as 'the directory relief'.

[502] Fourthly, RTC asks for 3 declaratory orders, the first of which is intended to define the extent of the RZ referred to as 'CBD and surrounds'. Secondly, it asks that the proviso in Reg 4(1) and Reg 4(6) of the WCLAA Regulations be declared unconstitutional and invalid. Thirdly, that the disposal in terms of the Regulations be declared unlawful. This I shall call 'the declaratory relief'.

[503] Lastly, there is the question of costs.

[504] By way of general comment it must be said that there is some overlap in certain of the relief sought which, overall, appears to be a belts and braces approach by RTC. Furthermore, there is some relief which may be redundant: the Court does not know whether the National Minister has issued proclamations in respect of the extent of the RZs in the interim. If so, then the 'CBD and surrounds' conundrum may have been resolved. In addition, if the WCLAA Regulations are set aside in part, there is other relief that will fall away. I shall thus discuss the relief in a more practical order.

THE DECLARATORY RELIEF

[505] Having found that the proviso to Reg 4(1) and Reg 4(6) do not pass constitutional muster, it follows that they fall to be set aside and prayer 15 of the draft should be granted. The relief sought in prayer 16 of the draft, for a declaration that

the disposal of the property in accordance with the WCLAA Regulations was unlawful, is essentially redundant in light of the declaration of invalidity of the Regulations and the review of the November 2015 cabinet decision to do so, to which I refer hereunder. However, *ex abundante cautela*, there can be no prejudice to any of the parties in the event that an order is made in terms of the said prayer 16.

[506] On the papers as they stand, I have found that the evidence establishes on a balance of probabilities that Sea Point falls within the RZ described as 'CBD and surrounds (Salt River, Woodstock and Observatory)' in the proclamations of December 2011. To the extent that this is still a live issue, a declaratory order should be made in terms of prayer 14 of the draft, which must be qualified slightly to take account of any subsequent developments.

THE ADMINSTRATIVE RELIEF

[507] I have found that the November 2015 Cabinet decision to sell the Tafelberg property to the Day School, and the March 2017 decision not to resile from that sale, were unlawful and they therefore both fall to be set aside. RTC is thus entitled to relief in terms of prayers 10 and 11 of the draft order.

[508] I agree with counsel for the Province that the earlier provincial decisions sought to be reviewed, as part of the disposal process, did not constitute administrative action: in terms of the *ratio* in *Grey's Marine*, they did not have direct legal effect in that they did not have 'direct and immediate consequences for individuals or groups of individuals.'[141] Moreover, it was held by Murphy J (for the Full Bench) in *Free Market Foundation*[142] that:

'"If a decision requires several steps to be taken by different authorities, only the last of which is directed at the citizen, all previous steps taken within the sphere of public administration lack direct effect, and only the last decision may be taken to court for review . . . Instead of

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[141] *Grey's Marine* para 24.

[142] *Free Market Foundation v Minister of Labour and others* 2016 (4) SA 496 (GP) para 76.

allowing challenges to intermediate or preliminary decisions, litigants are obliged to wait until a final decision has been made.'

[509] In the result I am of the view that the Court must decline the relief sought by RTC in prayers 6, 7, 8 and 9 of the draft order.

THE DIRECTORY RELIEF

[510] The relief sought in prayers 12 and 13 of the draft order essentially requires the Court to tell the Province (at various levels) how to do its job. This is an impermissible intrusion into the sphere of the executive arm of government. But in any event, should the Province persist in its decision to dispose of the Tafelberg property it will be required to act afresh and, in so doing, it will no doubt be guided by what has been said in this judgment. In addition, by taking cognizance of the terms of the constitutional relief granted herein, the Province will be guided as to its constitutional obligations. In the result RTC is not entitled to the relief sought in prayers 12 and 13.

THE CONSTITUTIONAL RELIEF

[511] As I have already said, if the court finds that the Province and the City have breached the Constitution it is duty bound under s172(1)(a) to say so. This is what O'Regan J did in *Rail Commuters* where she found that Metrorail had failed to discharge its duty to the rail commuting public by ensuring their safety. In that matter the Constitutional Court's order was a declaration that 'the first and second respondents have an obligation to ensure that reasonable measures are taken to provide for the security of rail commuters whilst they are making use of rail transport services provided and ensured by, respectively, the first and second respondents.' Because the Constitutional Court did not doubt in that matter that Metrorail would take the necessary steps to ensure the safety of the commuters, it chose not to issue any further orders.

[512] In *Hoërskool, Ermelo* [143] the Constitutional Court considered it appropriate to issue an order under s172(1)(b) in the absence of a declaratory order, so as to guide the parties in their future relationship. Moseneke DCJ said the following.

'It is clear that s172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under s172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements. In several cases this court has found it fair to fashion orders to facilitate a substantive resolution of the underlying dispute between the parties. Sometimes orders of this class have taken the form of structural interdicts or supervisory orders. This approach is valuable and advances constitutional justice, particularly by ensuring that the parties themselves become part of the solution.' (Internal references omitted)

[513] In the result the court issued an order directing the School Governing Body to determine an appropriate language policy that complied with s6 of the Constitution (the language clause) and to report back to the court in that regard. The Head of the Education Department was also directed to report to the court on a number of related, but more technical, issues.

[514] In *TAC*[144]the Constitutional Court issued both a declaratory order and a *mandamus*, but not a supervisory order:

'2. It is declared that:

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[143] *Head of Department, Mpumalanga Department of Education and another v Hoërskool Ermelo and another* 2010 (2) SA 415 (CC) para 97. The case dealt with the issue of the language of instruction at a formerly Afrikaans speaking high school.

[144] Para 135.

(a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-coordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV.

(b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.

(c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparas (a) and (b) in that . . .'

In addition to this declaratory order, the *mandamus* issued by the Constitutional Court embraced directions in respect of four defined medical protocols which the government was ordered to implement.

[515] Finally, I should refer to the order issued by the Constitutional Court in *Grootboom*, given its relevance in so far as the case also involved the demand for socio-economic rights under s26(2) of the Constitution. In that matter the court contented itself with a declaratory order which read as follows:

'2. "It is declared that:

(a) Section 26(2) of the Constitution requires the State to devise and implement within its available resources a comprehensive and co-coordinated program progressively to realise the right of access to adequate housing.

(b) The program must include reasonable measures such as, but not necessarily limited to, those contemplated in the Accelerated Managed Land Settlement Program, to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

(c) As at the date of the launch of this application, the State housing program in the area of the Cape Metropolitan Council fell short of compliance with the requirements in para (b), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations."'

[516] Considering the orders granted in the aforementioned judgments (and others) and for the reasons set out earlier in this judgment, I am of the view that it is appropriate in the particular circumstances of this case to grant a declaratory order under s172(1)(a) of the Constitution, as well as a *mandamus* and a supervisory order. In granting the declaratory order I am guided by the relief sought in prayer 1 of the RTC draft order. However, I am of the view that the proposed declaratory order needs to be adjusted slightly, so as to clearly reflect the nature of the issues and the manner in which the Court considers that they ought to be addressed. This will ensure that the parties resolve the issues between them collectively, in a manner which addresses the core of the underlying dispute and in a manner consistent with their constitutional obligations.

[517] Mindful of the caution expressed by the Supreme Court of Appeal in *Fischer*[145] that a court is bound to decide the case as the parties have decided to present it for adjudication, I am of the view that the precise formulation of the constitutional relief in this matter is, at the end of the day, a matter for the court to determine. In *Modderklip*[146] Langa ACJ cited with approval the following *dictum* of Harms JA in the court *a quo* in that case:[147]

'[18] . . . If a constitutional breach is established, this Court is (as was the Court below) mandated to grant appropriate relief. A claimant in such circumstances should not

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[145] *Fischer and another v Ramahlele and others* 2014 (4) SA 614 (SCA) para 14.

[146] *President of the Republic of South Africa and another v Modderklip Boerdery (Pty) Ltd (Agri-SA and others, Amici Curiae)* 2005 (5) SA 3 (CC) para 18. The case involved the eviction of unlawful occupiers of private land.

[147] 2004 (6) SA 40 (SCA).

necessarily be bound to the formulation of the relief originally sought or the manner in which it was presented or argued.'

Moreover, I am satisfied that there is no prejudice to any of the parties in the formulation of the preferred relief, as the evidence before the Court traverses all of the issues relevant to the declaratory order, and all the legal points associated therewith were fully addressed in argument.

[518] As part of the declaratory relief sought by RTC, Mr Hathorn SC annexed to the draft order a map which sought to depict what RTC's experts regarded as 'Cape Town: CBD and Surrounds', the area in question being shaded in yellow on the original. While Mr. Molapo was of the view that the area might include Maitland, in light of the fact that the City had initiated a social housing project there, there is no basis to reject the opinion of the experts. While the confirmation of the area may in fact turn out to be redundant, in light of the subsequent declaration of RZs by the National Minister, I am of the view that, *ex abundante cautela,* the area in respect whereof the declaratory order should apply needs to be delineated, given that the case has been based thereon.

[519] In relation to the supervisory order I have had regard to the fact that the COVID-19 pandemic has had a profound effect on the resources of all spheres of government, so much so that the provisions of the National Budget have required interim adjustment by the Minister of Finance. I am mindful too that the declaration of invalidity in respect of the portions of the WCLAA Regulations will require the issuing of revised regulations, which may (or may not) play a part in the formulation of the Province's envisaged policy. This too will take time.

[520] The facts of this case have demonstrated very clearly that the provision of adequate affordable housing is a function of all three spheres of government and that planning and policy cannot take place in isolation. As I have said, an effective and affordable policy will require consultation across all spheres of government, with a variety of departments and organs of State in each sphere. Having regard to the constraints imposed on all spheres of government and organs of State by the State of

Disaster proclaimed in respect of the COVID-19 pandemic, I have erred on the side of caution and afforded the parties an extended period of time within which to comply with their respective obligations under the orders made both in the RTC and the National Minister's applications.

RELIEF ULTIMATELY SOUGHT IN THE NATIONAL MINISTER'S APPLICATION

[521] The constitutional relief upon which the National Minister eventually settled comprises only a declaratory order under s172(1)(a). Originally, the National Minister also asked for a *mandamus* which effectively obliged the Province to enter into a dispute resolution process under IGRFA in relation to the intended sale of the Tafelberg property. This was subsequently abandoned, given that a review of the sale would require the Province to recommence the disposal process, if it is so minded. In such circumstances, a *mandamus* at this stage would have served no purpose.

[522] The declaratory order, on the other hand, is mandatory under the Constitution and, importantly, would serve to inform the Province of its constitutional obligations *vis-à-vis* the National Minister under Chapter 3 of the Constitution, in the event that the Province proceeds with the disposal of the property. As I have found that there was a breach of Chapter 3 by the Province, it is necessary that the declaratory order be made.

[523] The remaining relief sought by the National Minister is for the review of the sale to the Day School. Given that the grounds of review relied upon by the National Minster in that regard are substantially similar to those relied upon by RTC, and given the Court's findings in respect of the relief RTC seeks on review, the National Minister is entitled to a similar order. The same applies to the National Minster's application for a declaration of invalidity of the WCLAA Regulations. Although the National Minister sought slightly wider relief in respect of the declaration of invalidity, I have tailored the order to conform to the order made in favour of RTC.

COSTS

[524] In its draft order, RTC asked for an order that those respondents who opposed the application should bear the costs thereof, and that such costs should include the costs of two counsel. I am satisfied that the length and complexity of the case warranted the employment of two counsel by RTC.

[525] The principle in *Biowatch*[148] is that in litigation between the government and a private party seeking to assert a constitutional right, if the government loses it should pay the costs of the other side. There is no reason to deviate from that approach in this matter. The relief sought by RTC was opposed by the Province, the City and the Day School, but in argument, Mr. Hathorn SC indicated that RTC no longer sought costs against the Day School.

[526] I did not understand either the Province or the City to take issue with the application of the *Biowatch* approach and it was not suggested that the order should not attach joint and several liability on the part of those respondents. Further, I consider that it would be fair to direct the Day School to bear its own costs.

[527] Turning to the National Minister's case, she asks that her costs and those of her department (the DHS) and the SHRA be borne by the Premier, the MEC and the MEC: HS. While they are not specifically claimed, it is to be presumed that the costs are sought against those respondents jointly and severally. The costs of three counsel are sought by the National Minister.

[528] I am of the view that the costs of three counsel is not warranted. Mr. Masuku SC's involvement in the matter seems to have been limited to the consequences of the failure to publish in isiXhosa the May 2015 notice calling for offers on the property. Had the National Minister's team done their homework they would have established what the Day School's attorney managed to achieve through a rudimentary internet search and saved themselves time and money. In the result the argument in respect of the notice did not contribute at all to the debate and the National Minister's costs should be limited to two counsel where same were employed.

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[148] *Biowatch Trust v Registrar, Genetic Resources, and others* 2009 (6) SA 232 (CC) para 22.

[529] The SHRA joined in as the third applicant in the National Minister's application, although it sought no relief in the case. Ms Webber's contribution in argument was of assistance to the Court in understanding the statutory framework which governs social housing. In the circumstance I consider it would be fair to award the SHRA its costs of suit. Finally, there is no reason to apportion the costs of the respondents between the Premier and her erstwhile Cabinet Members. The Province, as the losing party, must bear the costs in the National Minister's application and, to this end, an order need only be granted against the Premier of the Western Cape, the first respondent in the National Minister's application.

[530] Ms Bawa SC asked that the City's costs in the National Minister's application be borne by the National Minister. I do not agree. There was no *lis* between the National Minister and the City and no relief was sought by her against the City, which was seemingly cited because of its potential interest in the application. In the result, the City responded to the National Minister's application at its peril. It would, in my view, be just and fair that the City bear its own costs in that application. The same applies in respect of the Day School, against whom no relief was sought either.

IN THE RESULT THE FOLLOWING ORDERS ARE MADE:

CASE NO. 7908/2017: THOZAMA ANGELA ADONISI AND OTHERS v MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE

1. It is declared that the fourth and sixth respondents have the following obligations in terms of the Constitution of the Republic, 1996:

    (i) under s25(1) the said respondents are obliged to take reasonable and other measures, within their available resources, to foster

conditions which enable citizens to gain access to land on an equitable basis;

(ii) under s26(2) the said respondents are obliged to take reasonable legislative and other measures, within their available resources, to achieve the progressive realisation of the right of citizens to have access to adequate housing as contemplated in s26(1) of the Constitution.

2. It is declared that the fourth and sixth respondents have failed to comply with their respective obligations under the legislation enacted to give effect to the said rights, namely, the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008, and have accordingly breached their respective obligations under the Constitution.

3. It is declared that in so failing to comply with their obligations as aforesaid, the fourth and sixth respondents have failed to take adequate steps to redress spatial apartheid in central Cape Town (the boundaries of which were in 2017 as depicted on the map annexed hereto marked “A”);

4. The fourth and sixth respondents are directed to comply with their constitutional and statutory obligations as set out in paras 1 to 3 above.

5. The fourth and sixth respondents are directed to jointly file a comprehensive report under oath, by 31 May 2021, stating what steps they have taken to comply with their constitutional and statutory obligations as set out above, what future steps they will take in that regard and when such future steps will be taken. Without derogating from the generality of the aforegoing, the fourth and sixth respondents are specifically directed to:

(i) consult with all departments of State and organs of State necessary to discharge their duty in so reporting to the Court; and

(ii) include in their report their respective policies and the integration thereof in regard to the provision of social housing as contemplated in the Social Housing Act within the area of central Cape Town as depicted on annexure “A” hereto.

6. The applicants are granted leave to file an affidavit (or affidavits) responding to the reports filed by the fourth and sixth respondents in terms of paragraph 5 above within one month of them having been served on their attorneys of record.

7. The November 2015 decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet, to sell Erf 1675, an unregistered portion of Erf 1424 Sea Point, and remainder of Erf 1424 Sea Point (hereinafter collectively referred to as “the Tafelberg Property”) to the third respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the third and sixth respondents is hereby reviewed and set aside.

8. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded with the third respondent is hereby reviewed and set aside.

9. It is declared that Sea Point falls within the restructuring zone ‘CBD and surrounds (Salt River, Woodstock and Observatory)’ as contemplated in sub-regulation 6.1 of the Provisional Restructuring Zone Regulations published under General Notice 848 in Government Gazette 34788 of 2 December 2011.

10. It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land Administration Act, 6 of 1998 by Provincial Notice No. 595 published in

Provincial Gazette No. 5296 on 16 October 1998 (hereinafter referred to as "the Regulations") are unconstitutional and invalid.

11. It is declared that the disposal of the Tafelberg Property in accordance with Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations is unlawful. This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment.

12. The applicants' costs of suit (which are to include the costs of two counsel where employed), are to be borne by fourth and sixth respondents, jointly and severally

13. Save as aforesaid, each party is to bear its own costs of suit in relation to this application.

CASE NO. 12327/2017: THE MINISTER OF HUMAN SETTLEMENTS AND OTHERS v PREMIER OF THE WESTERN CAPE PROVINCE AND OTHERS

1. It is declared that the failure of the Western Cape Provincial Government (hereinafter "the Province") to inform the National Government (represented by the first and second applicants herein) of its intention to dispose of Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (hereinafter collectively referred to as "the Tafelberg Property") and to consult and engage with National Government (represented as aforesaid) in this regard, constitutes a contravention of the Province's obligations in terms of Chapter 3 of the Constitution, and the Intergovernmental Relations Framework Act, 13 of 2005.

2. The November 2015 decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet, to sell the

Tafelberg Property to the fifth respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the first and fifth respondents are hereby reviewed and set aside.

3. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded in respect of the Tafelberg Property with the fifth respondent is hereby reviewed and set aside.

4. It is declared that the deed of sale between the Province and the fifth respondent in respect of the Tafelberg Property is void, of no force and effect and is hereby set aside.

5. It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land Administration Act, 6 of 1998 by Provincial Notice No. 595 published in Provincial Gazette No. 5296 on 16 October 1998, are unconstitutional and invalid. This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment.

6. The first and third applicants' costs of suit (which are to include the costs of two counsel where employed) are to be borne by the first respondent.

7. Save as aforesaid, each party is to bear its own costs of suit in relation to this application.

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GAMBLE, J

I AGREE:

_____

SAMELA, J

Appearances

T. A. Adonisi and others v Minister for Transport and Public Works: Western Cape and others, Case No 7908/17

For the Applicants:

P. Hathorn SC

C. de Villiers

Instructed by Ndifuna Ukwazi Law Centre,

Cape Town.

For the First, Second, Sixth

and Eighth Respondents:

E. Fagan SC

K. Pillay SC

A. du Toit

M. Mokhoetsi

Instructed by the State Attorney, Cape Town.

For the Third Respondent;

P. Farlam SC

B. Joseph SC

G. Quixley

Instructed by Edward Nathan Sonnenberg,

Cape Town.

For the Fourth Respondent:

N. Bawa SC

T. Mayosi

Instructed by Riley Incorporated, Cape Town.

For the Ninth Respondent:

E. Webber

Instructed by M.F. Jassat Dhlamini Attorneys, Johannesburg.

For the *amicus curiae*:

J. Bleazard

U. Naidoo

Instructed by the Equal Education Law Centre,

Cape Town.

Minister of Human Settlements and others v Premier of the Western Cape and others, Case No. 12327/17

For the First and Second

Applicants

I. Jamie SC

T. Masuku SC

L. Stansfield

Instructed by the State Attorney, Pretoria.

For the Third Applicant:

E. Webber

Instructed by Jassat Dhlamini Attorneys,

Johannesburg.

For the First, Second and

Third Respondents:

E. Fagan SC

K. Pillay SC

A. du Toit

M. Mokhetsi

Instructed by the State Attorney, Cape Town.

For the Fourth Respondent:

N. Bawa SC

T. Mayosi

Instructed by Riley Incorporated, Cape Town.

For the Fifth Respondent:

P. Farlam SC

B. Joseph SC

G. Quixley

Instructed by Edward Nathan Sonnenberg,

Cape Town.