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

CASE NO: 7908/2017
CASE NO.12327/2017

In the matter between:

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

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

FOURTH RESPONDENTS' APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE that the Fourth Respondent ("the City") intends to make application to this Court for leave to appeal to the Supreme Court of Appeal against paragraphs 1 to 6 and 12 of this Court's order dated 31 August 2020 under case number 7908/2017 ("'the Adonisi order") and those parts of the Judgment germane to those orders; and paragraph 7 of the order under case number 12327/2017 ("the Human Settlement order") and those parts of the judgment germane thereto.

TAKE NOTICE FURTHER that the grounds of appeal in relation to the Adonisi order are the following:

1. In relation to paragraph 1(i) with reference to s 25(1) which constitutes an error in that it should instead have been a reference to s 25(5) and the reference to erstwhile in para [91] which is clearly an error.

2. In relation to the orders in paragraphs 2 and 3:

   2.1. The Court erred in failing to find that the repeated references in the founding papers to the Rule 53 record and reliance on media reports was not sufficient to find a cause of action against the City and did not confirm a failure in respect of the City's obligations;

   2.2. The Court erred in failing to find that there was no case pleaded in the founding papers indicating the precise obligations that the City is said to had failed to comply with and in fact none is recorded in the Judgment;

   2.3. The Court erred in sourcing obligations, and concluding that the City had not complied with such obligations, under s 25(5) and s 26(2) of the

Constitution and did so despite acknowledging that the City's obligations are being progressively realised within its available means and resources in compliance with its obligations under section 26 of the Constitution in the remaining metropolitan City;

2.4. The Court erred

2.4.1. in conflating the obligations of the Province and the City and in doing so finding that the City had failed to comply with its obligations under the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008 by not taking adequate steps to redress spatial apartheid in the Applicants' central Cape Town when there is no specific obligation to that effect in this legislation;

2.4.2. in doing so failed to specify which provisions specifically had not been complied with on an area-specific basis, especially given that by the time it reached the City's oral argument the Applicants' case was that it no longer social housing that was being sought but that affordable housing will also do; and

2.4.3. in finding as such the Court ignored the City's social housing projects erected within walking distance to public transport and employment areas and which contributes to racial integration within certain suburbs as well as its plans for social housing developments in the next 10 to 15 years;

2.5. Having accepted that the City had policies in place and that the Applicants' attack was neither premised on those polices not being reasonable, nor that the City had not complied with such policies specifically, and having not found that the City had failed to act consistently with any statutory obligation, there was no basis on which to conclude that there had been a failure to comply with its constitutional obligations under s 25(5) and s 26(2) of the Constitution;

2.6. The Court erred in making the following contradictory findings -

2.6.1. On the one hand that a consideration of the RTC's attacks on the failure of the City, over the first 25 years of democratic rule, to address the issue of spatial apartheid in their definition of central Cape Town, and to this end seeks declaratory relief, and a structural interdict, to hold the authorities to account in respect of such failure, **required an assessment of various policy instruments applicable to both the Province and the City**; and yet

2.6.2. on the other hand defining RTC's case (at para 66) as not being directed at government's statutory or policy framework aimed at advancing spatial justice through the provision of affordable, well-located housing, but **at 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 City;

2.6.3. whilst at the same time **focusing only on the issue of social housing in the contrived central Cape Town**, without any regard to the provision of social housing elsewhere, other commitments under s 25 and s 26 and other housing

commitments and problems facing the City and yet on the basis of such narrow grounds, finding a constitutional infringement;

2.7. Having concluded that the lack of social housing in and around the CBD was not of the City's making but as a result of non-availability of suitable land at a fair price, the court erred in concluded that the City had failed to meet its constitutional obligations within its available resources;

2.8. The Court erred in paras [442]-[445] -

2.8.1. in interpreting the evidence of Mr. Mbandazayo to constitute an inference that sections 25 and 26 have been infringed in the contrived central Cape Town because he recognised that the throughout Cape Town that spatial injustice exists and the vestiges of apartheid needed to be dealt with when it was specifically submitted that such acknowledgement should not be construed as an admission that constitutional obligations under s 25 and s 26 had not been complied with;

2.8.2. in acknowledging, but falling to give due weight to social housing elsewhere in the City, and projects in the pipeline that have been committed to, as well having due regard to its social housing as a component of its overall housing service in the Greater Cape Town area;

2.8.3. in failing to find that the City's overall housing strategy and policies were not attacked, and despite such concluding that the City was fulfilling its housing mandate but failing to have regard to the fact that the City sought to meet the most pressing needs for housing in the most affordable way possible, the City was not in a position within its limited financial resources to pursue every possible housing option in specified geographic locations, and did not have a constitutional obligation to do so;

2.8.4. by implying that the City had not implemented SHA and SPLUMA and had failed to comply with SPLUMA when the opposite was reflected in the policies adopted as acknowledged by the Court in paragraph [450];

2.9. The Court erred in finding that the City failed to meet its constitutional obligations in the face of evidence that the City did not have the land to do so, was hamstrung in obtaining suitable land at an affordable price and did what it could over the years to provide affordable housing to the community within its resources;

2.10. The Court erred in concluding that the City had failed to comply with ss 25 and 26 in not advancing social housing under the SHA on land close to the CBD, without having identified precisely what the City was supposed to do so and had not done;

2.11. The Court erred (at para [49]) in construing the RTC's attack on the reasonableness of the sale of the Tafelberg land, without a proper consideration of the prospect of social housing development on the property, as an attack on the reasonableness of the conduct of the City, when the City was not a party to such sale or a decision-maker in relation to the sale;

2.12. The Court erred

2.12.1. By accepting Dr Odendaal's definition of how central Cape Town should be construed, as depicted by annexure "A", and in so doing determining that one area required priority of another in redressing the legacy of social apartheid which had resulted in a systemic deprivation of persons of colour to access urban land and residential accommodation across Cape Town, and in so doing rejecting the evidence of the City in this regard;

2.12.2. In failing to find that the Applicants' definition of central Cape Town was premised on the incorrect conclusion that the suburbs identified to be included in central Cape Town are areas which were previously designated as white only, save for Bo Kaap, when this was not the case in relation to significant parts of Woodstock, Salt River and Walmer Estate which areas also did not specifically benefit from public investment;

2.12.3. By accepting the Applicants' experts' definition of central Cape Town as the economic hub and yet, in contradistinction, recognising that in reality key economic nodes are in fact Paarden Eiland, Montague Gardens and Century City (at para [340]), and in doing so failed to accept that the "surrounding area" for social housing development and the RZ within which the City supplied housing was more extensive, and distinctly different to the Applicants' central Cape Town;

2.12.4. In rejecting the City's evidence on the geographic areas which the City used for its housing determination and in so doing delineating a central Cape Town which is not rationally construed, or consistent with the City's housing programmes, preferring instead artificially created boundaries depicted by annexure A;

2.12.5. By rejected the City's evidence that the geographic area for the provision of social housing should be considered with reference to Maitland, Brooklyn and areas in close proximity to the City;

2.12.6. In not accepting the City's version of what constitutes the CBD and its surrounds in that had it done so it could not have concluded that the City had not addressed social housing and contravened ss 25(5) and 26(2);

2.13. The Court erred in that though it was accepted that ss 25(5) and 26(2) did not mean that the Applicants could demand a specified form of housing, such as social housing in a designated area, in contradiction, it held that reasonable legislative and other measures progressively to realise the right in question, and comply with s 26 was not taken in relation to the Applicants' central Cape Town;

2.14. The Court erred – having made no findings against the City in para [476] - to then in the order conclude that it had breached s 25(5) and 26(2) when in fact Mr Molapo's evidence pointed to a number of affordable housing projects which the City has facilitated since 1990, including the social housing in the suburb of Maitland, being an area bordering on to the Applicants' artificially created central Cape Town;

2.15. The Court erred in finding the City to be in breach of constitutional rights given that its evidence was uncontroverted and accepted by the Court that it was obliged to meet high demands for housing having to use its available budgets to meet high demands for housing within its limited resources;

2.16. Having accepted that suitable land for social housing (and other forms of more affordable housing) is extremely scarce and expensive in the central City area, and that there is a shortage of state-owned land in or near the inner city which is not at the City's disposal (presumably a reference to CBD as distinct from the Central Cape Town area to which the applicants refer (at para [102])) the Court erred in para [479] in failing to have regard to the demands for housing elsewhere in the City that can be met for more people at lesser costs;

2.17. The Court erred in para [479.3] in concluding that the City had no policy, when there was no such admission. The admission was not the absence of a policy but the absence of social housing in the CBD which the City explained was due to lack of available land and high prices;

2.18. The Court erred by implying in para [490] that Mr Molapo, was side-lined and/or ignored in the making of crucial decisions to the extent it is inferred that this was done by the City in relation to social housing was not borne out by the evidence;

3. The Court erred in in relation to paragraph 4 in that it had not identified the precise obligation that is alleged the City must comply with, and as such the order is impermissibly vague making it impossible for the City to implement.

4. As for the order granting structural relief in paragraphs 5 and 6 the Court erred in making these orders given that:

4.1. They violate the principle of separation of powers in that the Court seeks to dictate a re-allocation of resources across housing programmes to prioritise social housing in the applicants' central Cape Town, and in doing so impermissibly selects where housing developments should be located without any regard to the complex factors and expertise required for purposes of determining the demand, implementability and financial constraints facing the City;

4.2. The Court accepted that the City was complying with legislation and regulations and having made no finding that the City had failed – deliberately or otherwise – to comply with any specific obligation or had unreasonably failed to give effect the rights contained in s 25(5) and s 26(2) of the Constitution;

4.3. The Court accepted that the City had openly and completely accounted to the Court in detail as to its Housing Programmes already in the pipeline

and which are contemplated in future and had in place the requisite legislation and policies;

4.4. The Court made no negative findings in relation to the evidence emanating from the City;

4.5. The Province and the City have different roles and responsibilities which would not necessarily be conducive to the production of a joint report but that in any event to the extent that its purpose is to ensure a co-ordinated approach, the absence of compulsion in relation to the relevant national sphere of government, i.e. the Departments of Housing and Public Works defeats the objective sought to be achieved;

5. The Court erred in holding the City jointly and severally liable with the Province for the costs in relation to the entire Adonisi application, when the City had no part – or say – in the sale of the Tafelberg land; had not opposed the declaratory relief in relation to the Regeneration Zone (RZ) or that the Tafelberg land fell within the RZ; had indicated that if the Tafelberg land had been made available to the City it would have been used for social housing, and even though the City's involvement in the case consumed less than 10% of the court's resources and even less of the papers.

TAKE NOTICE FURTHER that the in a relation to the Human Settlement order the Court erred in its order, read with the relevant parts of the judgement, as to the costs order in relation to the City

6. In that having concluded that the National Minister's case is founded, firstly, on Chapter 3 of the Constitution and the provisions of the Intergovernmental Relations Framework Act, 13 of 2005 ("IGRFA"), the Court made a patent error

6.1. in concluding that the City was only cited because of its potential interest, and that it responded to the National Minister's application even though no relief had been sought against it at its own peril, when in fact relief, as indicated above, was in fact sought against it in the Notice of Motion;

6.2. in concluding that there was no *lis* with the City when the relief sought in the Notice of Motion against the City to the effect that this Court -

6.2.1. declares that there is an intergovernmental dispute between the National, Provincial and Local Spheres of government within the meaning of section 1 of IGRFA; and

6.2.2. directs that the City, inter alia, engage with the National Minister in an intergovernmental dispute resolution process as envisaged by chapter 3 of the Constitution and regulated by IGRFA;

was sought despite the National Minister having failed to comply with the IGRFA requirements prior to launching the application and given that such relief was only abandoned during the latter stage of the proceedings;

6.3. By failing to have regard to the fact that based on the Notice of Motion, the City had come to Court only to oppose the relief as sought against it, having prior to the filing of the supplementary founding affidavit already

tendered to consult with the National Minister, despite which the relief sought was persisted with in the supplementary founding papers;

6.4. By ignoring the position of the City as set out in paragraphs 16 to 31 of the answering affidavit of Lungelo Mbandazwayo, the City's Municipal Manager, read with Annexures LM2A – LM4A, in which it was made clear – prior to the National Minister filing her supplementary founding affidavit - that the relief being sought against the City was misconceived and that, *inter alia*, the City was at all material times prepared to consult with the National Minister;

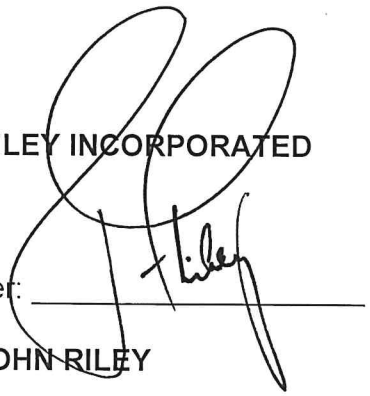
6.5. by effectively rubberstamping an abuse of the IGRFA process by awarding costs to the benefit of the National Minister, and concluding that the City was litigating at its own peril justifying that it was *"just and fair that the City bear its own costs in that application"*, rather than holding the National Minister to account for having improperly dragged the City to court and abusing IGRFA in the process.

TAKE NOTICE FURTHER THAT

(i) there are reasonable prospects of success, as contemplated by section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 ("*the Superior Courts Act*"); and

(ii) there are compelling reasons why the appeal should be heard, as contemplated by section 17(1)(a)(ii) of the Superior Courts Act.

DATED AT CAPE TOWN ON THIS 21ST DAY OF SEPTEMBER 2020



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per: _____

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