IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NOS: 7908/2017
12327/2017

In the matter between:

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

and

MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	First Respondent
PREMIER OF THE WESTERN CAPE 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
MINISTER OF PUBLIC WORKS	Seventh Respondent
MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE Respondent	Eighth
SOCIAL HOUSING REGULATORY AUTHORITY	Ninth Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Tenth Respondent

MINISTER OF FINANCE	Eleventh Respondent
GARY FISHER	Twelfth Respondent

and 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
MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE	Second Respondent
MINISTER OF HUMAN SETTLEMENTS: WESTERN CAPE	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

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

TAKE NOTICE THAT the first, second, sixth and eighth respondents intend to make application to this Court for leave to appeal against the whole of the order of this Court dated 31 August 2020 under case number 7908/2017 (**'the first order'**) and the parts of the judgment relevant to that order, including the order of costs; and against the whole of the order of this Court dated 31 August 2020 under case number 12327/2017 (**'the second order'**) and the parts of the judgment relevant to that order,

including the order of costs. (The parties are cited as in case no 7908/2017.)

TAKE NOTICE FURTHER THAT the grounds on which the application will be made in respect of the **first order** and relevant parts of the judgment are the following:

1. The Court erred in granting the order in paragraph 1 in that it is merely a repetition of the constitutional rights in ss 25(5) and 26(2) of the Constitution, and as such has no practical effect. (The reference to s 25(1) in paragraph 1(i) is presumably an error and should read s 25(5)).

2. The Court erred in granting the orders in paragraphs 2 and 3 in that:

    2.1. they are premised on an incorrect finding that the fourth and sixth respondents were obliged in terms of the Housing Act 107 of 1997 ('the Housing Act'), the Social Housing Act 16 of 2008 ('the Social Housing Act'), and ss 25(5), 26(1) and 26(2) of the Constitution, to provide social housing in an area defined by the Court as 'central Cape Town';

    2.2. the Court failed to source the alleged obligations of the fourth and sixth respondents to provide social housing in 'central Cape Town' in specific provisions of the Housing Act or of the Social Housing Act (which Acts provide for a balancing of competing housing interests), and instead sourced the obligations in sections 25(5), 26(1) and 26(2) of the Constitution, thereby undermining the principle of subsidiarity;

2.3. the Court sourced an obligation to provide social housing in 'central Cape Town' in sections 25(5), 26(1) and 26(2) of the Constitution, where no such obligation is to be found;

2.4. the Court failed to draw a distinction between the fourth and sixth respondents, despite the fact that the Constitution, the Housing Act and the Social Housing Act all place different obligations on the two spheres of government;

2.5. the Court premised the finding that the sixth respondent has breached its obligations in terms of the Housing Act and the Social Housing Act, and therefore its obligations under the Constitution, in large part on a finding that the sixth respondent failed to adopt suitable policies to give effect to the Social Housing Act, when in fact:

2.5.1. the applicants did not include as an independent cause of action a failure by the sixth respondent to adopt a suitable social housing policy, and it is impermissible for them to rely on a constitutional complaint that was not pleaded, alternatively not pleaded at the outset;

2.5.2. alternatively to paragraph 2.5.1 above, if it is found that the applicants did include as an independent cause of action a failure by the sixth respondent to adopt a suitable social housing policy, the applicants were obliged by the principle of subsidiarity to rely

on non-compliance with the applicable statutory provisions, which they failed to do; and

2.5.3. in any event, the evidence was that the sixth respondent has, since at least 2010, complied with its primary obligation in terms of the Social Housing Act, namely the submission to the fifth respondent of proposed areas for designation as restructuring zones, including in 'central Cape Town' as defined by the Court; and

2.6. the Court refused, without any proper basis for doing so, to take into account the sixth respondent's commitment to developing social housing at the Helen Bowden site and to ensuring that the fourth respondent develops social housing at the Woodstock Hospital site, both of which fall within the area defined by the Court as 'central Cape Town'.

3. The Court erred in granting the order in paragraph 4 in that they failed to identify the specific obligations with which the fourth and sixth respondents must comply, and the order is accordingly impermissibly vague and has no practical effect.

4. The Court erred in granting the orders in paragraphs 5 and 6 in that:

4.1. the orders violate the constitutional principle of separation of powers;

4.2. the orders require the Court to play the role of democratically-elected

government in that they involve the Court in the assessment of myriad complex political choices, including the best use of state-owned property; the optimal allocation of resources across housing programmes; and the prioritisation of areas for social housing;

4.3. the orders do this despite the fact, quite apart from a lack of constitutional authority, that the Court possesses neither the administrative nor the technical expertise required to make such assessments;

4.4. the orders were granted despite the fact that the applicants failed to demonstrate unreasonableness on the part of the sixth respondent in its efforts to give effect to the rights in terms of sections 25(5), 26(1) and 26(2) of the Constitution; and in the face of evidence that the Western Cape Department of Human Settlements annually spends the whole of its budget; has consistently received clean audits; and has received numerous national housing awards (including in 2013 and 2015 for the delivery of social housing, after which this award fell away);

4.5. the orders appear to ignore the fact that the sixth respondent has already, in its answering affidavits, accounted to the Court in detail for how it is implementing the Social Housing Programme, including by providing timelines for each social housing project in its pipeline;

4.6. the orders are premised on an alleged lack of transparency on the part

of the sixth respondent as regards what is described as a fundamental shift in its policies away from the Regeneration Programme, when in fact the Regeneration Programme includes among its strategic objectives the development of a percentage of residential stock in identified precincts for affordable housing to ensure that poorer households get incorporated into central Cape Town;

4.7. the orders are premised on a finding by the Court that the Woodstock Hospital and Helen Bowden decisions taken by the sixth respondent shortly before the March 2017 meeting were a stratagem, despite there being no basis for such a finding;

4.8. the orders, by requiring a joint report, impermissibly conflate the roles of the provincial and local spheres of government which have separate and distinct constitutional and statutory duties; and

4.9. in as much as the orders are intended to ensure co-ordination between the spheres of government, they are misconceived because they omit the national sphere.

5. The Court erred in granting the order in paragraph 10 in that:

5.1. the order is premised, in part, on a finding of inconsistency between regulation 4(6) and the proviso to regulation 4(1) of the Western Cape Land Administration Regulations ('the impugned regulations') on the

one hand, and section 3(2) of the Western Cape Land Administration Act 6 of 1998 ('the WCLAA') on the other, which is in turn based on an incorrect interpretation of the words 'proposed disposal' in section 3(2) of the WCLAA in that:

5.1.1. the Court found incorrectly that the constitutional context of the WCLAA is an obligation on the sixth respondent 'to address historical injustices perpetuated through the deprivation of the majority of ... citizens of access to land', when in fact the constitutional context of the WCLAA is the power conferred on the sixth respondent in terms of section 104 of the Constitution – the power to acquire and dispose of property being necessary for provincial governments to give effect to the full range of their constitutional obligations;

5.1.2. the Court assumed incorrectly that procedural fairness necessarily entails the granting of a hearing before a decision is taken, when that is not the case; and

5.1.3. the Court erred in finding that no useful purpose would be served by adopting the interpretation of 'proposed disposal' contended for by the sixth respondent (namely that an agreement to dispose, which is subject to a resolutive condition pertaining to public participation, is a 'proposed disposal'), when in fact:

5.1.3.1. the interpretation contended for by the sixth respondent allows the sixth respondent to secure offers which have been found by the provincial property committee to be advantageous, by keeping offerors locked in for the duration of the public participation process; and

5.1.3.2. the impugned regulations afford the public an opportunity to comment on an actual proposed transaction so that meaningful comment may be made;

5.2. the order is premised otherwise on a finding that the impugned regulations are inconsistent with section 4 of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), when in fact section 4 of PAJA does not apply at all because:

5.2.1. a decision by the sixth respondent to conclude a written contract for the disposal of land which is subject to a resolutive condition pertaining to public participation does not constitute 'administrative action' as defined in PAJA, because it has no direct, external legal effect (which was and remains part of the sixth respondent's case); and/or

5.2.2. a decision as described in paragraph 5.2.1 above does not materially and adversely affect the rights of the public;

5.3. alternatively to paragraph 5.1 above, if it is found that section 4 of PAJA does apply, there is no inconsistency between the provisions of the impugned regulations and that section, because the provisions of the impugned regulations are consistent with section 4(3), and even if they were not, section 4(1)(d) authorises an administrator to follow a procedure which is fair but different; and

5.4. despite saying that they would limit the temporal effect of such declaration, the Court failed to do so.

6. The Court erred in granting the order in paragraph 11 in that:

6.1. in so far as the second sentence of the order is meant to provide that the order in paragraph 10 will operate prospectively from the date of the judgment, the order in paragraph 10 would not have the effect of rendering the disposal of the Tafelberg properties unlawful;

6.2. assuming that the order should be read without the second sentence:

6.2.1. the Court misdirected itself when it assumed that the relief in the first sentence follows automatically from a declaration of invalidity of the impugned regulations, when in fact having declared a provision to be invalid, a court may make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity;

6.2.2. this misdirection was material in that an order limiting the retrospective effect of the declaration of invalidity of the impugned regulations would have been just and equitable in light of the fact that by the time the operative decision in March 2017 had been taken, the applicants had been afforded every opportunity to comment on the proposed sale; and

6.2.3. the Court misdirected itself when it failed to appreciate that even if the November 2015 decision were to be set aside by virtue of the invalidity of the impugned regulations, this would not necessarily affect the March 2017 decision, which was the operative decision.

7. The Court erred in granting the order in paragraph 7 in that it is based on several legally and factually incorrect premises, namely that:

7.1. it is a legal requirement that immovable property must be 'surplus' as that term is used in the Government Immovable Asset Management Act 19 of 2007 ('GIAMA') before it may be disposed of by a provincial government, when in fact that is not the case (in which regard the Court held, incorrectly, that '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';

7.2. the Tafelberg properties were not surplus when the decision was taken to dispose of them, when in fact:

7.2.1. that decision was only taken by the sixth respondent in November 2015 (subject to a resolutive condition); and

7.2.2. by July 2011 (alternatively by November 2015) the Tafelberg properties had become surplus to their users in that the Tafelberg School site had been relinquished by the Western Cape Education Department to the Department of Public Works after Tafelberg Remedial High School moved to new buildings in Bothasig in June 2010; and Wynyard Mansions was no longer being used efficiently by the Department of Human Settlements as housing;

7.3. the sixth respondent failed to comply with section 5(1)(f) of GIAMA, when in fact:

7.3.1. section 5(1)(f) does not require that if a custodian determines that an immovable asset *can* be used as described in the section, then it *must* be so used – instead it is designed to ensure that the custodian gives careful consideration to the factors described in that section before embarking on a disposal process, and it is Cabinet which must ultimately determine what the best use of the property is likely to be;

7.3.2. the Department of Public Works performed its section 5(1)(f) obligation when it sent letters to user departments on 26 February 2013 and received and considered their responses, including the response from the Department of Human Settlements on 26 March 2013 (the Court finding incorrectly that the deponent on behalf of the sixth respondent made only a bald allegation as regards compliance with this section and failed to offer any documentary proof or comment); and

7.3.3. even if it were to be found that, contrary to paragraph 7.3.2 above, the Department of Public Works failed to fulfil its obligation in terms of section 5(1)(f) of GIAMA, the evidence is that Cabinet did consider whether the Tafelberg properties should be used for affordable or social housing purposes when it took the November 2015 decision;

7.4. the November 2015 decision was invalid, because the sixth respondent did not have a U-AMP or C-AMP (which the Court refers to incorrectly as policy documents) in relation to the Tafelberg properties, when in fact:

7.4.1. nothing in GIAMA makes it a condition for the valid disposal of immovable property that there must be U-AMPs and a C-AMP in place;

7.4.2. the authority of provincial governments to dispose of immovable property derives from provincial legislation and not from GIAMA;

7.4.3. both the national and provincial spheres of government are implementing the requirements pertaining to U-AMPs and C-AMPs incrementally, which has not prevented either sphere from continuing to dispose of their immovable properties;

7.4.4. the purpose of the provisions of GIAMA pertaining to C-AMPs and U-AMPs, namely to ensure proper decision-making when it comes to the management and disposal of immovable properties, was fulfilled when Cabinet took the November 2015 decision;

7.5. the November 2015 decision was taken in a policy vacuum as regards social housing, when in fact the sixth respondent was at that stage already actively implementing the Social Housing Programme and had developed and was following a social housing pipeline in a manner which had earned it two national awards;

7.6. the decision was unlawful or inappropriate because it was aimed at raising revenue for office space for the Education Department which is not social infrastructure, when it manifestly is and which the sixth respondent is in any event constitutionally obliged to provide to its officials;

7.7. the decision was unlawful or improper because it resulted in 'enormous financial benefit', when in fact it was the duty of the sixth respondent to ensure best value for money and the sixth respondent would moreover use any 'financial benefit' for the fulfilment of its constitutional obligations;

7.8. having found that the decision was administrative action, the Court nevertheless failed to consider, as required by section 9 of PAJA, whether the interests of justice required it to extend the 180-day period prescribed in section 7 of PAJA, and did not grant such extension.

8. The Court erred in granting the order in paragraph 8 in that it is based on several legally and factually incorrect premises, namely that:

8.1. should the November 2015 decision be found to have been unlawful, it follows automatically that the March 2017 decision falls to be reviewed and set aside, when that is not the case;

8.2. the March 2017 decision falls to be reviewed and set aside because it was materially premised on a mistake of fact, namely that Sea Point does not fall within a restructuring zone, when in fact:

8.2.1. it was correct that Sea Point did not fall within a restructuring zone;

8.2.2. what Cabinet took into account was an opinion by senior counsel

that Sea Point did not fall within a restructuring zone, something which they were entitled, and duty-bound, to do; and

8.2.3. the risk which this possibility posed was one of many factors which Cabinet took into account;

8.3. the March 2017 decision falls to be set aside because Cabinet failed to obtain and consider relevant facts (which also rendered the decision irrational), namely:

8.3.1. what the views of the fourth respondent were as regards the meaning of the notices, when that could never have constituted a basis for dispelling the risk associated with the ambiguity in the notices and senior counsel's opinion (the fourth respondent's views in any event already being known); and

8.3.2. what the outcome would be of a national ministerial process which was 'imminent', when in fact this process had, by the time the application was heard more than two years later, still not been completed;

8.4. the March 2017 decision falls to be reviewed and set aside because at that time the Tafelberg properties were not contained in the C-AMP, when that would not be a proper basis of review for the reasons given above;

8.5. the March 2017 decision falls to be reviewed and set aside because Cabinet did not comply with sections 5(1)(f) and 13(3)(a) of GIAMA, when in fact these provisions confer duties on the *custodian* and not on Cabinet, and the Department of Public Works did in any event comply with them;

8.6. the March 2017 decision falls to be reviewed and set aside because it does not appear from the minute of the meeting that Cabinet had any regard to GIAMA or the WCLAA, when in fact both were dealt with in documentation which served before Cabinet; and

8.7. the March 2017 decision falls to be reviewed and set aside because financial models prepared on behalf of the sixth respondent, the third respondent, NASHO and the sixth applicant showed that social housing was feasible on the site, when in fact the models did not show that, and even if they had, that would not render the decision reviewable.

9. The Court erred in granting the orders in paragraphs 7 and 8 read with the order in paragraph 11 in that:

9.1. the Court failed to take account of the fact that the Tafelberg properties are unsuitable for social housing, and have been found by the sixth respondent to be unsuitable for social housing, so that the effect of reviewing and setting aside the decisions and of invalidating the sale is simply that the properties remain in the ownership of the sixth

respondent, serving no useful purpose;

9.2. the Court failed to exercise a judicial discretion not to grant the review (even if there were grounds for doing so).

10. The Court erred in granting the order in paragraph 9 in that:

10.1. the order violates the constitutional principle of separation of powers because it usurps the role of the fifth respondent who is authorised in terms of section 3(1)(f) of the Social Housing Act to designate restructuring zones;

10.2. the order (and judgment) overlooks the fact that neither the 2 December 2011 notice nor the 15 December 2011 notice ('the notices') was published by the fifth respondent (as opposed to by her Department), despite the fact that section 3(1)(f) of the Social Housing Act confers the power to designate restructuring zones on the fifth respondent herself, and the notices are accordingly invalid for want of lawful authority;

10.3. the 2 December 2011 notice was replaced by the 15 December 2011 notice as far as the restructuring zones in the Metropole were concerned; and

10.4. the order is based on an incorrect interpretation of the notices.

11. The Court erred in not dismissing the application.

TAKE NOTICE FURTHER THAT the grounds on which the application will be made in respect of the **second order** and relevant parts of the judgment are the following:

1. The Court erred in granting the order in paragraph 1 in that:

1.1. the order assumes that every provincial government is under a legal duty to consult with national government as regards its intention to dispose of an immovable asset, alternatively an immovable asset that could possibly be used for housing, without identifying the source of any such duty;

1.2. the Court failed to appreciate that a duty as aforesaid would amount to an impermissible interference by the national sphere with an exclusive provincial executive power;

1.3. to the extent that the Court relied directly on section 41 of the Constitution for the source of the legal duty, it was not entitled to do so because of the principle of subsidiarity;

1.4. to the extent that the Court relied on section 5 of the Intergovernmental Relations Framework Act 13 of 2005 ('the IGRFA') for the source of the legal duty, it erred in doing so, because that section is limited to consultation with 'other affected organs of state' and co-ordinated action

in regard to the implementation of policy or legislation 'affecting the material interests of other governments', whereas the disposal of property belonging to a provincial government does not affect the national government, and does not affect the material interests of the national government;

1.5. the Court failed to appreciate that the sixth respondent complied with the relevant statutory provision, being section 3(3)(c) of the WCLAA, when on 18 May 2016 it notified the Acting Land Claims Commissioner in the Department of Rural Development and Land Reform: Western Cape and the Regional Manager in the national Department of Public Works of the proposed disposal; and

1.6. in any event, were section 5 of the IGRFA to be applicable to the disposal of the Tafelberg properties, the requirement to inform and consult with the fifth respondent and her department would be at variance with the provisions regarding disposal in the WCLAA, which do not require any processes in relation to the national government beyond what is set out in section 3(3) to be followed.

2. The Court erred in granting the order in paragraph 2 for the reasons given in paragraphs 7 and 9 above.

3. The Court erred in granting the order in paragraph 3 for the reasons given in paragraphs 8 and 9 above.

4. The Court erred in granting the order in paragraph 4 for the reasons given in paragraphs 7 and 9 above, and because there is otherwise no legal or factual basis for this order.

5. The Court erred in granting the order in paragraph 5 for the reasons given in paragraph 5 above.

6. The Court erred in not dismissing the application with costs, including the costs of three counsel.

TAKE NOTICE FURTHER THAT in the event that leave to appeal is granted, the first, second, sixth and eighth respondents will ask for the following additional relief:

(a) that such leave be to the Supreme Court of Appeal;

(b) that the costs of this application be costs in the appeal.

DATED AT CAPE TOWN THIS 18 DAY OF SEPTEMBER 2020.

STATE ATTORNEY

Per:

Attorneys for the first, second,
sixth and eighth respondents
22 Long Street
CAPE TOWN
(Ref: **C van Tonder**)

To: The Registrar

High Court
CAPE TOWN

And to: **NDIFUNA UKWAZI LAW CENTRE**
Attorneys for the applicants
18 Roeland Street
CAPE TOWN
(Ref: **M Shandu**)

And to: **STATE ATTORNEY**
Attorneys for the fifth respondent
Salu Building
316 Thabo Sehume Street
PRETORIA
(Ref: **P Mabaso**)

c/o **STATE ATTORNEY**
22 Long Street
CAPE TOWN
(Ref: **S Chetty**)

And to: **EDWARD NATHAN SONNENBERGS**
Attorneys for the third respondent
1 North Wharf Square
Loop Street, Foreshore
CAPE TOWN
(Ref: **J Zieff**/0334954)

And to: **RILEY INC**
Attorneys for the fourth respondent
212 Rosmead Avenue
WYNBERG
(Ref: JFR/MAT15004/wd)

And to: **M F JASSAT DHLAMINI**
Attorneys for the ninth respondent
143 Jan Smuts Avenue
Parkwood
JOHANNESBURG

c/o **A PARKER & ASSOCIATES**
Suit G06, Rostra House, The Forum
Northbank Lane, Century City
CAPE TOWN