Republic of South Africa
In the High Court of South Africa
(Western Cape Division, Cape Town)

[REPORTABLE]

CASE NO: 21166/12

In the matter between:

CITY OF CAPE TOWN	**Applicant**
And	
KHAYA PROJECTS (PTY) LTD	**First Respondent**
PEER AFRICA (PTY) LTD	**Second Respondent**
THE MINISTER OF HUMAN SETTLEMENTS, WESTERN CAPE	**Third Respondent**
JONATHAN MITCHELL	**Fourth Respondent**
WITSAND "IEECO" HOUSING BENEFICIARY SUPPORT ORGANISATION	**Fifth Respondent**
WITSAND PHASE ONE COMMITTEE	**Sixth Respondent**
SACLAWA	***Amicus Curiae***

JUDGMENT: DELIVERED 11 NOVEMBER 2014

MANTAME, J

A. INTRODUCTION

[1] Applicant came before this court for two forms of a declaratory relief. The first being that first respondent has failed to satisfy its constitutional obligations as set out in *Section 26(1) of the Constitution of the Republic of South Africa, 106 of 1996* ("the Constitution"), alternatively, that first respondent, in concluding the contract to provide and construct housing as part of the Witsand EECO Human Settlement Project, it undertook constitutional obligations as set out in *Section 26(1) of the Constitution of the Republic of South Africa, 106 of 1996.* Secondly, that the arbitration between first and second respondents that was referred to fourth respondent in 2009 for adjudication has lapsed in terms of *Section 23(a) of the Arbitration Act 42 of 1965.*

[2] This matter served before me for the first time on 24 April 2014. On that day first respondent raised some points in *limines* to the constitutional relief that applicant sought.

2.1 Firstly, that the applicant has not shown that it had complied with Rule 16 A of the Rules of this Court.

2.2 Secondly, that the applicant has not joined all parties with a real and substantial interest in the outcome of these proceedings.

2.3 Thirdly, that the relief which the applicant seeks is academic.

[3] Mr Katz SC opposed these points in *limines* and submitted that as the matter stood, it is ripe for hearing. Any postponement that would be granted by this court would amount to an undue delay.

[4] I made an order on the same day that the applicant comply with Rule 16 A in order to allow any possible *amici* to be joined in the proceedings. The matter was then postponed for hearing to 30 May 2014. On 30 May 2014 SACLAWA Enterprise CC was admitted as *amicus curiae* in these proceedings. The third point forms part of applicants' main application and will be dealt with as such in my judgment.

B <u>BACKGROUND FACTS</u>

[5] The then Blaauwberg Municipality which now falls under the applicant, commissioned a consultant to investigate the possibility of new housing options for the

residents of Witsand. At the time, Witsand was an informal settlement in the West Coast. Various options were considered, and after extensive consultation with the community, it was decided that the best option was to develop Witsand into a formal township. According to applicant, in deciding to develop Witsand, applicant was acting to meet the obligations in terms of the right of access to adequate housing in terms of Section 26(1) of the Constitution.

[6] In 2000 applicant commenced discussions with second respondent about the possibility of developing Witsand as a showcase for integrated environmentally energy efficient and cost optimised ("IEEECO") human settlement development. The IEEECO development promised optimization of local energy and environmental conditions. According to this planning, the housing project was going to have health benefits for the residents who suffered from lung and heart diseases as a result of air pollution from wood and coal burning. The community was extensively work- shopped about this project and they fully supported the concept. Applicant supported the development of approximately 2000 formal housing units in Witsand, and further supported the IEEECO methodology in principle. In order to evaluate the IEEECO concept, applicant decided to proceed with a pilot project of 400 units. This was known as Phase 1. It was then decided that after completion of Phase 1 of 400 units, applicant would proceed with the development and construction of the remaining 1600 units.

[7] In December 2001, applicant concluded an agreement with second respondent for the development of Phase 1 - Witsand Housing Project. Second respondent was appointed as a developer of the project in terms of the agreement, and their primary obligation was to "*develop and complete the Project*" in compliance with the Government's National Housing Code.

[8] In February 2002, applicant and second respondent concluded an agreement with the Witsand community that was represented by Witsand Housing Committee. The agreement was referred to as "the Social Compact Agreement". Clause 4.1 of this agreement read as follows:

"The common objective is to ensure that the first phase of the Witsand site of 400 residential erven is developed in the (sic) response to the needs of the homeless people within the immediate Witsand Informal Settlement and that the development process shall endeavour to support the creation of a viable, self-sustainable community."

Applicant further concluded two subsidy agreements with the Western Cape Housing Development Board to fund the Witsand Housing Project. Those agreements were signed in March and September 2004 respectively. According to applicant second respondent acting as applicant's agent and in fulfilment of its obligations, proceeded with issuing a tender for the construction of 320 of the 400 units of Phase 1. The other 80 units were going to be constructed according to a traditional PHP process – meaning that these units would be built by locally-trained residents under the supervision of second respondent. These units were also subjected to the IEEECO development methodology. After the tender process was finalised, first respondent was appointed as the contractor of the 320 units in Witsand.

[9] In October 2005, second respondent concluded a contract with first respondent. By this time, according to applicant, its contract with the second respondent's, for some reason had largely fallen by the wayside. Applicant stated that second respondent's role now changed from that of the applicant's developer to its implementing agent. According to applicant, first respondent was obliged in terms of the following clause of the first and second respondent's agreement to:

"4. …keep a *"competent person to administer and control the works"* on site "*continuously...during the execution of the work";*

5.1 …comply with all acts of Parliament, National Building Regulations, the Provincial Housing Department's Minimum Norms and Standards, the IEEECO prescripts and Municipal by-laws…;

11.1.1 begin the works and proceed with due skill, diligence, regularity and expedition…"

The agreement entered into by first and second respondent regulated the construction process, payment and dispute resolution mechanism, that is, mediation and arbitration. For instance, Clause 25 provided that a dispute will initially be solved through mediation. If mediation failed, Clause 25.3 provided that if either party disputes the opinion of the mediator, such party shall refer the matter to arbitration. *"Where the dispute is submitted to arbitration, then the arbitration shall be held in terms of the Arbitration Act and shall be conducted in accordance with the current Rules for the Conduct of Arbitrations published by the Association of Arbitrators and shall be heard by a sole arbitrator unless otherwise agreed by the parties."*

[10] In 2005, first respondent commenced to construct the 320 units. According to applicant, from the beginning, there were concerns about poor supervision by first respondent at the site. Applicant authorised payment to second respondent at various stages of completion. However, second respondent had concerns about defects in the units as a result of first respondent's workmanship. When these defects were discovered, second respondent stopped making payments to first respondent. Despite concerns about the poor state of the houses, applicant granted Occupation Certificates (also known as "*Happy letters*") to the residents and they were allowed to take occupation although there were concerns about the defects. The full extent of the defects became apparent on occupation. Second respondent commissioned an expert to look at the defects. The expert inspections revealed as follows:

10.1 That the fire walls / party walls separating the two halves of the semi-detached units were improperly constructed. This affected insulation and created a fire hazard;

10.2 That the roof sheets and the steel roof trusses had not been properly installed. There were a variety of defects in the workmanship, including missing screws, improperly placed screws, using the wrong screws, loose screws, leaving holes in the roof sheeting, missing anchor wires and improperly aligned roof sheeting. There was a risk that roof sheets would lift or even be blown off.

10.3 The “Isoboard®” overpulin roof insulation used by first respondent to construct the ceiling of the units was improperly installed and plagued by unacceptable workmanship. This increased fire risks; decreased insulation; increased risk of mould; and increase energy usage.

10.4 The foundations were not properly constructed considering the environmental conditions in the area.

[11] First respondent agreed to remedy the defects, but second respondent disputed its entitlement to be paid the outstanding and any additional amounts for the remedial work. This dispute was not capable of resolution and it was then referred to arbitration in 2008 – 2009 by the parties. Fourth respondent was subsequently appointed as arbitrator. It seems the arbitration has dragged, as it has to date not been concluded. Though, this appears to be the case, first and second respondent, as they are parties to this dispute entered into a written arbitration agreement with the arbitrator to extend the time limits as contemplated in terms of Section 23 (a) of the Arbitration Act 42 of 1965. Applicant did not form part of these proceedings, but claims that he has an interest in the matter. First and fourth respondents have refused to furnish applicant with documentation amongst others, extending the period of this arbitration on the basis that those proceedings are private and confidential. Applicant then approached this court as an interested party for these two forms of declarators.

C ISSUES

[12] This Court is now called upon to determine whether first respondent could be held accountable in terms of Section 26(1) of the Constitution, and further, whether the arbitration proceedings between first and second respondents that are still pending before the fourth respondent could be held to have lapsed in terms of Section 23 (a) of the Arbitration Act 42 of 1965.

D ARGUMENT BY THE PARTIES

[13] At the start of proceedings, Mr Combrink for the second respondent indicated that though he has been briefed by second respondent he will not be arguing the matter, he had a watching brief and will therefore abide by the decision of the Court.

Mr Katz SC and Mr Bishop appeared for the applicant, Mr Olivier SC and Mr Verster appeared for first respondent and Mr Schreuder appeared for the *Amicus Curiae.*

[14] Mr Katz SC for the applicant argued that private parties like first respondent who contract to build houses as part of a government housing project incur constitutional obligations to build *"adequate*" housing in terms of Section 26(1) of the Constitution. Whatever rules might be imposed by the contract, they must produce an end product that meets constitutional standards. Section 26(1) of the Constitution affords everyone in South Africa "*the right to have access to adequate housing."* The constitution is not limited to the vertical application of rights between the person and the state. Section 8 (2) of the Bill of Rights bind a private party "*if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right"*. According to applicant, first respondent had a constitutional duty towards the Witsand community to provide "adequate" housing. This argument was based on **Governing Body of the Juma Musjid Primary School & Others v Essay N.O. and Others[1],** where the provincial department of education was operating a public school on private land owned by a trust. The trust sought to evict the school from the property because the department had failed to conclude an agreement for the use of the land. One of the issues before the Constitutional Court was whether the trust had any constitutional obligations under the right to a basic education in terms of Section 29(1) (a) of the Constitution that would prevent the granting of an eviction order. Nkabinde S held that:-

> *"It is clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the MEC. There was also no obligation on the Trust to make its property available to the MEC to use as a public school."*

[15] It was submitted that Nkabinde J held further, that the purpose of Section 8 (2) of the constitution *"is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right."* As a trust had

[1] [2011] ZA CC 13; 2011 (8) BCLR 761 (CC)

permitted the department to use the land and *"performed the public function of managing, conducting and transacting"* the affairs of the school, it incurred "a negative constitutional obligation not to impair the learners' right to a basic education." It was therefore held that the trust acted reasonably in the circumstances.

[16] According to Mr Katz SC, there is nothing novel about private parties incurring direct horizontal constitutional obligations, including obligations relating to socio-economic rights such as housing. In **Government of the Republic of South Africa v Grootboom[2],** where Yacoob J held:

> *"A right of access to adequate housing also suggest 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."*

So the constitutional court found that Section 36(1) imposes "at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or imposing the right of access to adequate housing.

[17] Furthermore, Mr Katz SC submitted that the degree to which a contract in the area of housing can be determinative of the rights and obligations of parties must be determined against the background of the right of access to adequate housing. Applicant accepts though that the primary duty to provide housing to people of South Africa rests on it and the state, and not with the private parties. The state takes full responsibility to identify and address the need for housing, develop policies, budget to find and implement those policies. The state also has an obligation to contract with developers, to protect the interest of the beneficiaries to monitor the performance under the contracts and to enforce compliance therewith. It is not at all the intention of the applicant to shirk its constitutional obligations or shift those to the first respondent. Be that as it may, the state depends on private companies to perform its obligations in terms of Section 26. So it is applicant's submission that when the company contract with the state for the construction of houses, it intends to "promote

[2] [2002] ZA CC 19; 2001 (1) SA 46 CC; 2000 (11) BCLR 1169 CC at para 34

and fulfil" the constitutional right to housing and therefore incurs certain basic constitutional obligations. First respondent in undertaking with second respondent, who is the agent of the applicant to build the 320 units, voluntarily accepted the constitutional obligations. First respondent was required to build houses that complied with basic building standards, safe from fire that does not expose its inhabitants to the elements, and has no risk of collapse. This obligation according to applicant arises in two ways, first, it is an implied term of first and second respondents' agreement that the units built would constitute "*adequate housing"* in terms of Section 26(1) of the constitution and, secondly, first respondent incurred an additional direct constitutional obligation not to build houses that fell short of the basic standard of adequacy demanded by the constitution. In all, "*adequate housing"* must comply with nationally accepted industry building standards, including SANBS standards, national and provincial building codes, manufacturer Specifications and Agrément SA requirements. First respondent did not comply with these standards, as their workmanship was full of defects, as evaluated by different experts in the building industry.

[18] Further, in support of this submission, Mr Katz SC, in this regard referred to **Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others[3],** where the Court had to consider whether a private company that had successfully tendered to pay social grants had incurred constitutional obligations. Froneman J held that:

> *"When Cash Paymaster concluded the contract for the rendering of public services, it too became accountable to the people of South Africa in relation to the public power it acquired and the public function it performs. This does not mean that its entire commercial part dependent on, or derived from, the performance of public functions is subject to public scrutiny, both in its operational and financial aspects."*

[3] [2014] ZACC 12; 2014 (6) BCLR 641 (CC); 2014 (4) SA 179 (CC)

The service providers who build housing are in similar position as Cash Paymaster. The recipients of housing control access to housing and determine the quality and adequacy of these houses.

[19] The second leg of applicant's relief was that the arbitration has lapsed because the arbitrator failed to reach a decision within four months as stated in Section 23(a) of the Arbitration Act. Though applicant is not party to these proceedings, does it have a *locus standi* to seek that declaration? Applicant submitted that it has *locus standi* on two grounds: - firstly, it is second respondent's principal and therefore entitled to be a party to the arbitration, secondly, it is affected by the arbitration, and Section 23(a) is designed to protect third parties as well as parties to the arbitration. It was the applicant's contention that second respondent has always acted as applicant's agent. That could be gleaned from the first and second respondents' agreement. The fact that first and second respondents sought to regulate their relationship *inter se* in no way detracts from the principal – agent relationship that has always existed between them. As second respondent's principal, applicant was a party to the agreement and was entitled to participate in the arbitration and is therefore entitled to seek an order that, the arbitration has lapsed. Applicant contended further that, even if applicant is not second respondent's principal, applicant is clearly affected by the outcome of the arbitration. Accordingly, fourth respondent was required to make an award four months after the date on which such arbitrator or arbitrators entered on the reference, or the date on which such arbitrator was, or was called upon to act by notice in writing from any party to the reference. It was applicants' submissions that, the four month period ended at least on 19 October 2009, some four and a half years ago. The parties to the arbitration have refused to make available a document extending the duration of the arbitration, on the basis that the arbitration is private, including second respondent whom applicant claims to be its principal. Applicant submitted that it is entitled to the said document. Applicant further contended though, that second respondent has no objection in making the document available to applicant, but it could not make it available without the consent of the arbitrator and first respondent. So failure by the parties to prove the existence of this document can only be interpreted as an acknowledgment that it does not exist, or has not prevented the lapsing of the arbitration by operation of law. So applicant is therefore entitled to the relief it is seeking.

[20] First respondent opposed this application on the basis that it has no obligation whatsoever, as referred to by applicant to provide housing in terms of Section 26(1). Mr Olivier SC for first respondent argued that the relief sought against first respondent is academic. Applicant contended that if it is awarded the relief it seeks, it would be able to put first respondent's and would be "*offenders*" on a "*blacklist*" to prevent it from receiving future tenders from the government and secondly, that would be a "*message*" to other contractors not to "*hide behind commercial contracts to justify building houses that demean their occupants' dignity…*" It is first respondent's submission that both the blacklisting and warning to others are measures which can be achieved in the economic domain without having an empty court order. Further, this order would be academic in the sense that it will have no practical effect on the contractual relationship between applicant and first respondent, it will have no effect on the arbitration between first and second respondent as the issues involved is whether the first respondent has complied with the terms of the contract and not about the so-called "*constitutional obligations*".

[21] It was first respondent's submission that this constitutional relief stood to be adjudicated in terms of *Section 19(1)(a)(iii) of the Supreme Court Act 59 of 1959*. The fact that a person cannot claim relief consequential upon the determination of a declarator is not a bar to the court exercising its discretion in favour of the applicant, but the absence of an existing and concrete dispute may cause the court not to grant the declarator –See- **Shoba v Officer Commanding, Temporary Police Camp[4] and JT Publishing (Pty) Ltd v Minister of Safety and Security[5].**

[22] Counsel for the first respondent argued further, that as the case is, applicant does not seek to exercise any "existing, future or contingent rights" against the first respondent, but rather an implied term in Section 26(1) of the Constitution, of which first respondent denies its existence. What applicant seeks to do, is asking this Court to express an opinion on whether Section 26(1) of the Constitution requires the inclusion of an implied term in a construction agreement between builders and the state or organ of state. According to Mr Oliver SC, the constitutional obligation which

[4] 1995 (4) SA (1) (A) at 14 F - H
[5] 1997 (3) SA 514 (CC) at 525 para 15

is addressed in Section 26(1) of the Constitution is not enforceable against individuals – not in terms of the constitution, and not in terms of common law – See **Theewaterskloof Holdings (Edms) Bpk v Jacobs[6].**

[23] First respondent's Counsel submitted further, that it is not possible for this court to deal with the alleged defective work by second respondent as this dispute is still the subject of arbitration between the first and second respondents. In any event, respondent denies the existence of any defective work. Besides, applicant cannot raise the existence of any defects in claims against first respondent as there is no privity of contract between them. The contract in existence is between the first and second respondents, and not with the applicant. Based on the applicant's supposition that it is entitled to raise the issue of the defective work against the first respondent in order to claim a declarator as second respondent's principal, applicant should have foreseen a major dispute of fact in that regard. That could be deduced from the fact that first and second respondent took their dispute to arbitration.

[24] First respondent further disputes that applicant is the principal of first respondent, but if at all that was the case, applicant should be bound by first respondent's submission of the issues currently before arbitration. There was no need at all for the applicant to approach this court.

[25] Further, Mr Olivier SC submitted that applicant cannot claim the declarator that the arbitration has lapsed simply because the parties to the arbitration, that is, first and second respondent have agreed in writing that the date for the award be extended, and secondly, applicant has no *locus standi* at all to claim such relief. The existence of such an agreement was made known to the applicant by means of a letter from the arbitrator dated 21 September 2012. Furthermore, applicant was made aware by means of a letter dated 29 September 2012 by the arbitrator that arbitration proceedings are conducted on a private and confidential basis, and could not send the document extending the time of arbitration as requested. The arbitrator confirmed in the said letter that *"this arbitration has not lapsed, as the parties have previously mutually agreed to extend the time limits set by Section 23(a)…"* Applicant therefore

[6] 2002 (3) SA 401 (LLC) 411 E

has no *locus standi* to seek this relief as it is not a party to these proceedings in his own name, or in a representative capacity. Furthermore, there is no reason for him to doubt the existence of such an agreement as he was informed in writing. First respondent disputed that second respondent was the agent of the applicant. The first and second respondent's agreement described applicant as the "*project developer"* and second respondent as the "*implementing agent*." Such reference to second respondent as *"implementing agent"* must not be confused with agency relationship as applicant does. Also in the same agreement, though applicant is mentioned – nowhere in the said document was applicant described as the "*principal"* of second respondent or defined nor described as a party in its own right.

[26] Furthermore, counsel submitted that in the contract that was concluded by applicant and second respondent, second respondent is described as the "*developer*" and applicant as "*the municipality.*" There is no mention of a principal-agent agreement. According to *Clause 2.2.4* of that contract, it is stated that - the municipality *"does not accept any responsibility for the execution of the project or for the rectification of defects which comes to light as a result of the inspection or for any other reason."* That clause is not compatible with a classic agency agreement, where liabilities incurred by the agent *ipso jure* become those of the principal. Even during the arbitration proceedings, neither the arbitrator nor second respondent regarded applicant as second respondent's principal. Also second respondent, in the arbitration agreement with first respondent, did not convey that it represented the applicant as its agent. Second respondent even refused to disclose the confidential documents to the applicant. If there was an agency agreement, surely the principal should be bound by its agent's decision and not come to this court as an independent party. It was first respondent's argument that applicant's application should be dismissed with costs in its entirety.

[27] The *Amicus*, in turn argued that contractors such as themselves and first respondent do not have any constitutional obligations as set out in Section 26(1) of the Constitution. They only have a negative obligation not to interfere with a person's constitutional right to have access to adequate housing as contemplated in the said Section. Contractors do not undertake any constitutional obligation when they contract with the state in respect of the construction of houses and associated infrastructure.

It is the duty of the state to take reasonable legislative measures in order to achieve the progressive realisation of everyone's right to access to adequate housing in terms of Section 26(1) of the Constitution. If applicant intends to bring about re-ordering of private relations in imposing additional obligations "*above and beyond the contracts*" between applicant, first and second respondents, it has to ensure that whatever has to be delivered "*above and beyond"* the tender specifications, the state has to pay for such expenses. Further, that will result in uncertainty and chaos in the building industry, in relation to the housing projects subsidised by the state.

[28] According to the *amicus*, the state has taken reasonable legislative measures, through the publication of a National Housing Code in terms of the Housing Act and other measures within its available resources to achieve the progressive realisation of everyone's right to have access to adequate housing. If regard is had to the applicant's relief, the contractor will be required to build to a higher standard than the one undertaken, or covered by a contract entered into between the contractors and the state; it will add to the obligations of contractors and tenderers in terms of common law and ordinary contractual obligations of all contractors which enter into agreements with the state; constitutional obligations which the state might seek to be added to a building contract, will be a term implied by law. In his argument, Mr Schreuder contended that, what applicant is seeking is already catered for in Section 217 (1) of the Constitution which reads as follows:

> *(1) "When an organ of state in the National, Provincial and local sphere of Government or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost effective."*

[29] Furthermore, the National Building Regulations and Building Standard's Act No 103 of 1977 ("the Building Act") sets out all the building standards that the contractor has to comply with. The National Building Regulations require all buildings to comply with the structural and other requirements. Codes of Practice were promulgated in terms of the said regulations to facilitate its proper implementation under the auspices of the National Home Builders Registration Council ("NHBRC") which is the regulatory

body of the home building industry. The NHBRC's mandate is to protect the interests of the housing consumers and to ensure compliance with regulated building industry standards. In terms of the Housing Consumers Protection Measures Act 95 of 1998:- any person in the business of building homes is required by law to register with the NHBRC. The NHBRC certifies builders who meet regulated industry criteria for technical, construction and financial capabilities. All housing schemes and houses are required to be enrolled with the NHBRC to protect home owners against poor building practices. This means therefore, that there is already a regulatory framework in place which governs, amongst others, contracts between the state and the contractors in respect of housing schemes undertaken by the state in its progressive realisation of everyone's right to access to adequate housing. Neither the Constitution, nor this regulatory framework places a legal obligation on any other person than the state to provide adequate housing as contemplated by Section 26 of the Constitution. It was Mr Schreuder's argument, that the state has always taken reasonable legislative measures in order to achieve progressive realisation of the right of persons to have access to adequate housing and it still continues to do so.

[30] It was ***amicus's*** argument, that though the applicant seeks a declarator, it has not made out a case as to what constitutes "*adequate*" housing and what the phrase "*basic constitutional standards"* mean. The relief as it is sought is vague and embarrassing and is therefore excipiable. The constitutional court has pronounced on the fact that it is unreasonable for a private entity to be forced to bear a burden which should be borne by the state for providing the occupiers with accommodation – See **President of the Republic of South Africa & Another vs Modderklip Boerdery (Pty) Limited.**[7] Given such findings by the constitutional court, the relief sought by the applicant fails the test of effectiveness and its application falls to be dismissed on that basis alone. If regard were to be had to **Modderklip Boerdery(*supra*)**, contractors like the first respondent and *Amicus* could not be expected to provide housing other than contractually determined in terms of the procurement process, executed in terms of the Constitution, national, provincial and municipal legislation. The state bears the exclusive duty to provide persons with access to adequate housing. Further, applicant has failed to rely on the relevant legislation in order to give

[7] 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC)

effect to rights flowing from Section 26 of the Constitution. In **Mazibuko & Others vs City of Johannesburg**[8], where the constitutional court held, that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution. Applicant should have resorted to legislation such as the Housing Act, National Housing Code, National Standards (NHBRC standard, National Building Regulation, etc.) in order to seek relief against first respondent. *Amicus* submitted that in view of these arguments, the constitutional relief should be dismissed with costs.

D ANALYSIS AND THE APPLICABLE LEGISLATION

[31] Applicant approached this Court seeking two forms of declarators against first respondent. Applicant entered into a contract on or about December 2001 with second respondent to develop a strategic triangle of land in Atlantis (referred to as Witsand Project) as a low cost housing project. In this contract, applicant was referred to as *"the municipality"* and second respondent was referred to as *"the developer*." In order to realise the construction of these houses, second respondent entered into an agreement with first respondent who is a building contractor to attend to the building of these houses. Second Respondent was referred to as *"primary support organization"* and first respondent was referred to as "*secondary support organization*." Applicant submitted that when it contracts with a private company, it intends to promote and fulfil its constitutional obligation in terms of Section 26. Applicant who approached this Court for at least two declarators against first respondent, did not sign any contract with first respondent. Applicant relied on the fact that he is an interested party and further contended that at all times during the Witsand project, applicant acted as "*principal,*" and second respondent its "*agent*." First respondent on the other hand disputed this "*principal – agent"* relationship between these two parties, and submitted that if second respondent acted as such, applicant must be bound by second respondent's submission of the issues which are before an arbitration. In any event, it was first respondent's submission that its contract is with second respondent. There was a real dispute of fact between these parties regarding

[8] 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 73

the alleged defects in those houses; hence they submitted themselves to arbitration jurisdiction. I will deal with the arbitration issue in my judgment when I am dealing with the second declarator. I will now turn to deal with the first declarator.

[32] Applicant seeks a declarator against first respondent that it failed to satisfy its constitutional obligations to construct adequate housing in terms of Section 26(1) of the Constitution, or alternatively, that first respondent in concluding the contract to provide and construct housing as part of Witsand Project, it undertook constitutional obligations as set out in Section 26(1) of the Constitution. As I stated in the aforementioned paragraph, applicant did not have a direct contractual relationship with first respondent, but stated that the standard of the houses that were constructed by first respondent was appalling. The roofs were not properly installed and that led to leaks and the risk of it being blown off; the insulation and firewalls were not installed safely, creating a fire risk. Furthermore, the foundations were not properly constructed and therefore at a risk of collapse. Despite requests to remedy these defects, first respondent failed to do so, instead it resorted to arbitration. It was therefore first respondent's constitutional obligation to build adequate housing as stipulated in Section 26(1) of the Constitution.

[33] First respondent vehemently opposed this relief on the basis that applicant cannot raise the existence of any defects in claims for a declaration against the first respondent as there is no privity of contract between them. Knowing full well that this dispute is currently before arbitration, this Court cannot deal with such issues as this currently serve in the arbitration tribunal. Further, the constitutional obligation envisaged by Section 26(1) of the constitution is in any event not enforceable against individuals – not in terms of the Constitution, neither in terms of common law. A declarator, without having the effect of enabling the applicant to claim damages or specific performance from the respondent, is clearly academic in effect.

[34] Applicant has conceded that it is not aware of the extent of the actual damages to those defective houses, besides the fact that by the end of 2013, the estimated cost of repairing those units stood at R17 million. In this judgment, I will not deal with the extent of damages incurred for the reason that damages in those houses are not conclusive. In any event, that is not relevant for the determination of this declaratory.

I will now turn to deal with Section 26(1) of the Constitution on which this relief is premised. Section 26(1) of the Constitution reads as follows:-

"Everyone has the right to have access to adequate housing."

In order to ensure that everyone enjoys this right in the "bill of rights" the state procures the services of private companies in order to give effect to "adequate housing." Can it be safely said that private companies, in the form of first respondent, if indeed provided sub-standard houses for the state, failed to satisfy its constitutional obligations or in concluding the contract to construct housing as part of Witsand Project, it undertook constitutional obligations in terms of Section 26(1) of the Constitution? In my view, that could not be so as the provisions of Section 26(1) are further qualified in the following paragraph. Section 26(2) reads as follows:-

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

There is nowhere in this section where the legislature attempts to delegate this constitutional obligation to individuals or private parties. I have taken consideration of applicant's submission in this regard that "*the City does not seek to shirk its constitutional obligations or to shift those obligations to Khaya*."

In my opinion, applicant is doing exactly what it contended not to be doing. For this court to be asked by applicant to impose additional constitutional obligations to first respondent would be tantamount to "over-regulating" the building industry that has been ably regulated.

[35] Applicant further submitted that, it was first and second respondents' implied term in their contract that the units build would constitute "*adequate housing"*. First respondent disputed that contention. Unfortunately second respondent is not before court to neither accept nor dispute that contention. In my view, applicant is not in a position to make those allegations as it was not privy to what these parties agreed to. I tend to agree with first respondents' counsel that applicant is in the process of

seeking opinion to this court on this implied term in a contract that was concluded by two independent parties. It was first respondents' argument that, there was a considerable dispute of fact, regarding the so-called defective work, hence the parties involved decided to resolve their dispute through arbitration.

[36] Applicant is correct that the state has a constitutional obligation to provide adequate housing. If that is conceded to be the case, it is the duty of the state to monitor the project up until its finalisation, if it decides to procure it to the third party. Though Section 8(2) of the Bill of Rights of the Constitution binds private parties to certain rights in the constitution, it does so to an extent it is applicable, taking into account the nature of the right and the nature of the duty imposed by that right. In **Juma Musjid (supra)**, it was held that the purpose of Section 8(2) is not to obstruct private autonomy or to impose on private party duties of the state. Similarly in this matter, Section 26(1) is qualified further in Section 26(2) of the constitution. The burden imposed by the constitution particularly in Section 26(1) cannot shift or extend to the individuals and private party and/or parties. In my view, this court cannot make a finding either that it is an implied term of first and second respondents' agreement that the units built would constitute "*adequate housing"* in terms of Section 26(1) of the constitution as argued by applicant. Applicant did not form part of these parties' agreement or agreements and could not make such pronunciations.

[37] In my finding, what would constitute "*adequate housing*" could only be achieved if the state make use of reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right. In this regard as the state did in the past, it should continue to make utilization of procurement legislation, (the tender specifications must include or comply with one or more of the several national standards published in the South African Bureau of Standards ("the SABS"), Government's National Housing Code, the Housing Act 107 of 1997, the Provincial Housing Department's Minimum Norms and Standards, the iEECO prescripts, Municipal by-laws, Agrément SA requirements, the National Building Regulations and Building Standards Act 103 of 1977, in line with the National Building Regulations, the Codes of Practice that have been promulgated for the implementation of the National Home Builders Regulation Council. If the contractor transgresses, and does not comply with building regulations or standards, there is a regulatory body that the

company is accountable to. In any event, by law it is compulsory for all the companies in the home / housing building industry, to register with NHBRC. I am certain that when applicant and / or its developer, award tenders, they do not award to companies that are not in compliance with legislative standards. For applicant to contend that first respondent should produce an end product that meets constitutional standards, of which such constitutional standards have not been defined by them, in my opinion goes against the rules of fairness. In my view, first respondent could be held to have a negative obligation not to interfere or obstruct a person's constitutional right to have access to adequate housing in terms of Section 26(1). It should be imperative for applicant to always insist on a continuous stage assessment of construction by experts in order to ensure quality workmanship. If the state is proactive in taking the legislative measures seriously and manage the process properly, it will be able to close loopholes in the contracts. It is completely unacceptable for contractors to build shoddy and sub-standard houses for the poor. Since the state has a constitutional obligation to deliver service to the people in the form of low-cost housing in this instance, in my view, the state has to tighten up the screws and ensure that the houses that the contractors produce are dignified, suitable for human habitation and they should pass the muster. If they do not – applicant should not issue the occupation certificates or "*happy letters*" for occupation by the recipients. If the contractor transgresses, it will have a damages claim, or a claim for specific performance on the contractor. If applicant continues to issue occupation certificates for occupation by recipients, like it did in the present case, in my opinion that is an indication that it is happy with the work that was performed by the contractors, unless there is some form / kind of an undertaking that has been given by the defaulting party.

[38] I have considered all the authorities that were referred to by the parties. I now turn to deal with **Allpay Consolidated Investment Holdings (Pty) Ltd (*supra*),** where the constitutional court had to consider whether a private company (Cash Paymaster) that had successfully tendered to pay social grants had incurred constitutional obligations. Mr Katz SC submitted that first respondent concluded a contract for the rendering of public services like Cash Paymaster. *Amicus,* in this regard contended that **Allpay Consolidated Investment Holdings (Pty) Ltd (*supra*)** does not find application in this regard, as the litigant relied on the Social Assistance Act 13 of 2004 for the payment of social grants by the state and the awarding of tender by South

African Social Security Agency ("SASSA") in order to give effect to the right, or alternatively, challenge the legislation as being inconsistent with the Constitution – See **Mazibuko (*supra*)**. *Amicus* submitted that applicant does not challenge, rely or resort to any legislation in the building industry and therefore this application should fail. First respondent associated themselves with *Amicus's* submission in this regard.

[39] In my analysis, the constitutional obligations in that case are considerably different from the one sought by Applicant in that, the obligations were expressly spelt out in **Allpay** (*supra*). Applicant submitted that if that declarator is granted, it would be able to put first respondent on a "*blacklist"* to prevent it from receiving future tenders, and further it would give a "*message"* to other contractors not to *"hide behind commercial contracts to justify building houses that demean their occupants' dignity…*" I agree with first respondent's submission that although there are plans in place by the applicant for non-compliance by private companies, the fact remains that the constitutional obligations have not been defined by applicant as to exactly what they are. In my judgment, I have already stated that according to my interpretation, Section 26(1) only confers constitutional obligations to the state. In any event in **Allpay Consolidated Investment Holdings (Pty) Ltd (*supra*)** at paragraph [56] – stated

> *"The contract between SASSA and Cash Paymaster also makes clear that the latter undertook constitutional obligations. The request for Proposals further stipulates that the tender is subject to the Constitution. The contract itself indicates that the Request for Proposals forms part of the contract and was incorporated by reference. The preamble of the contract states that "SASSA is in terms of the applicable legislative framework responsible for the administration, management and payment of social grants in line with the Constitution."*

In terms of the contract that was entered into by Applicant and Second Respondent, there was no mention of constitutional obligations that had to be undertaken by any party. Also, in terms of the contract that was entered into by first and second respondents, there was no mention of constitutional obligations that have to be undertaken by any party. It is my view, that a party should be held accountable on

what it agreed on. It can never occur after ten years of entering into a contract, that an interested party would approach this court claiming constitutional obligations that were never expressed or implied for that matter. If a party intends to enforce some obligations, *albeit* constitutional in nature – such obligations should be made transparent and be spelt out in the contract and a party who fails to comply with such obligations should know the consequences thereof. Taking into account my analysis above, a declarator is not warranted as it would not serve any purpose in this regard. In my view, this relief sought should fail.

[40] I now turn to deal with the second relief. The second form of the relief sought by the applicant is a declaration that the arbitration between first and second respondents has lapsed in terms of Section 23(a) of the Arbitration Act 42 of 1965. Applicant contends that this arbitration has lapsed due to the fact that the arbitrator failed to reach a decision within the four (4) months period contemplated in Section 23(a) of the Arbitration Act. The question arises as to whether applicant is entitled to seek this declarator - although it is not party to these proceedings; and if indeed the arbitration has lapsed, what are the consequences thereof?

[41] First respondent does not dispute the fact that the four month period has lapsed, but contended that such period was extended by agreement between the parties and such award can therefore be made at a later date. The document extending such proceedings cannot be made available to applicant, as such were private and confidential. If at all applicant is the principal of the second respondent, it should abide by the decision of its agent, that is, second respondent in this regard. Be that as it may, first respondent disputes the fact that applicant and second respondent have a principal – agent relationship. This therefore means that applicant has no *locus standi* to claim that the arbitration has lapsed.

[42] Though applicant argued that in an agreement between applicant and second respondent, it appears clearly on the title page and preamble that second respondent is the applicant's *"implementing agent*", in my opinion, such reference does not expressly or impliedly prove that there is an agency relationship that normally applies in the law of agency. In my view, this argument by applicant stands to be rejected, on the basis that, the law of agency regulates the performance of a juristic act on behalf

or in the name of one person who is specifically referred to as a principal by another who is specifically referred to as an agent. The agent is authorised by its principal to act with the result that a legal tie (*vinculum juris*) arises between the principal and a third party which creates, alters or discharges legal relations between the principal and a third party. In this contract, that was not what was envisaged. The agreement refers to "*the municipality*" and "the *developer"* as distinct parties, who have to fulfil functions and obligations as per their written contract.

[43] Unfortunately, second respondent did not agree or deny this principal – agent relationship as alleged by applicant. It was first respondent's submission that, though applicant was mentioned in its contract with second respondent, it was never described as a principal. If that was the intention of applicant and second respondent, such relationship would have been reflected as such throughout the contract. First respondent further stated that, for instance, *Clause 2.2.4* of the contract between applicant and second respondent states that the municipality (applicant) *"does not accept any responsibility for the execution of the project or for the rectification of defects which comes to light as a result of the inspection or for any other reason."* That is in contrast with a classic agency agreement where liabilities incurred by the agent *ipso iure* become those of the principal. I agree with first respondent's counsel's submission in this regard.

[44] In my view, it is patently clear that applicant and second respondent contracted with each other as independent parties. First and second respondents for instance agreed to resolve their disputes through arbitration as reflected in the paragraph dealing with settlement of disputes. Paragraph 25.3 reads as follows:-

> *"…Where the dispute is submitted to arbitration, then the arbitration shall be held in terms of the Arbitration Act and shall be conducted in accordance with the current Rules for the Conduct of Arbitrations published by the Association of Arbitration and shall be heard by a sole arbitrator unless otherwise agreed by the parties."*

In the above quotation, there is no mention of applicant's duty to intervene as a principal, if that process stalls. I am satisfied that if applicant knew that the arbitration

award was supposed to have been granted at least by 19 October 2009, and was sure of its *locus standi* it should not have waited until 2012 to file this application. As an interested party, it should have set the law in motion within a reasonable period. In the result, this relief should also fail, as applicant lacks *locus standi* to bring these proceedings before this Court.

E ARBITRATION

[45] Having said so, it is my duty to deal with the arbitration proceedings in this judgment that are currently before the fourth respondent. Though fourth respondent did not oppose the second relief that was sought by applicant, the correspondence between applicant and fourth respondent served before this Court in the form of annexures to this application. Upon considering the contents of those documents, there is no doubt in my mind that indeed the arbitration proceedings are currently before fourth respondent, and he confirmation that its duration was extended by agreement between the parties. Due to the nature of these proceedings, they are supposed to be cost efficient and quicker than litigation – not the other way round. Applicant approached this Court before the finalisation of these proceedings as an interested party, and to declare them as lapsed and furthermore for this Court to make a further determination thereafter if the prayer is successful. Unfortunately, applicant's prayer is not successful. Further, this Court could not pronounce and or make a finding on the proceedings that are still pending before another forum.

[46] At this point, I might as well remind first, second and fourth respondent, that the dispute between the parties detrimentally affects the socio-economic rights of the poor. I am aware that no order was sought against the fourth respondent in these proceedings. Similarly, I will not turn a blind eye where there are serious allegations of falling roofs or imminent crumbling structures against the marginalized people. It is in the public interest that a determination of issues is made and the arbitration proceedings be finalised by the fourth respondent within a reasonable period. The amount of time that has lapsed without finalisation of these proceedings is completely unacceptable. The delay in finalisation of these proceedings resulted in applicant approaching this Court out of frustration, using tax payer's funds to try and reach finalisation of this matter. As this Court was advised that proceedings were proceeded

with on a "*private and confidential*" basis, - it was never disclosed exactly at what stage they were currently at. Fourth respondent is asked to re-convene and finalise the arbitration with the reasonable and necessary co-operation by the parties within a period of four (4) months from the date of this judgment.

F FINDING

[47] In the result applicants application is dismissed.

G COSTS

[48] I have considered all the submissions made by the parties in this matter in respect of costs.

48.1 Chamber Book application – granted by Samela, J on 1 March 2013

I have perused the chamber book order granted by my brother Samela, J in this respect and, there were no costs awarded.

In the result that each party will pay its costs.

48.2 Chamber Book application – 7 August 2013 and the hearing of 15 August 2013

This chamber book was filed by first respondent compelling applicant to furnish certain documents, and also to set aside the chamber book order and it was opposed by applicant.

In my view, this was an abuse of process by first respondent. In the result, first respondent is ordered to pay costs of the chamber book application of 7 August 2013 and the hearing of 15 August 2013.

48.3 The hearing of 14 November 2013, 24 April 2014 and 11 August 2014

Applicant is ordered to pay the costs of these proceedings, including costs of respondent's two counsel and costs of *amicus curiae.*

48.4 The hearing of 30 May 2014

Each party is ordered to pay its own costs.

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MANTAME, J