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

REPORTABLE
CASE NO: 7908/2017

In the matter between:

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

And

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

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

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

In the matter between:

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

Bench: P.A.L.Gamble and M.I.Samela, JJ

Heard: 13 November 2020, 12 March 2021

Delivered: 23 April 2021

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 23 April 2021

JUDGMENT – LEAVE TO APPEAL

GAMBLE, J:

INTRODUCTION

1. On 31 August 2020 this Court handed down judgment in the two applications conveniently heard together in November 2019, being case no. 7908/2017 ("the RTC application") and case no.12327/2017 ("the National Minister's application"), colloquially referred to as "theTafelberg application".

2. On 22 September 2020, the City of Cape Town ("the City") lodged an application for leave to appeal the orders made against it and the following day the Provincial Government of the Western Cape ("the Province") did likewise. For the purposes of this judgment, the parties are cited to as they were before us and we utilise the same abbreviations that we employed in the main judgment.

3. By arrangement with the parties, the application for leave to appeal was set down for hearing in open court on Friday 13 November 2020. Shortly before that

hearing, the legal representatives for both RTC and the National Minister advised the Court of certain material developments subsequent to the handing down of judgment in the main matter and filed affidavits to this end. Mindful of the approach in Lamana[1], we considered the substance of the affidavits which was to inform the Court of a joint statement issued by way of a press release on 18 September 2020 by the Premier of the Province, Mr. Winde, and the Provincial Minister of Human Settlements, Mr. Madikizela. A copy of that statement was annexed to one of the affidavits and it later became common cause that it was duly issued.

4. The statement was self-serving in many respects as the Province sought to assure the public of its "commitment to achieving spatial redress", of its avowed intention "to push ahead with spatial redress projects" and that it had "started to develop an inclusionary housing policy". The judgment of this Court was also dealt with at length in the statement, including the fact that the sale of the Tafelberg property had fallen by the wayside as a consequence of the stance adopted by the Day School.

"The decision to sell the property in Sea point (sic) known as Tafelberg to the successful bidder, The Phyllis Jowell Jewish Day School, was taken in the previous political term, by a cabinet different to the current one.

Whilst that agreement of sale was the impetus for the litigation which has followed, it's clear that the real aspects of contestation argued before the Western Cape High Court, and therefore the judgment's consequences, span far beyond this particular site and this particular

[1] South African Police Service Medical Scheme 2011 (4) SA 456 (SCA)

purchaser, which has been unable to take ownership of the site for over two years already as a result of the litigation.

The Western Cape Government can now confirm that, after reflecting on the recent judgment handed down by the Western Cape High Court, the Phyllis Jowell Jewish Day School have indicated to us that they do not intend to pursue their rights under this contract of sale any further - a decision which we believe will result in the mutual termination of the sales agreement and the return of the property to the Western Cape Government's property portfolio.

Its return to our portfolio will give us the opportunity to re-consider (sic) its future use in light of the priorities of this new administration and I am grateful to the board of Phyllis Jowell Jewish Day School for informing us of their decision in this regard and which will allow its use to be considered afresh."

5. In an affidavit filed on 12 November 2020 - the eve of the hearing of the application for leave to appeal – the legal adviser in the Department of the Premier of the Western Cape advised the Court that an agreement of termination had been drafted in relation to the sale of the property but that at that stage it had not been concluded due to certain suspensive conditions which were then still pending. In the result, said the Province, the original agreement of sale to the Day School was still in place.

6. When the application for leave to appeal commenced on 13 November 2020 we informed counsel and the parties that we were reluctant to proceed to hear the application until the outstanding issues relating to the cancellation of the sale agreement between the Province and the Day School had been resolved. Despite

requests by both sides that we should continue with the hearing, we remained of the view that all the necessary formalities needed to be complied with before the matter was ripe for hearing. We considered that the Court needed to be fully appraised regarding the question of mootness, if that was to be the case. In the result, the application for leave to appeal was postponed sine die with the wasted costs of 13 November 2020 reserved for later determination.

7. Early in 2021, we were informed that the cancellation agreement in relation to the Tafelberg property had been finalised and the Court was furnished with a copy thereof. Being satisfied that the matter was ready for hearing, we directed that the parties agree on a suitable date, and the matter was then heard virtually on Friday 12 March 2021. The parties were represented as before, save that the Day School did not participate in the matter further. Due to prior commitments, Ms Webber was unable to appear on behalf of the SHRA, which requested that the Court consider her written submissions in relation to the application for leave to appeal. In addition, there was no further appearance by the *amicus curiae.*

8. We are indebted to counsel for their detailed heads of argument and their submissions during a lengthy virtual hearing that lasted well beyond 17h30 on the Friday in question. Before dealing with the application itself it is necessary to effect certain corrections to our earlier orders in light of firstly, a patent error therein, and secondly, potential ambiguity.

CORRECTION OF ORDERS IN TERMS OF RULE 42(1)(b)

9. In terms of Rule 42(1)(b) a court is permitted, either on application or *meru motu*, to correct a patent error or ambiguity it its order. It was drawn to our attention by the Province that there was a patent error (in essence a typographical mistake) in para 1(i) of the order in the RTC application in that the reference to s25(1) of the Constitution should have read “s25(5)”.

10. There being no objection by any of the parties, the correction will be effected forthwith.

11. During the initial hearing of the application for leave to appeal on 13 November 2020, it was drawn to our attention by Mr Hathorn SC on behalf of RTC that there were two potential ambiguities in our declarations of invalidity regarding Reg 4(6). The ambiguity lay therein that the orders could be interpreted as being restricted to the parties to the two applications, whereas the intention was to the contrary: in making our order, we did not intend that other parties to contracts of sale of provincial land to whom rights had already accrued prior to our declaration of invalidity, should be prejudiced or in any way negatively affected by the declaration

12. Given that our orders were guided by the notices of motion and draft orders presented to us prior to, and during the course of, the hearing, we asked counsel to reformulate the suggested changes to the orders so that they might fairly reflect what we intended. We are indebted to counsel for RTC for their contribution in this regard.

13. In the result, and there being no objection from any of the other parties, we direct that the following corrections are to be effected to the orders made on 31 August 2020.

Ad Case No. 7908/2017

In para 11 of the order the phrase "*This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment"* is deleted and replaced with the following –

"The declaration of invalidity in paragraph 10 will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings."

Ad Case No. 12327/2017

In para 5 of the order the phrase "*This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment"* is deleted and replaced with the following –

"The declaration of invalidity will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings."

THE APPROACH TO APPLICATIONS FOR LEAVE TO APPEAL

14. An applicant for leave to appeal must meet the requirements of s17(1) of the Superior Courts Act, 10 of 2013, which reads as follows.

"17. Leave to Appeal **–**

(1) Leave to appeal may only be given where the…judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16 (2)(a); and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

15. There has been some debate in courts of first instance as to the effect of s17(1) in determining the criteria to be applied when considering an application for leave to appeal. It has been held that the change in wording of the relevant section through the use of the word "would" in s17(1)(a)(i), when compared to the word

"might" in the relevant section of the former Supreme Court Act, 59 of 1959, has had the effect of raising the bar for an applicant for leave to appeal.[2]

16. Recently, in Ramakatsa[3], the Supreme Court of Appeal ("SCA"), with reference to its earlier decision in Caratco [4], effectively put the debate to rest.

"[10] Turning the focus to the relevant provisions of the Superior Courts Act (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the

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[2] See for example Mont Chevaux Trust v Goosen and others (LCC14R/2014) 3 November 2014; South African Breweries (Pty) Ltd v Commissioner of South African Revenue Services [2017] ZAGPPH 340 (28 March 2017); ABSA Bank Ltd v Transcon Plant and Civil CC and another [2020] ZAKZPHC 19 (23 June 2020).

[3] Ramakatsa and others v African National Congress and another [2021] ZASCA 31 (31 March 2021)

[4] Caratco (Pty) Ltd v Independent Advisory (Pty) Ltd 2020 (5) SA 35 (SCA)

trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." (Internal references omitted)

MOOOTNESS

17. The reference in s17(1)(b) to s16(2)(a)(i) of the Superior Courts Act relates to the question of mootness.

"16(2)(a)(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone."

18. In Normandien Farms[5] the Constitutional Court recently set out the principles relevant to the issue of mootness.

"[46] It is clear from the factual circumstances that this matter is moot. However, this is not the end of the inquiry. The central question for consideration is: whether it is in the interests of justice to grant leave to appeal, notwithstanding the mootness. A consideration of this Court's approach to mootness is necessary at this juncture, followed by an application of the various factors to the current matter.

[47] Mootness is when a matter "no longer presents an existing or live controversy". The doctrine is based on the notion that judicial resources ought to be utilised efficiently and

[5] Normandien Farms (Pty) Ltd v South African Agency for Promotion of Petroleum Exploration and Exploitation SOC Ltd and another 2020 (4) SA 409 (CC)

should not be dedicated to advisory opinions or abstract propositions of law, and that courts should avoid deciding matters that are “abstract, academic or hypothetical”.

[48] This Court has held that it is axiomatic that “mootness is not an absolute bar to the justiciability of an issue [and that this] Court may entertain an appeal, even if moot, where the interests of justice so require”. This Court “has discretionary power to entertain even admittedly moot issues”.

[49] Where there are two conflicting judgments by different courts, especially where an appeal court’s outcome has binding implications for future matters, it weighs in favour of entertaining a moot matter.

[50] Moreover, this Court has proffered further factors that ought to be considered when determining whether it is in the interests of justice to hear a moot matter. These include:

> (a) whether any order which it may make will have some practical effect either on the parties or on others;
>
> (b) the nature and extent of the practical effect that any possible order might have;
>
> (c) the importance of the issue;
>
> (d) the complexity of the issue;
>
> (e) the fullness or otherwise of the arguments advanced; and
>
> (f) resolving the disputes between different courts.” (Internal references omitted)

19. In Hoerskool Fochville[6] the SCA stressed that the enumerated factors should be considered together and that an appeal should only be heard in matters which raise "a discrete legal issue of public importance."

THE ORDERS SOUGHT TO BE APPEALED AGAINST

20. It is useful to commence adjudication of this application by setting out the orders (as duly amended in terms of Rule 42(1)(b)) which we made in these applications and against which the Province and the City now wish to appeal.

"*CASE NO. 7908/2017: THOZAMA ANGELA ADONISI AND OTHERS v MINISTER FOR TRANSPORT AND PUBLIC WORKS: WESTERN CAPE*

1. It is declared that the fourth and sixth respondents have the following obligations in terms of the Constitution of the Republic, 1996:

> *(i) under s25(5) the said respondents are obliged to take reasonable and other measures, within their available resources, to foster conditions which enable citizens to gain access to land on an equitable basis;*
>
> *(ii) under s26(2) the said respondents are obliged to take reasonable legislative and other measures, within their available resources, to achieve the progressive realisation of the right of citizens to have access to adequate housing as contemplated in s26(1) of the Constitution.*

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[6] Centre for Child Law v The Governing Body of Hoerskool Fochville and another 2016 (2) SA 121 (SCA) at [11]

2. It is declared that the fourth and sixth respondents have failed to comply with their respective obligations under the legislation enacted to give effect to the said rights, namely, the Housing Act, 107 of 1997 and the Social Housing Act, 16 of 2008, and have accordingly breached their respective obligations under the Constitution.

3. It is declared that in so failing to comply with their obligations as aforesaid, the fourth and sixth respondents have failed to take adequate steps to redress spatial apartheid in central Cape Town (the boundaries of which were in 2017 as depicted on the map annexed hereto marked "A");

4. The fourth and sixth respondents are directed to comply with their constitutional and statutory obligations as set out in paras 1 to 3 above. 5. The fourth and sixth respondents are directed to jointly file a comprehensive report under oath, by 31 May 2021, stating what steps they have taken to comply with their constitutional and statutory obligations as set out above, what future steps they will take in that regard and when such future steps will be taken. Without derogating from the generality of the aforegoing, the fourth and sixth respondents are specifically directed to:

> *(i) consult with all departments of State and organs of State necessary to discharge their duty in so reporting to the Court; and*
>
> *(ii) include in their report their respective policies and the integration thereof in regard to the provision of social housing as contemplated in the Social Housing Act within the area of central Cape Town as depicted on annexure "A" hereto.*

6. The applicants are granted leave to file an affidavit (or affidavits) responding to the reports filed by the fourth and sixth respondents in terms of paragraph 5 above within one month of them having been served on their attorneys of record.

7. The November 2015 decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet, to sell Erf 1675, an unregistered portion of Erf 1424 Sea Point, and remainder of Erf 1424 Sea Point (hereinafter collectively referred to as "the Tafelberg Property") to the third respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the third and sixth respondents is hereby reviewed and set aside.

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

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

10.It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land Administration Act, 6 of 1998 by Provincial Notice No. 595 published in Provincial Gazette No. 5296 on 16 October 1998 (hereinafter referred to as "the Regulations") are unconstitutional and invalid.

11. It is declared that the disposal of the Tafelberg Property in accordance with Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations is unlawful. The declaration of invalidity in paragraph 10 will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings.

12. The applicants' costs of suit (which are to include the costs of two counsel where employed), are to be borne by fourth and sixth respondents, jointly and severally.

13. Save as aforesaid, each party is to bear its own costs of suit in relation to this application.

CASE NO. 12327/2017: THE MINISTER OF HUMAN SETTLEMENTS AND OTHERS v PREMIER OF THE WESTERN CAPE PROVINCE AND OTHERS

1. It is declared that the failure of the Western Cape Provincial Government (hereinafter "the Province") to inform the National Government (represented by the first and second applicants herein) of its intention to dispose of Erf 1675, an unregistered portion of Erf 1424 Sea Point, and the remainder of Erf 1424 Sea Point (hereinafter collectively referred to as "the Tafelberg Property") and to consult and engage with National Government (represented as aforesaid) in this regard, constitutes a contravention of the Province's obligations in terms of Chapter 3 of the Constitution, and the Intergovernmental Relations Framework Act, 13 of 2005.

2. The November 2015 decision of the Premier of the Western Cape Province, acting together with other members of the Provincial Cabinet, to sell the Tafelberg Property

to the fifth respondent, together with the deed of sale in respect of the Tafelberg Property entered into between the first and fifth respondents are hereby reviewed and set aside.

3. The 22 March 2017 decision of the Premier of the Western Cape Province, acting together with the other members of the Provincial Cabinet, not to resile from the contract of sale concluded in respect of the Tafelberg Property with the fifth respondent is hereby reviewed and set aside.

4. It is declared that the deed of sale between the Province and the fifth respondent in respect of the Tafelberg Property is void, of no force and effect and is hereby set aside.

5. It is declared that Regulation 4(6), and the proviso in Regulation 4(1), of the Regulations made under section 10 of the Western Cape Land Administration Act, 6 of 1998 by Provincial Notice No. 595 published in Provincial Gazette No. 5296 on 16 October 1998, are unconstitutional and invalid. The declaration of invalidity will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings

6. The first and third applicants' costs of suit (which are to include the costs of two counsel where employed) are to be borne by the first respondent.

7. Save as aforesaid, each party is to bear its own costs of suit in relation to this application."

THE PROVINCE'S APPLICATION FOR LEAVE TO APPEAL THE RTC ORDERS

21. It is convenient to address the Province's application first. Its Notice of Application for Leave to Appeal dated 18 September 2020 is a lengthy document running to some 21 pages. It seeks to appeal against the whole of the order made in the RTC application and the whole of the order made in the National Minister's application. What is rather surprising about the application, though, is that it sought to appeal the order setting aside the sale of the Tafelberg property (paragraphs 7 and 8 of the order in the RTC application), notwithstanding its knowledge of the fact that the Day School had decided to withdraw from the sale, and notwithstanding the fact that at the same time it had issued the statement referred to earlier.

22. However, when the application was argued in March 2021, counsel for the Province did not persist in the application to appeal the order invalidating the sale and accepted that that the relief granted in paragraphs 7 and 8 of the RTC application was moot.

23. Nevertheless, Mr Fagan SC, relying on s16(2)(a)(i), went on to argue that there were "discrete legal issue[s] of public importance" which warranted an appeal hearing in the interests of justice in respect of the order of invalidity of the sale. In this regard, it was argued that a number of our findings in relation to the interpretation and application of the Government Immovable Asset Management Act, 2007 ("GIAMA") and our comments thereon were flawed.

24. The point of departure is that the basis for our finding of the invalidity of the sale to the Day School was the invalidity of the Regs. That much is clear from para 267 of the judgment. What follows thereafter in the judgment is an evaluation of the arguments put up by the Province in the event that we were wrong in our finding

that the Regs were invalid. Given that the sale has been cancelled, those additional findings are now to be regarded as *obiter dicta.*

25. Then, in their heads of argument in the application for leave to appeal, counsel for the Province set out seven issues that they said constituted some of the "discrete legal issues of public importance" and which warranted leave to appeal being granted, notwithstanding the mootness. They include the following -

[25.1.] Whether immovable property must be "surplus" under GIAMA before it may be disposed of;

[25.2.] Whether GIAMA is over-arching legislation, with the WCLAA being a procedural mechanism applicable to sales of land in the Western Cape;

[25.3.] The import of ss5(1)(f) and 13(3)(a) of GIAMA;

[25.4.] The necessity for the availability of U-AMPS and C-AMPS before disposals of land can take place; and

[25.5.] Whether it is a legitimate purpose to ensure best value for money when government land is disposed of.

26. In my view, what the Province now seeks to do is to procure an opinion from the SCA as to the correctness of these *obiter* findings. That is not the purpose of

an appeal hearing as the judgment of Navsa JA in Radio Pretoria[7] so trenchantly reminds us.

"Courts of appeal often have to deal with congested court roll. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise. Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation."

That *dictum* follows the approach, more than a century ago, of Innes CJ in Geldenhuys[8]

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

27. Furthermore, to decide these issues, a court of appeal would be required to delve into the facts and background circumstances to address the multiplicity of issues raised now by counsel against the background of an agreement between the Province and the Day School that the sale, which RTC so strenuously opposed, has been set aside and all outstanding issues in relation thereto have been resolved. On that score, it is apposite to refer to the following *dictum* in the judgment of Maya JA (as she then was) in Legal-Aid South Africa [9].

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[7] Radio Pretoria v Chairman, Independent Communications Authority of South Africa and another 2005 (1) SA 47 (SCA) at [44]

[8] Geldenhuys & Neethling v Beuthin 1918 AD 426 at 441

[9] Legal-Aid South Africa v Magidiwana and others 2015 (2) SA 568 (SCA) at [31]

"The appeal raises no discrete legal point which does not involve detailed consideration of facts and no similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."

28. In the result, I am not persuaded that this is a case in which we should exercise the limited discretion which we enjoy under s16(2)(i)(a) and grant leave to the Province notwithstanding the mootness of the sale issue. That mootness has the consequence that the application for leave in respect of the RTC application otherwise reduces into two distinct areas – the constitutional relief and the declarations of invalidity in respect of the regulations promulgated under the Western Cape Land Administration Act ("the Regs"). For the sake of convenience, I shall deal with the latter first.

Invalidity of the Regs

29. In our judgment we considered the idiosyncracy of the Regs that we believe fly in the face of a sensible administrative process of hearing parties before a decision in which they might have an interest is made, thereby giving effect to the constitutional concept of participatory democracy. The rationale put up by the Province for the Regs remains difficult to follow and, in the circumstances, I thus have significant reservations about the prospects of success on appeal against paragraphs 10 and 11 of our order.

30. That having been said, the Regs are a critical part of the Province's property disposal machinery. While the effect of our order does not affect any disposals of provincial land which are in the process of being finalised, the finding of

invalidity of the regulations in question does, in my considered view, constitute "a discreet issue of public importance that will have an effect on future disputes", as the SCA put it in Ramakatsa.

31. On that basis, I am satisfied that the Province should be give leave to appeal the orders made in paragraphs 10 and 11 of the RTC application.

The constitutional relief

32. Turning to the constitutional relief, we found that the Province was in breach of its obligations under ss25(5), 26(1) and 26(2) of the Constitution insofar as it had failed to give effect to its obligations under the Housing Act, 1997 and the Social Housing Act, 2008. We were of the view that the Province did not have any, alternatively suitable, policies in place to address these shortcomings and we exercised our powers under s172 of the Constitution to ensure that the Province complied with its constitutional obligations.

33. We were concerned, too, that the Province had adopted a reactionary response to the RTC challenges to the absence of such policies rather than being possessed of a planned, long-term programme that would begin to address the effects of spatial apartheid in central Cape Town and the absence of affordable housing. We remain concerned that, rather than addressing the core issues at hand, the Province now seeks to take steps to litigate and protract further the delays occasioned by its constitutional delinquency. We do not for one moment deny the Province its constitutional entitlement to litigate in our courts and beyond, but we note that in the press statement issued on 18 September 2020 the Province implicitly

acknowledged its shortcomings and we would have expected that it would have employed its resources to that end rather than on the high cost of litigation.

34. In the application for leave to appeal we were criticised by the Province for breaching the separation of powers principle in granting wide ranging orders which were said to trench upon the "heartland" of executive prerogative. We attempted to demonstrate that our orders were constitutionally sanctioned and in accordance with a wide range of judicial authorities, and we do not agree that we have impermissibly gone beyond our constitutional remit. In the result, we remain of the firm belief that we exercised our discretion judicially in this matter.

35. We accept that, at the end of the day, our orders are wide-ranging and break new ground, as it were. Further, we are not so bold as to consider that our constitutional orders are beyond further judicial scrutiny and it seems to me therefore that it is fair to say that there are compelling issues of public importance which warrant a higher court considering our orders. Indeed, the interests of justice demand so.

36. In the result, I am persuaded that, in terms of s17(1)(a)(ii), the Province should be granted leave to appeal against paragraphs 1, 2, 3, 4, 5 and 6 of our orders in the RTC application.

Paragraph 9

37. In paragraph 9 of the RTC orders we issued a declarator regarding the status of Sea Point in relation to certain provisional restructuring zone ("RZ")

regulations issued by the National Department of Human Settlements in 2011. We do not know whether there have been any subsequent amendments or variation to that status but that is neither here nor there for purposes of this application.

38. It is not clear to us what the Province's motivation is for seeking leave to appeal against a determination that essentially operates in its favour. We say this because the declaration of an RZ would entitle either provincial or local government to apply to the National Minister (or a relevant agency such as the SHRA) for central government funding to erect subsidised housing. The papers before us show that when it decided not to resile from the sale on 22 March 2017, the Provincial Cabinet was uncertain as to whether Sea Point fell within the RZ described as "CBD and surrounds" – some said it did, others (including Mr Fagan who advised Cabinet at the time) said it appeared not to fall within the RZ, while yet others, including the Premier's legal adviser, appeared to be ambivalent. In the circumstances, we would have thought that the Province would have welcomed our finding in that regard which would have clarified any uncertainty.

39. Surely, the Province does not now want to adopt a stance in which it can resist later demands that it pursue a social housing project in Sea Point on the basis that the suburb does not fall within an RZ? On the other hand, were the Province to apply, for instance, to the SHRA for funding for a social housing project in Sea Point, and such application not be favourably entertained by that entity, the Province would be entitled to rely on our order to attempt persuade the authority otherwise.

40. Be that as it may, we consider that the issue traversed in paragraph 9 of the RTC order is essentially moot and should not waste the time and resources of a

higher court. The National Minister has never objected to the contention that Sea Point fell into the RZ in question and she does not seek to appeal our order in that regard. In any event, the National Minister is entitled to make a final determination regarding the extent of the RZ, or to vary its boundaries, at any stage.

41. For these reasons, I am of the view that any appeal against paragraph 9 of the order in the RTC application will fall squarely within the purview of s16(2)(a)(i) of the Superior Courts Act and that leave to appeal should be refused on that basis alone. If I am wrong in that regard, I consider, in any event, that the evidence before us concerning the issues covered by paragraph 9 was more than sufficient to warrant the declaratory relief granted. In the result, I am of the view that are, in any event, no reasonable prospects of success on appeal against the granting of the order in paragraph 9 of the RTC application and that leave to appeal in that regard should thus be refused.

Costs

42. Lastly, in the RTC application, the Province seeks leave to appeal the costs order that it and the City be held jointly and severally liable for RTC's costs. We deal below with the issue of costs generally when considering the City's application for leave to appeal. It will be convenient to deal with the Province's application for leave in this regard at that stage.

THE PROVINCE'S APPLICATION FOR LEAVE TO APPEAL IN THE NATIONAL MINISTER'S APPLICATION

The Invalidity of the Regs

43. For the reasons set out earlier in relation to the RTC application, I am satisfied that we should grant the Province leave to appeal against paragraph 5 of the order of invalidity in the National Minister's application.

Mootness

44. As in the case of the RTC application, counsel for the Province accepted that any appeal against the orders made in paragraphs 2, 3 and 4 of the National Minister's application – orders relating to the invalidity of the sale to the Day School – were moot. For the reasons already given, I am of the view that there is no basis to exercise our discretion under s16(2)(i)(a) of the Superior Courts Act in favour of the Province and leave to appeal paragraphs 2, 3 and 4 of the order in the National Minister's application must therefore be refused. What remains then in the National Minister's application is the declaratory relief granted in paragraph 1 of our order.

45. I am of the view that the declaratory relief granted in paragraph 1 of the National Minister's orders is fact-specific, having been based, in particular, on the facts that had arisen after the Province had taken the decision to sell the Tafelberg Property to the Day School. It will be recalled that the National Minister claimed that she had recently come to hear of the sale, and demanded to be consulted thereon in terms of the Intergovernmental Regulations Framework Act, 13 of 2005.

46. Given that the sale has been terminated, there is no longer any *lis* between the National Minister and the Province – there is nothing that she needs to

be consulted on - and thus there is no live issue which can be claimed to be the subject of litigation. In National Coalition,[10] the Constitutional Court approached the matter as follows.

"A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law. Such was the case in *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security and Others* [1997 (3) SA 514 (CC)] where Didcott J said the following at para [17]:

(T)here can hardly be a clearer instance of issues that are wholly academic, of issues exciting no interest but an historical one, than those on which our ruling is wanted have now become."

47. In the circumstances, I am of the view that the matter ruled on in paragraph 1 of the National Minister's order is moot. For the reasons already set out, I do not agree with counsel for the Province that the order in paragraph 1 raises discrete issues of law which fall within the ambit of s16(2)(i)(a) warranting the exercise of our discretion and leave to appeal that order must accordingly be refused.

THE CITY'S APPLICATION FOR LEAVE TO APPEAL

48. The application by the City is for leave to appeal the constitutional relief granted against it in the RTC application (paragraphs 1 to 6 of the orders) and the costs order made against it in both that application (paragraph 12 thereof) and the National Minister's application (paragraph 7 thereof).

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[10] National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs 2000 (2) SA 1 (CC) at [21] fn18

The Constitutional Relief

49. In our judgment we expressed the view that the issue in regard to the persistence of spatial apartheid in central Cape Town and, in particular, the absence of a coherent policy on the part of the City to address affordable housing, both the City and the Province bore the responsibility of addressing the situation. This is particularly so, because there are large tracts of land to which the Province has access which it could utilise in conjunction with the City's initiatives. For this reason, we considered it constitutionally appropriate to direct both spheres of government to come up with a cohesive plan.

50. Given the purpose and form of our orders in the RTC application, the City's fate is inextricably bound in with that of the Province, albeit that the City has gone some limited way towards coming up with a policy of sorts. It was argued by Ms Bawa SC in the application for leave that we had impermissibly conflated the duties and functions of the two spheres of government in making our order binding on both the Province and the City.

51. I am of the respectful view that there may be some merit in this argument and upon consideration of all the facts and circumstances, I believe that the City has reasonable prospects of success on appeal against the constitutional relief granted against it in the RTC application.

Costs

52. Turning to the question of costs, the City complains that it was unreasonable to burden it with joint and several responsibility for RTC's costs as its only interest in resisting that application was in relation to the constitutional relief. For the rest, the City did not oppose any of the relief in relation to the sale of the Tafelberg property, the challenge to the Regs or the RZ issues. The City points out that the time spent by it on the various legs of the RTC application was disproportionate to its potential liability for 50% of the costs and says that an award against it of no more than 10% of the total costs in the RTC application was more reasonable in the circumstances.

53. In relation to the National Minister's application, the City points out that no relief was sought against it therein and our finding that it litigated at its peril in that application and that it was fair to require it to bear its own costs in that application is wrong. Rather, says the City, the National Minister should have been ordered to bear its costs (or a part thereof).

54. It is established law that the award of costs is customarily within the discretion of the court of first instance, and that a court of appeal

"will not reverse the decision of a lower court as to costs unless it is quite clear that some important factor escaped the attention of the lower court or unless the discretion exercised has not been a judicial discretion."[11]

55. But where the court of appeal is persuaded that the lower court did not exercise its discretion judicially, or where that court was moved by a wrong principle

[11] Molteno Bros v SA Railways 1936 AD 408 at 417

of law or an incorrect appreciation of the facts, then it is incumbent upon that court to correct the wrong.[12]

56. While a court would generally not consider granting leave to appeal only a costs order, in circumstances such as the present, where

[56.1.] the City will be participating in the appeal on the constitutional issue;

[56.2.] the time taken on appeal to address the question of costs will not be extensive;

[56.3.] the costs involved are not insignificant;

[56.4.] the costs must come from the public purse; and

[56.5.] there are reasonable prospects of success on appeal in regard to the costs issues;

I am of the considered view that leave to appeal the costs orders should be granted to the City.

57. As regards the Province's application for leave to appeal the costs orders made against it, we consider that the basis for granting of leave on costs to the City must mean that the Province has reasonable prospects of success in this regard in the RTC application. Similarly, in relation to the National Minister's application, we

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[12] Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) at 863-4; Ferris and another v First rand Bank Ltd 2014 (3) SA 39 (CC) at [28] – [29]

have granted the City leave to appeal the order made in relation to costs and it is just and equitable in the circumstances that the Province be granted leave on this score.

WASTED COSTS OF 13 NOVEMBER 2020

58. Mr. Hathorn pressed us to award the wasted costs of 13 November 2020 to RTC in light of the fact that the Province had left the filing of its explanatory affidavit very late, the suggestion being that had it been done earlier the costs of the day and the preparation therefor would have been saved, or at least reduced. It bears mention that both Mr Fagan and Mr Hathorn indicated their willingness to argue the matter on the day on the assumption that the sale would be cancelled by agreement. Counsel had filed heads of argument by that stage and indicated that they had spent considerable time preparing for the hearing. However, we indicated to counsel that we required the matter to be finally determined before the application for leave was heard, as we did not wish to run the risk of anything coming unstuck.

59. The wasted costs were therefore strictly speaking not attributable to the conduct of any of the parties, and given that the postponement of the application was ultimately occasioned by the Court's insistence on finality being reached, it would be unfair to mulct any of the parties now with an order for the wasted costs. The fairest in my view is to make an order that the wasted costs be costs in the cause.

60. As far as the costs of the applications for leave to appeal themselves are concerned, the customary order will apply and the costs thereof will be costs in the appeal. I would simply add for the benefit of the Supreme Court of Appeal and the

Taxing Master that we are of the view that the employment of two counsel was warranted.

IN THE CIRCUMSTANCES THE FOLLOWING ORDER IS GRANTED:

In case no 7908/2017 ("the RTC application")

A. In para 11 of the order the phrase "*This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment"* is deleted and replaced with the following –

"The declaration of invalidity in paragraph 10 will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings."

B. The First, Second, Sixth and Eighth Respondents ("the Province") are granted leave to appeal to the Supreme Court of Appeal against the orders made against them in paragraphs 1, 2, 3, 4, 5, 6, 10, 11 and 12 of the order of 31 August 2020. Save as aforesaid, the application for leave to appeal is dismissed.

C. The Fourth Respondent ("the City") is granted leave to appeal to the Supreme Court of Appeal against the orders made against it in paragraphs 1, 2, 3, 4, 5, 6 and 12 of the order of 31 August 2020.

D. The wasted costs occasioned by the postponement on 13 November 202 will be costs in the cause.

E. The costs of the application for leave to appeal will be costs in the appeal.

In case no 12327/2017 ("the National Minister's application")

F. In para 5 of the order the phrase "*This declaration shall operate prospectively and will not affect any rights which have accrued to any party as at the date of this judgment"* is deleted and replaced with the following –

"The declaration of invalidity will not affect any rights which have as at the date of judgment accrued to any person or entity that is not a party to these court proceedings."

G. The Province is granted leave to appeal to the Supreme Court of Appeal against the order made against it in paragraphs 5 and 6 of the order of 31 August 2020. Save as aforesaid, the application for leave to appeal is dismissed.

H. The City is granted leave to appeal against the order made in paragraph 6 of the order of 31 August 2020.

I. The wasted costs occasioned by the postponement on 13 November 2020 will be costs in the cause.

J. The costs of the application for leave to appeal will be costs in the appeal.

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GAMBLE, J

SAMELA, J:

I AGREE

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SAMELA, J