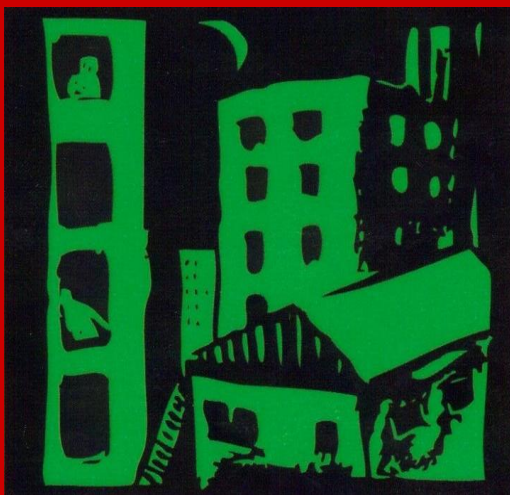
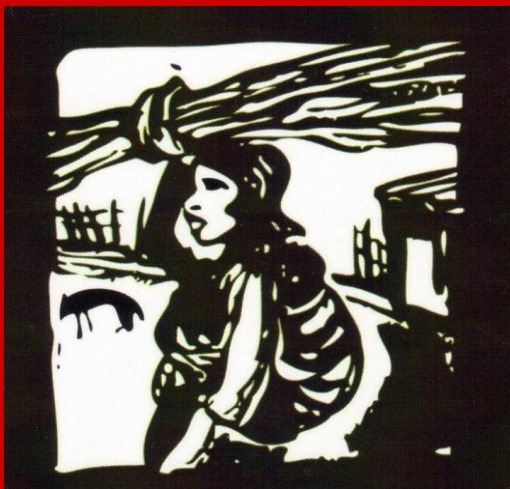


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**Spatial inclusivity
after 31 years of
democracy: *Minister
for Transport and
Public Works:
Western Cape &
Others v Adonisi and
Others* (522/2021 &
523/2021) [2024]
ZASCA 47**

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ABSTRACT

Achieving spatial inclusivity remains a challenge in South Africa. In 2025, the country marks 31 years of democracy, so it is opportune to reflect on how well the courts have fared in securing working-class' freedoms in the struggle against spatial apartheid. Section 26 of the Constitution refers to the right to housing as subject to progressive realisation, a right which overlaps with ILO Recommendation 115 in regard to locating workers' housing conveniently close to places of employment. However, the case of Minister for Transport and Public Works: Western Cape & others v Adonisi and Others (522/2021 &

523/2021) [2024] ZASCA 47 (12 April 2024) *suggests that, for many workers in cities, the dream of equality remains unfulfilled. Here, the applicants sought to appeal an unfavourable decision from the court a quo, arguing, amongst other things, that provincial and local authorities were not compelled to provide social housing in specific areas. This case note examines the fairness of the decision, drawing inspiration from the capability approach. More widely, it assesses the extent to which freedoms have been realised after 31 democracy by looking at the social housing practices of provincial and local governments.*

Keywords: social housing; freedoms; capability approach; functioning; restructuring zone; democracy

1 INTRODUCTION

2025 marks 31 years of democracy in South Africa, even though the country is still reeling from the effects of apartheid. One of the most visible effects lies in the spatial structuring of urban areas. Most people who are black and working-class or poor reside in townships originally designed by the apartheid government. For instance, in Cape Town, black working-class commuters typically live in places that are more than 20 to 30 km away from their places of employment,¹ and spend four to six hours a day commuting to and from work because of an ineffective public transport system. As a result of this, Ms Thozama Adonisi and others with the assistance of Ndifuna Ukwazi Law Centre, challenged sale of property owned by the Western Cape Provincial Government in the Western Cape High Court. Ms Adonisi argued that this property could have been used for social housing for working-class residents of Cape Town like herself. She was awarded a favourable judgment rescinding the sale of the property. The property in dispute was sold by the Western Cape Provincial Government to a private buyer for use as a day school. This judgment was appealed in the Supreme Court of Appeal by the Western Cape Government and others.

This case note discusses the decision of *Minister for Transport and Public Works: Western Cape & others v Adonisi and Others*.² It considers whether there was a failure by the appellants (the respondents in the court *a quo*) to fulfil an obligation of “reversing apartheid special design” and thereby ensure that social housing is provided in the centre of Cape Town city. The court *a quo* held that the Minister of Transport and Public Works Western Cape and others had failed to redress the spatial inequalities of apartheid.³

¹ Kerr A “Tax(i)ng the poor? Commuting costs in South African cities” (2017) 85 *South African Journal of Economics* 321 at 337–338.

² *Minister for Transport and Public Works: Western Cape & others v Adonisi and Others* (522/2021 & 523/2021) [2024] ZASCA 47.

³ *Adonisi & Others v Minister for Transport and Public Works Western Cape & Others; Minister of Human Settlements v Premier of the Western Cape Province & Others* [2021] 4 All SA 69 (WCC) (31 August 2020) order/judgment.

The case note argues that, for South Africa to meet its international obligations – such as those under the ILO standard, R115 – Workers' Housing Recommendations, 1961 (No. 115) – it must amend the Housing Act and Social Housing Act. Given the anomalies of the judgment in the Supreme Court of Appeal (SCA), the note examines how the capability approach can be understood in the context of spatial development and considers what light it sheds on social housing. The capability approach is centred around social justice and wellbeing for individuals to fulfil their potential, as will be later unpacked in this case note. It is for this reason by means of analysis, that the case note unpacks the deprivation of capabilities as a result of unjust social housing policy. In regard to the *Adonisi* decision, this contribution concludes that peoples' capabilities must be borne in mind when legislators and policy implementors come to reform the Social Housing Act and Housing Act. In short, the case note criticises the SCA decision in *Adonisi* and delves into the shortcomings in housing legislation that it serves to highlight.

2 THE FACTS FROM THE COURT A QUO (WESTERN CAPE HIGH COURT)

The case of *Adonisi & Others v Minister for Transport and Public Works Western Cape*⁴ involved a former domestic worker and nurse by the name of Thozama Adonisi (the first applicant in the court *a quo*), although referring to Cape Town municipality as her place of domicile, she, like many working-class people, does not live near her place of employment in Cape Town's central business district (CBD).⁵ Thirty-one years into democracy, the government has been unable to give Ms Adonisi (and the many people like her) affordable houses in the inner city of Cape Town, closer to the workplace. Ms Adonisi was employed as nurse at Christian Barnard Memorial Hospital, located in the CBD.⁶

A property identified by the Reclaim the City social movement as suitable for social housing is a former Jewish school named Tafelberg.⁷ The property is located at 355 Main Road, Sea Point, and has been partially converted into a block of apartments known as Wynard Mansions.⁸ When the last group of students in this school were transferred elsewhere, the Western Cape Provincial Government (hereafter third appellant) deliberated on rezoning the property⁹ and occupants residing in the Wynard mansions were given notice to vacate the property.¹⁰

⁴ *Adonisi* (2021) at para 6.

⁵ *Adonisi* (2021) at para 6.

⁶ *Adonisi* (2021) at para 7.

⁷ *Minister for Transport and Public Works: Western Cape & others v Adonisi and Others* (522/2021 & 523/2021) [2024] ZASCA 47 at para 2.

⁸ *Minister of Transport* (2024) at para 2.

⁹ *Minister of Transport* (2024) at para 2.

¹⁰ *Minister of Transport* (2024) at para 2.

In 2016, the property was sold by the Western Cape Provincial Government to a “day school” for R135 million.¹¹ This gave rise to legal proceedings by Ms Adonisi and others to challenge and set aside the sale in two High Court applications.¹² Subsequently, the first and third appellants (the Minister of Transport and the Western Cape Provincial Government) did not consider either objections to the sale or public support for developing social housing in Tafelberg.¹³

It is for this reason that this case was brought before the Western Cape High Court by Ms Adonisi and others. They challenged the sale on the grounds that it infringed on the state's obligation to promote the right to housing by providing social housing in the central part of Cape Town for those in need, as well as dealing with the scars of spatial inequality, which see commuters living far from their places of employment.¹⁴ Ms Adonisi and others were awarded a favourable judgment in 2020.¹⁵ The Western Cape High Court declared that the third and fifth respondents had violated their constitutional and legislative obligations to champion fair access to land and affordable housing as a means to heal the scars left by apartheid spatial planning.¹⁶

The respondents (Ms Adonisi and others, previously applicants in the court *a quo*) challenged the applicants’ actions on the grounds that the implementation of urban regeneration in the Central Business District was still in doubt.¹⁷ Since the 1990s, the construction and renovation of buildings in the CBD has catered for the 20 per cent of top income-earners in the City of Cape Town.¹⁸ Gentrification of areas within the periphery of the central part of the city (such as Bo-Kaap, Woodstock and Salt River) have resulted in rental properties intended for the poor and working class being sold to property developers, thus excluding people with low incomes.¹⁹ The poor and working class have been forced to move ever further out of the city.²⁰ The state cannot afford to buy market-priced land, yet it owns pockets of land near the CBD that could be used for social housing.²¹

Furthermore, it was claimed, the provincial government, displaying its neoliberal tendencies, placed financial gains over social housing in selling the Tafelberg property.²²

¹¹ *Minister of Transport* (2024) at para 2.

¹² *Minister of Transport* (2024) at para 3.

¹³ *Minister of Transport* (2024) at para 10.

¹⁴ *Minister of Transport* [2024] at para 10.

¹⁵ *Adonisi and Others* [2021] at para 506.

¹⁶ *Adonisi* (2021) at para 506.

¹⁷ *Minister of Transport* (2024) at para 10.

¹⁸ *Minister of Transport* (2024) at para 21

¹⁹ *Minister of Transport* (2024) at para 21.

²⁰ *Minister of Transport* (2024) at para 21.

²¹ *Minister of Transport* (2024) at para 21.

²² *Minister of Transport* (2024) at para 22.

The provincial government denied any wrongdoing in selling the property, asserting no breach in fulfilling its constitutional and statutory duties.²³ It acknowledged that spatial apartheid is far from being addressed in Cape Town, and claimed that it had struck a balance between the delivery of spatially integrated housing and obeying constitutional imperatives. Maintaining a realistic budget is a necessity for any province,²⁴ and the provincial government claimed it had made the appropriate spatial integration.²⁵ The applicants had asserted that respondents must state the obligations due to them in terms of the Housing Act 107 of 1997, the Social Housing Act 16 of 2008 (SHA), and the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA).²⁶

The Western Cape High Court declared that the third and fourth appellants had failed to honour their obligations in regard to the prevention of deprivation of property and to the progressive realisation of the right to property in terms of sections 25(1) and 26(2) of the Constitution.²⁷ Furthermore, they had failed to comply with the obligations of the Housing and Social Housing Act.²⁸ Therefore, the disposal of Tafelberg property in terms of the Provincial Restructuring Zone Regulations under the Government Gazette was deemed to be illegal.²⁹ The transaction thus had to be cancelled by the respondent parties in the court *a quo*.³⁰ The case was appealed in the SCA by the respondents, who became appellants, while the applicants from the court *a quo* decision became respondents.

2.1 The disputed legal issues

The legal questions addressed by the SCA were (1) whether the province and City of Cape Town have an obligation to provide social housing at a specified location (central Cape Town); (2) whether there was due compliance with the provisions of the Government Immovable Asset Management Act 19 of 2007 (GIAMA) in providing social housing; (3) if Sea Point fell under a restructuring zone; (4) whether the province had an obligation to inform and consult the national government on the decision to dispose of the property; (5) the constitutionality of regulation 4; and (6) the proviso to regulation 4.

2.1.1 *Obligation by the provincial government and municipality to provide social housing at a specific location*

²³ *Minister of Transport* (2024) at para 23.

²⁴ *Minister of Transport* (2024) at para 23.

²⁵ *Minister of Transport* (2024) at para 23.

²⁶ *Minister of Transport* (2024) at para 24.

²⁷ *Minister of Transport* (2024) at para 28.

²⁸ *Minister of Transport* (2024) at para 28. See also *Adonisi and Others v Minister for Transport and Public Works Western Cape and Others* [2021]; *Minister of Human Settlements and Others v Premier of the Western Cape Province and Others* (7908/2017; 12327/2017) [2020] ZAWCHC 87; [2021] 4 All SA 69 (WCC) (31 August 2020) at paras 26, 27, 48–49, 94 and 104.

²⁹ *Minister of Transport* (2024) at para 28.

³⁰ *Minister of Transport* (2024) at para 28.

The SCA laid out the specific responsibilities under the SHA of provincial governments (in section 4) and municipalities (section 5). The province and the City cannot ignore these obligations, taking into account the need for racial, social, economic, and physical integration.³¹ The respondents had to show that the obligations set out in the Housing Act and SHA had not been met by the appellant.³² Impediments to providing social housing in the inner city were attributed to the cost of land, that is, to “economies of scale” in relation to building costs due to land availability.³³

The court considered that the appellants did not see any need to backtrack from the sale of the Tafelberg property because other areas within the precinct were pegged for social housing.³⁴ For instance, 12 erven had been given to the City at a price below market value for social housing, and the Woodstock hospital site development had been earmarked to provide 700 social housing units.³⁵ The court was satisfied with the third and fifth appellants' measures, which it found to be in line with the principles in the social housing and other legislative frameworks.³⁶ Therefore, it was found that the provincial and local governments had no obligation to provide housing in a “specific location”, judging from the silent or non-existent obligation in both the Housing Act and the SHA.³⁷

2.1.2 Compliance with GIAMA

The SCA reiterated most of the High Court facts. As far as the regulation on the disposal of assets was concerned, it reasoned that this was in line with the asset management objective and the powers vested in the premier in disposing property in terms of section 3(1) of the Western Cape Land Administration Act 6 of 1998 (WCLAA).³⁸ The court essentially found that the premier and transport department had followed procedure.³⁹

However, it is submitted that the SCA failed to apply the contextual interpretation of GIAMA and the WCLA. In this interpretation, even where a property was held to be surplus, there was a need for the provincial government to find out if other departments at the provincial and local levels might be interested in purchasing it.⁴⁰ Such deliberation on the disposal of the property would had to have the objective of promoting socially beneficial initiatives.⁴¹ The SCA avoided any consideration of

³¹ *Minister of Transport* (2024) at para 44.

³² *Minister of Transport* (2024) at para 44.

³³ *Minister of Transport* (2024) at para 46.

³⁴ *Minister of Transport* (2024) at para 48.

³⁵ *Minister of Transport* (2024) at para 49.

³⁶ *Minister of Transport* (2024) at paras 49, 50 and 51.

³⁷ *Minister of Transport* (2024) at para 51.

³⁸ *Minister of Transport* (2024) at para 58.

³⁹ *Minister of Transport* (2024) at paras 59–64.

⁴⁰ *Adonisi* (2020) at para 304.

⁴¹ *Adonisi* (2020) at para 304.

whether other departments of the Western Cape provincial cabinet had been consulted prior to the disposal of the property (such as the Western Cape Department of Social Development, whose services overlap with those of the Department of Human Settlements). Any such consideration would probably have avoided the unnecessary disposal of the property to private individuals or entities.

2.1.3 *Is Sea Point part of a restructuring zone?*

In terms of section 1 of the SHA, a restructuring zone is defined as a geographical area which has been identified by the municipality (with the agreement of the provincial government) for social housing. Any such zone must be designated by the Minister for approved projects in the gazette.⁴² In other words, a restructuring zone is an area which has been planned for social, racial and economic integration using social housing and designated as such by a resolution of a municipality. A restructuring zone is intended to bring about restructuring of the spatial make-up of the area, resulting in the social inclusion of people in the low-income bracket to urban areas that have economic opportunities.⁴³ Did Sea Point fall within a restructuring zone?⁴⁴

The SCA pointed out that the court *a quo* erred in declaring that Sea Point fell under a restructuring zone.⁴⁵ It emphasised that notice given to the national government on areas designated for restructuring did not include Sea Point.⁴⁶ Referring to other precedents pertaining to expert evidence (deposed in affidavits by Mr Molapo in the court *a quo*), the SCA said that this evidence was misleading.⁴⁷ The High Court misinterpreted which areas needed restructuring: Tafelberg (under Sea Point) had not been listed as one of those areas.⁴⁸ Basically, the SCA refused the argument that such restructuring zones were temporary. This did not bind the provincial government not to cancel the sale of the Tafelberg property.⁴⁹ Had Sea Point been accepted by the SCA as a restructuring zone, it would entail that social housing be built in Sea Point. The wording of the notices does not imply that Sea Point is one of the designated areas.⁵⁰ Referring to section 3(1)(f), the Court pointed out that the SHA states that the restructuring zone must form part of the integrated plan of the municipality and that such zones must be clearly defined in the Government Gazette.⁵¹

⁴² See section 1 of the Social Housing Act.

⁴³ Housing Development Agency (HDA) & NASHO *Reviving our inner cities: Social housing and urban regeneration in South Africa* Johannesburg: HDA (2013).

⁴⁴ *Minister of Transport* (2024) paras 65–68.

⁴⁵ *Minister of Transport* (2024) paras 65–68.

⁴⁶ *Minister of Transport* (2024) paras 78–80.

⁴⁷ *Minister of Transport* (2024) paras 78–80.

⁴⁸ *Minister of Transport* (2024) at para 79.

⁴⁹ *Adonisi* (2020) at para 343.

⁵⁰ *Minister of Transport* (2024) at para 80.

⁵¹ *Minister of Transport* (2024) at para 80.

The SCA also stated that the province was understood to have made the interpretation of the statute without seeing any need to seek further advice from the national government.⁵² The latter had been given notices of restructuring plans since 2010, but had failed to pay attention to those notices.⁵³ In other words, the SCA stated that the national government had been notified of the plans of the province to sell the property but had never responded. The province had to remind the Minister of its plans to restructure.⁵⁴ There was hence no *mala fide* conduct on the part of the province and municipality. In fact, the number of intended housing plans was reduced due to the government's delays and the consequent impact on the necessary budgeting processes.⁵⁵

However (and as will be argued in the critical analysis of the judgment), this was a missed opportunity for the SCA to note that the provincial government acted irrationally by not complying fully with GIAMA.

2.1.4 Whether the province was obligated to consult the national government

The next issue was whether the province was obligated to inform and consult the national government on the decision to dispose of the property.⁵⁶ The SCA held that it was unclear on what grounds the Minister had to be consulted.⁵⁷ The Minister of Human Settlements had argued that she was not properly consulted on the disposal of the property.⁵⁸ The SCA highlighted compliance with the formal notification procedure in sections 3(2) and 3(3) of the WCLAA.⁵⁹ It stated that the Minister conceded she was not required to be consulted on every aspect and that this weakened the merits of the respondent's case considerably.⁶⁰

However, the SCA was misdirected in omitting to state that the provincial cabinet did not make any meaningful effort to await an outcome from the national ministerial process (as was highlighted by the court *a quo*) in regard to obtaining approval for selling the property.⁶¹ The provincial government made a decision without looking thoroughly into the consequences of disposing of the property, thus acting irrationally.⁶²

⁵² *Minister of Transport* (2024) at para 81.

⁵³ *Minister of Transport* (2024) at para 82.

⁵⁴ *Minister of Transport* (2024) at para 82.

⁵⁵ *Minister of Transport* (2024) at paras 82, 83, 84 and 85.

⁵⁶ *Minister of Transport* (2024) at para 87.

⁵⁷ *Minister of Transport* (2024) at para 89.

⁵⁸ *Minister of Transport* (2024) at para 89.

⁵⁹ *Minister of Transport* (2024) at para 93.

⁶⁰ *Minister of Transport* (2024) at para 93.

⁶¹ *Adonisi* (2020) at para 359.

⁶² *Adonisi* (2020) at para 359.

3 THE SCA'S DECISION: ERRONEOUS REASONING, MISSED OPPORTUNITIES AND GAPS IN THE LAW

3.1 The capability approach and the right to social housing

Noting that South Africa is 31 years into democracy, freedom is a key trait of democracy. It is important to understand the concept of freedom through the capability approach developed by Kimhur in the context of housing (from Sen and Nussbaum) and the state's important obligation to provide housing.

The capability approach is centred on the notion that the well-being of people should be gauged on their capabilities and functioning rather than on economic gain alone.⁶³ Sen proposes that achievements through well-being must be gauged by functioning, while capability is realised by attaining a set of freedoms.⁶⁴ Among other things, acquiring capabilities depends on a person's physical condition and built environment. Furthermore, the capability approach maintains that Dworkin's notion of the equality of resources and Nozick's equal protection of individual liberty rights are not precise in terms of the extent of equality amongst individual beings.⁶⁵ The capability approach enables a deeper understanding of the positive obligations that should be fulfilled to realise socio-economic rights.⁶⁶ Positive obligations to provide housing are ultimately subject to progressive realisation, as evidenced by the *Grootboom* case. The later cases of *Olivia*, *Blue Moonlight* and *Dladla*⁶⁷ (which addressed the procedures to be followed in the prevention of illegal eviction) are also relevant because they deal with access to alternative accommodation.

The capability approach places emphasis on Sen's notion of "functionings". Functionings are the essential traits of a person's being. They include, for example, the state of being healthy, having shelter, and living in safe environment, but also extend to nonmaterial things such as being happy and feeling composed.⁶⁸ Functionings can also be an act of choice for one's well-being. The fact that people choose to reside next to their place of employment can be a functioning; the fact that people can skip meals or drinking liquid between certain times of the day for a period time to boost their spiritual well-being is a choice of function. This is different from living near employment in deplorable conditions so as to cut down on transport costs, yet if such person could afford, they would stay far from work in place in good living conditions. Here, the functioning of a

⁶³ Sen *A Inequality re-examined* Oxford: Clarendon Press (1992) at 12; Robeyns I "The capability approach: A theoretical survey" (2007) 6(1) *Journal of Human Development* 93 at 95-96.

⁶⁴ Robeyns (2007) at 103.

⁶⁵ Sen (1992) at 12.

⁶⁶ Vizard P, Fukuda-Parr S & Elson D "Introduction: The capability approach and human rights" (2011) 12(1) *Journal of Human Development and Capabilities* 1 at 2.

⁶⁷ *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 BCLR 475 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) BCLR 150 (CC); *Dladla and Another v City of Johannesburg and Others* 2018 (2) BCLR 119 (CC).

⁶⁸ Sen (1992) at 40-42.

person is not by choice but by circumstance. If a person skips two meals a day because they cannot afford two meals a day, this act is certainly not a functioning by deliberate choice.

The capability approach touches on questions of freedom. Capabilities are described by Sen as real freedoms that people need in order to reach their potential as human beings. Such freedoms are usually exercised only through access to opportunities.⁶⁹ A person enjoys freedom when they are given the right to vote; but this freedom is constrained if, on election day, a person has to travel 50 km to the nearest polling station. A person has more chance of realising various freedoms if given the opportunity to reside in an area which is close or conveniently located to the place of employment. Conversely, such freedom is constricted when there is no available and affordable accommodation near where a person works.

Martha Nussbaum has worked on developing the capability approach: she offers a list of the capabilities necessary for a person to function. Her work places a great deal of emphasis on the importance of constitutional principles. Such principles, in her view, need to be respected by all governments around the world, with the recognition of the importance of human dignity operating as a minimal condition.⁷⁰ She lists 10 functions: (1) life; (2) bodily health; (3) bodily integrity; (4) senses, imagination and thought; (5) emotions; (6) practical reason; (7) affiliation; (8) other species; (9) play; and, finally, (10) control over one's environment.⁷¹

Nicholls has explored some of these functions in the particular context of housing, homelessness and capabilities. Housing may be understood as a space in which individuals are enabled to achieve their functions.⁷² A function such as "life" can be read in terms of housing as implying that a person needs to reside in an area near work where their life is not under any threat of danger.⁷³ Many working-class people are forced into life-situations in which, in order to get to work, they have to walk in the early hours of the morning to bus stations or pick-up points in areas that expose them to encounters with robbers who could be a threat to their lives. The second function of "bodily health" can also relate to the human need for adequate rest: most working people arrive very late from work and have to wake up early in the morning to return to work.⁷⁴ The consequent lack of sleep can affect a person's bodily health.

The tenth function refers to control over one's environment: this entails what a person must have in respect of possession and have the ability to work in an area that they reside in or which is located nearby the place of employment. Nicholls emphasises that

⁶⁹ Sen (1992) at 57–63.

⁷⁰ Nussbaum M *Women and human development* New York: Cambridge Press (2000) at 1.

⁷¹ Nussbaum (2000) at 77–80.

⁷² Nicholls CM "Housing, homelessness and capabilities" (2010) 27(1) *Housing, Theory and Society* 23 at 24.

⁷³ Nicholls (2010) at 30–31.

⁷⁴ Nicholls (2010) at 31–32.

this tenth point is particularly important since housing is both a space of belonging and a place where a person has the capability to function and attain all the needs that exist in a “layered system”.⁷⁵

Both Nussbaum and Sen’s approaches to capability have been developed by Kimhur in the context of housing policy.⁷⁶ Kimhur agrees that the capability approach is normative in that it advocates for freedoms as the suitable basis for addressing a person’s well-being. However, Kimhur points out that the capability approach’s potential for addressing housing policy has not been fully examined.⁷⁷ Public policy must not seek an increase in the individual's well-being or for the opulence of sources, commodities, and primary goods. Public policy must focus on how well-being should rather relate to an individual’s achievement and advantage regarding the opportunities around that person.⁷⁸ Therefore, a person’s housing affordability may be linked to their capability in that upon the payment of the monthly mortgage or rentals of the house, the individual is left with a healthy residue of income to spend on other needs known as functioning for his capability enhancement.⁷⁹ This elaborates an understanding of the functioning of commodities in housing policy as sustainable goods supplied in economics, law and planning. The capability approach would apply to housing as a socio-economic or socio-cultural instrument.⁸⁰ People may use this capability to identify with the success of attaining the house as a sustainable commodity.

Kimhur asks which capabilities are related to various forms of housing-related functioning. One example is that people cherish their houses because of the effort they put into obtaining them.⁸¹ In the context of understanding housing, capability involves issues such as tenure rights; gender equality with regard to home ownership; access to basic amenities (such as water, electricity, and refuse collection); and closeness to work. In terms of social housing issues, the capability approach helps reveal several deficiencies, such as the fact that social housing and Reconstruction and Development Programme (RDP) beneficiaries in South Africa receive accommodation only in places far from employment opportunities or any possibilities of conducting business trade.

How do Kimhur’s arguments apply to the *Adonisi* case? First, there is his stress on how housing is deeply related to questions of freedom. Individual functioning is undermined

⁷⁵ Nicholls (2010) at 36.

⁷⁶ Kimhur B “How to apply the capability approach to housing policy? Concepts, theories and challenges” (2020) 37(3) *Housing theory and society* 257. See also Sen A *Commodities and capabilities* Delhi, New York: Oxford University Press (1999) at 39–55; Sen A “Capability and well-being” in Nussbaum MC & Sen A (eds) *Quality of life* Oxford: Oxford University Press (1993) at 31; Narayan D *Voices of the poor: Can anyone hear us?* Oxford University Press for the World Bank (2000) at 265–266; Nussbaum M *Women and human development* Cambridge Press, New York (2000) at 5, 91 and 96–97.

⁷⁷ Kimhur (2020) at 258; Sen (1999) at 57–72.

⁷⁸ Kimhur (2020) at 262; Sen (1993) at 39–55.

⁷⁹ Kimhur (2020) at 263.

⁸⁰ Kimhur (2020) at 266.

⁸¹ Kimhur (2019) at 268.

when people do not enjoy tenure in properties close to their workplaces, and many people waste precious time in commuting to and from work. In the *Adonisi* case, challenging the provincial government's decision was intended to symbolise that something needs to be done to reverse spatial apartheid. Furthermore, it is important to recall that freedoms entail not only civil and political rights but also freedoms that can be understood within the context of housing. Securing rights to tenure can assist working-class individuals in attaining a level of freedom towards the securing of their capabilities. Housing in the context of commodity implies that well-being is uplifted where there is secured tenure or guarantee of affordability.

3.2 Meaningful engagement in pursuit of social housing

Social housing policy in South Africa requires that the people who are meant to benefit from it must be involved in the entire planning process. The institutions which deal with social housing must consult with residents in a way that gives full meaning to the idea of participation: there must always be meaningful engagement.

Scholars such as Chenwi have unpacked the meaning of the term "meaningful engagement".⁸² For Chenwi, it requires the state to ensure that its policies and programmes consider input from the people who are meant to benefit from them.⁸³ Thus, section 2(1)(i) of the Housing Act obliges all spheres of government (at national, provincial, and local levels) to communicate adequately with communities affected by housing development. The national housing code emphasises the need to ensure the effective participation of affected communities from the planning stage through to the development phases of particular houses. A key case with regard to meaningful engagement is *Government of South Africa v Grootboom*.⁸⁴

In this case, the court found that government housing policy did not consider those who were in desperate need of housing. The state was ordered by the court to adopt, implement and supervise a programme to cover those desperately in need of housing.⁸⁵ Similarly, in *Minister of Public Works v Kyalami Ridge Environmental Association*,⁸⁶ the court held that those affected by government developments must receive adequate consultation in the form of engagement.⁸⁷ It was demonstrated that the government had shown its commitment to give meaningful engagement. In the case of *Port Elizabeth*

⁸² Chenwi L "'Meaningful engagement' in the realisation of socio-economic rights: The South African experience" (2011) 26(1) *Southern African Public Law* 128 at 136.

⁸³ Chenwi (2011) at 136.

⁸⁴ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

⁸⁵ *Government of the Republic of South Africa* (2000) at paras 73–78 and 87.

⁸⁶ *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC).

⁸⁷ *Minister of Public Works v Kyalami Ridge Environmental Association* (2001) at paras 110–111.

Municipality v Various Occupiers,⁸⁸ the court noted there had been a lack of engagement on the part of the municipality.⁸⁹

Furthermore, for the engagement process to be successful, there must be a participation process as compared to reaching a settlement. Meaningful engagement, in this case, reduces litigation costs as well as the issues that are in dispute, thus serving as a realistic way to reach agreement. In *Occupiers of 51 Olivia Road v City of Johannesburg*,⁹⁰ the court made an order requiring the parties to engage meaningfully.⁹¹ *Mamba v Minister of Social Development* challenged the closure of refugee camps that had been established in response to xenophobic violence.⁹² The court here made an order that the parties must engage with each other meaningfully and with all other stakeholders on an urgent basis to settle their scores and challenges within the parameters of the Constitution.⁹³

In the light of this succinct judicial precedent, the SCA judgment is deficient in not mentioning how shambolic the process of engagement between the communities, municipalities and the province was in the sale of the Tafelberg property.

3.3 Specific areas in the Social Housing Act

The social housing policy is intended to help people find affordable housing and ensure that this housing lies within easy reach of their workplaces. As the *Adonis* case is of high public interest, it is important to note that this was a missed opportunity by the SCA to recall an ILO standard, R115 – Workers' Housing Recommendation, 1961 (No. 115), in construing people's freedoms.

For instance, the responsibility of state authorities is stated in point no. 9. This prescribes that state authorities must have housing programmes which are consistent with national goals and that public and private sources should be available for the construction of workers' housing and related community facilities.⁹⁴ In addition, point no. 11 states that public authorities, to the extent required and as far as practicable, should assume responsibility either for providing directly, or for stimulating the provision of, workers' housing on a rental or home-ownership basis.⁹⁵ Point no. 24(b) states that public authorities should create land reserves in appropriate situations in order to facilitate advance planning of such housing and facilities. Point no. 24(3) states that such land should be made available for workers' housing and related community

⁸⁸ *Port Elizabeth Municipality v Various Occupiers* 2004 12 BCLR 1268 (CC).

⁸⁹ *Port Elizabeth Municipality* (2004) at para 61.

⁹⁰ *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 BCLR 475 (CC).

⁹¹ *Occupiers of 51 Olivia Road* (2008) at paras 24–26.

⁹² *Mamba v Minister of Social Development* 2008 CCT65/08.

⁹³ *Mamba* (2008) at para 1.

⁹⁴ See Point no. 9 of R115 – Workers' Housing Recommendation, 1961 (No. 115).

⁹⁵ See Point no. 11 of R115 – Workers' Housing Recommendation, 1961 (No. 115).

facilities at a fair price.⁹⁶ Point no. 41 is that workers' housing should take into account that public and private transport facilities ought to be within easy reach of places of employment and close to community facilities such as schools or shopping centres.⁹⁷

The SCA judgment also explains how provincial and local governments can escape liability for building social housing in specific areas. The Court stated that there was no "specific wording" in the social and housing legislation or policy that compels provincial and local authorities to build houses in specific areas.

All in all, from a judicial-activist perspective, this case represents a missed opportunity for the SCA. It could have been a chance to critically mention non-availability in the Housing Act and the SHA to have explicit wording that compels municipalities to reverse spatial apartheid. It is submitted that the court could have set a precedent compelling the first and second respondent to develop a revised or amended Housing Act that compels both the provincial and local governments to provide housing near people's work areas. Despite the dismissal of the respondents' argument in the SCA that Sea Point was a suitable place for planned areas for social housing, this could have been rectified with the appropriate bill subsequently converted into legislation.

3.4 A missed opportunity to address SPLUMA issues

The SCA ignored the mismatch in coordinating SPLUMA with municipal by-laws.⁹⁸ It also failed to mention that SPLUMA refers to the importance of addressing spatial injustice. In terms of the judgment in the court *a quo*, arguments by the respondents were raised that the government has the constitutional duty to advance spatial justice through the progressive realisation of the right to housing.⁹⁹ Section 7 of SPLUMA sets out five principles that are relevant to spatial land-use planning. A key such principle is spatial justice.¹⁰⁰ The SCA did not properly show the significance of SPLUMA, which in the court *a quo* has been thoroughly unpacked.

For instance, the court *a quo* noted that SPLUMA strives to give effect to sections 25 and 26 of the Constitution through the provision of adequate, affordable housing on suitably located land and that this is realised through spatial justice.¹⁰¹ It dismissed the claim that there were provincial budgetary constraints because the National Treasury had not allocated any funding, maintaining that this was an excuse and invalid for not drawing on existing policy on affordable housing. The principle of spatial justice is applicable across all spheres of the state, and the availability of land in the central part of Cape Town would have allowed the provincial government to promote spatial justice by

⁹⁶ See Point no. 24(2)(b) and 24(3) of R115 – Workers' Housing Recommendation, 1961 (No. 115).

⁹⁷ See Point no. 41 of R115 – Workers' Housing Recommendation, 1961 (No. 115).

⁹⁸ Budlender J & Royston *Edged out: Spatial mismatch and spatial justice in South Africa's main urban areas* Johannesburg Socio-Economic Rights Institute of South Africa (2016) at 10–67.

⁹⁹ *Adonisi* (2020) at para 35.

¹⁰⁰ Section 7 of the Spatial Land Use Management Act.

¹⁰¹ *Adonisi* (2020) at paras 83 and 84.

blending affordable housing into wealthier areas.¹⁰² It is not known why the court omitted to discuss this issue.

The author strongly feels that SPLUMA does not explain the purpose of developing social housing in specific areas. It would be useful if the municipal by-laws and municipal spatial development frameworks examined this issue. As noted by authors such as Berrisford, the judgment returns to the problems of apartheid.¹⁰³ Notably, town planners at both the local and provincial levels appear reluctant to address social exclusion, despite generally accepting that apartheid-era inequalities continue to exist at the level of basic infrastructure and amenities.¹⁰⁴ The SCA judgment also fails to respond to issues of the kind raised by Harrison et al., who argue that planning frameworks lack the necessary power to strengthen spatial coordination between government and provinces.¹⁰⁵

SPLUMA is silent, too, on the position of municipalities with regard to unused land. Urban areas may have areas of privately owned but unutilised land. In a comparative study of land regimes, Luthango points out that unutilised land and abandoned buildings pose a threat to urban safety (with such places often used for illegal activities) and also represent a loss of potential revenue.¹⁰⁶

There is need for municipalities and provinces to go back to the drawing-board and begin engaging in meaningful dialogue (as suggested above). Only then is there likely to be any progress towards addressing the issues of spatial justice identified by the Constitutional Court when it enlarged upon the implications of section 26 of the Constitution in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*.¹⁰⁷ Here, the Court emphasised the state's duty to take into consideration the

¹⁰² Adonisi (2020) at para 478.

¹⁰³ Berrisford S "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22(3) *Urban Forum* 247 at 249–250.

¹⁰⁴ Berrisford(2011) at 249–250.

¹⁰⁵ Harrison P, Todes A & Watson V *Planning and transformation: Learning from the post-apartheid experience* Taylor & Francis Group (2007) at 243.

¹⁰⁶ Brown-Luthango M "Access to land for the urban poor: Policy proposal for South African cities" (2010) 21(3) *Urban Forum* 123 at 127–128. See also Turpin AR "Cape Town has huge tracts of SANDF land lying unused enough for 67 000 households" (16 December 2020) *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2020-12-16-cape-town-has-huge-tracts-of-sandf-land-lying-unused-enough-for-67000-households/> (accessed 23 April 2024); Ndifuna Ukwazi "City to lease out new market street parking lot despite promises to use it for affordable housing" (15 December 2020) *Jumpshare* available at <https://jumpshare.com/v/sVBdtEpj7Hl2UdGLbK5o> (accessed 23 April 2024); CORC "Civil society organisations call for the release of under-utilised military land to combat Cape Town's housing crisis" (7 December 2020) *Jumpshare* available at <https://jumpshare.com/v/TcHKxDiq19IIUWI2WcMe> (accessed 3 April 2024).

¹⁰⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC) at para 256. See also Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30(1) *Southern African Public Law* 26 at 31; Van Wyk J "Can legislative

closeness of school and job opportunities when it plans to relocate people in the interests of providing them with decent places of living.¹⁰⁸ In order to promote spatial justice, it is important for the City to conduct land audits on any vacant or underutilised land that belongs to the state and to make recommendations for the expropriations necessary for social housing in service of the public interest. It is rather worrying that property tax in South Africa constitutes only 0.5 per cent of the country's gross domestic product (GDP), as this means that not enough is being done by local authorities to collect the tax revenue necessary for promoting spatial justice through subsidised housing initiatives.¹⁰⁹

3.5 Ignoring submissions on affordable housing

It is not clear why the SCA did not consider the affidavit submitted by a municipal official in the court *a quo*. This stated that the City did have plans to provide suitable social housing, but needed the cooperation of the national and provincial governments to do so.¹¹⁰ Indeed, the submissions by the City of Cape Town further reveal that the province did not consult with it on its intention to dispose of the Tafelberg property.

Perhaps if the City had been properly consulted, more pressure would have been put on the national government to avail the necessary budget in line with policies such as the Breaking New Ground policy.¹¹¹ There is no way in which the City would be able to implement social housing in the CBD due to the limited amount of land it owns in its capacity as the local authority.¹¹² It is not denied by reality on the ground that a vast number of working-class people live near the CBD and that daily transport is inadequate, with the situation at the time (the Covid-19 pandemic) having been worsened by cable theft.¹¹³ Addressing this problem and making suitable land available to the City of Cape Town would certainly require the intervention of the provincial government.

The SCA also erred by not taking into account a number of submissions which stated that the province had cancelled its plans to be involved in urban regeneration programmes. This means that there had been no proper use of procedures in terms of GIAMA through firstly approaching the City of Cape Town or another government department (such as Human Settlements) on selling of the land rather selling the land to a private buyer. It is also unknown why the SCA ignored the statement from a City of

intervention achieve spatial justice?" (2015) 48(3) *Comparative and International Law Journal of Southern Africa* 381 at 399.

¹⁰⁸ *Residents of Joe Slovo* (2010) at paragraph 256, 400 and 407.

¹⁰⁹ Brown-Luthango (2010) at 135.

¹¹⁰ *Adonisi* (2020) at para 450.

¹¹¹ Breaking New Ground is a housing policy that seeks to tackle informal settlements quickly.

¹¹² *Adonisi* (2020) at para 466.

¹¹³ Phaliso S "Cape Town commuters stranded again as cable theft brings trains to a halt" (7 February 2024) *Ground Up* (7 February 2024) available at <https://groundup.org.za/article/cape-town-commuters-stranded-again-as-cable-theft-brings-trains-to-a-halt/> (accessed 9 November 2024).

Cape Town official which the court *a quo* supported in regard to tackling the supply of land for social housing in proximity to the CBD.¹¹⁴

3.6 Resource constraints and social housing

The government has adopted ambitious policies on social housing. In the period 2004–2009, it developed the Breaking New Ground (BNG) Policy Framework as a response to the poor quality of houses built in the RDP programme.¹¹⁵ One result of the new initiative was a decrease in the number of housing units built per year. While 161,854 units were constructed in 2009–2010, only 121,879 were built in 2010–2011.¹¹⁶ 2019 saw 69,513 houses being built; by 2020, this number had decreased to 51,166.¹¹⁷

Thus, while the number of people on the waiting list for houses continues to grow, the number of houses built is shrinking.¹¹⁸ According to Turok, the problem is linked to the government's focus (since taking power in 1994) on people's living conditions, rather than on more structural problems, such as unemployment and the need to boost tax revenues.¹¹⁹

The SCA judgment is a setback to achieving goals such as the BNG, as the court omitted to look into the submissions of the City of Cape town discussed above.¹²⁰ The housing programme is slowly losing its momentum over the years because it is seen not as an investment but a cost to the state.¹²¹ This constrains the available housing budget, thus creating demand for free housing. Furthermore, the RDP and BNG housing schemes were, from the beginning, rocked by multiple corruption scandals.¹²² These have ranged from transactions that lack the necessary transparency between the state institutions

¹¹⁴ Adonisi (2020) at para 490.

¹¹⁵ Wertman C "There's no place like home: Access to housing for all South Africans" (2015) 40(2) *Brooklyn Journal of International Law* 719 at 742.

¹¹⁶ Department of Human Settlements *Strategic Plan & Budget* Financial & Fiscal Commission & Community Law Centre Comment (2012).

¹¹⁷ Department of Human Settlements *2019/20 Annual Report* (2020).

¹¹⁸ Tissington K, Munshi N, Mirugi-Mukundi G & Durojaye E *Jumping the queue, waiting lists and other myths: Perceptions and practice around housing demand and allocation in South Africa* Johannesburg: Socio-Economic Rights Institute of South Africa (2013) at 56–79.

¹¹⁹ Turok I "Turning the tide? The emergence of national urban policies in Africa" (2015) 33(3) *Journal of Contemporary African Studies* 348 at 353.

¹²⁰ See comment above "3.4 Disregard of submissions by City of Cape Town's plans on affordable housing".

¹²¹ Turok I "Turning the tide? The emergence of national urban policies in Africa" (2015) 33(3) *Journal of Contemporary African Studies* 348 at 353.

¹²² Maluleke W, Siyanda D & William MR "Betrayal of a post-colonial ideal: The effect of corruption on provision of low-income houses in South Africa" (2019) 11(1) *International Journal of Business and Management Studies* 139 at 152–159. See also Khowa-Qhoai T & Tyali N "Breaking new ground: Perceptions of RDP house beneficiaries of the Mavuso settlement in Alice, South Africa" (2024) 12(1) *Africa's Public Service Delivery and Performance Review* 1 at 6–8.

and service providers to unclear property registration systems that actually exclude deserving beneficiaries.¹²³

In *Glenister v President of the Republic of South Africa*,¹²⁴ the Constitutional Court succinctly stated that corruption causes disproportionate harm to the poor through the misappropriation of funds meant to steer development in the public interest, thus reducing the government's capacity to provide basic services. The government's image is tarnished too, hence limiting potential foreign investment and aid.¹²⁵ Corruption is a setback to the economy, obstructs development, and hinders poverty alleviation.¹²⁶

The Author is of the view courts have a duty to develop jurisprudence in a spirit of judicial activism, as was demonstrated in the decision of the court *a quo*. Singh et al. submit that section 39(2) of the Constitution may be seen through the lens of judicial activism. For instance, judicial activism may entail checks and balances, giving courts the task of assessing decisions from other branches of the government – something which cannot be separated from politics.¹²⁷ The present SCA judgment represents a missed opportunity to incorporate recently developed policy that promotes spatial transformation. Although appeals are based on what has been argued in the courts *a quo*, appeal courts are the custodians of the equality principles championed by the Constitution.

In 2020, the government announced the Declaration of Priority of Human Settlements and Housing Development (PHSHD) through the Department of Human Settlements.¹²⁸ Amongst other objectives, this policy promotes human settlements, spatial transformation and consolidation by ensuring the restructuring and revitalisation of urban areas in housing delivery.¹²⁹ This measure strengthens the hopes of overcoming widespread spatial injustice among households. The project is centred on the National Development Plan, as well as the National Spatial Development Framework (NSDF), the Integrated Development Framework and the Integrated Urban Development Framework.

The NSDF recognises the failures of current spatial legislation. It also acknowledges President Cyril Ramaphosa's insistence that the spatial regime needs an integrated solution that goes beyond the mandate of any single government department or level of

¹²³ Turok (2015) at 354. See also Turok I & Scheba A "Right to the city and the New Urban Agenda: Learning from the right to housing" (2019) 7(4) *Territory Politics, Governance* 494 at 500–501.

¹²⁴ *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC).

¹²⁵ *Glenister* (2011) at 198.

¹²⁶ *Glenister* (2011) at 198.

¹²⁷ Singh A & Bhero MZ "Judicial law-making: Unlocking the creative powers of judges in terms of section 39(2) of the Constitution" (2016) 19(1) *Potchefstroom Electronic Law Journal* 1 at 12–13.

¹²⁸ Government Gazette No. 43316, Declaration of Priority of Human Settlements and Housing Development, 15 May 2020.

¹²⁹ Government Gazette No. 43316 (2020).

government.¹³⁰ In essence, the President's pronouncements imply that municipalities cannot go it alone in addressing issues related to spatial inequalities.

All of these policies could have been incorporated in the judgment in the light of the SCA showing that it is a champion of promoting the constitutional right to housing in terms of section 26 of the Constitution. The SCA judgment in focus in this case note was misdirected in absolving the provincial government from supporting the City of Cape Town. The main purpose of the NSDF is to carry out long-term strategic planning geared towards 2050. It strives to align with the goals and objectives of SPLUMA. At the same time, municipalities need to show they are committed to addressing spatial inequalities.

4 CONCLUSION

This case note has critically examined key aspects of the *Adonisi* case. It has argued that the SCA conspicuously failed to address issues of spatial justice by neglecting to take into account the lived realities of the people involved. It holds that it is more than likely that the Constitutional Court will reverse the decision of the SCA.

The case was set down for consideration by the Constitutional Court for a hearing on 12 February 2025 and judgment has been reserved. There have been no updates when the judgement will be handed at this point in time of writing. However, it is anticipated that the Constitutional Court will give an order that resonates with, and is sympathetic to, the lived realities of people such as Ms Adonisi. This contribution argues that the SCA dwelt too narrowly on administrative issues and failed to consider the powerful implications of the case as a potential game-changer for people living far from the city centre.

In addition, the case note suggests that *Adonisi* invites reflection on how well the different spheres of government have fared 31 years into democracy with regard to the fundamental question of housing. Drawing inspiration from the capability approach, democracy is here understood not simply as the process of giving people the freedom to vote. It takes the question further and insists that the majority parties in all of South Africa's nine provinces begin to re-address issues that remain as the legacy of apartheid.

This is especially the case in urban areas, where the majority of people do not qualify for mortgages to buy property in areas closer to places of work or for conducting business. The functionings and freedoms identified by capability-approach theory enable people to realise their full freedoms by having residence near places of work. It is anticipated that the decision in the Constitutional Court will resonate with the lived realities of the working class. As of February 2025, arguments before the Constitutional Court closed and judgment has been reserved, and will be announced in an unknown date, it is hoped that justice will be served by this case, symbolically reversing the scars left by apartheid.

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