



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 823/2024

In the matter between:

THE MSUNDUZI MUNICIPALITY

APPELLANT

and

CAPITAL CITY HOUSING NPC

FIRST RESPONDENT

PIETER HENDRIK STRYDOM N O

SECOND RESPONDENT

**THE SOUTH AFRICAN LOCAL
GOVERNMENT ASSOCIATION**

THIRD RESPONDENT

**THE MINISTER OF
CO-OPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS**

FOURTH RESPONDENT

**THE MEC FOR CO-OPERATIVE
GOVERNANCE AND TRADITIONAL
AFFAIRS, KWAZULU-NATAL**

FIFTH RESPONDENT

THE MINISTER OF FINANCE

SIXTH RESPONDENT

**THE MINISTER OF HUMAN
SETTLEMENT**

SEVENTH RESPONDENT

**THE MEC FOR HUMAN
SETTLEMENT, KWAZULU-NATAL**

EIGHTH RESPONDENT

Neutral citation: *The Msunduzi Municipality v Capital City Housing NPC and Others* (832/2024) [2026] ZASCA 83 (04 June 2026)

Coram: MATOJANE, KGOELE, COPPIN JJA and CLOETE and
OPPERMAN AJJA

Heard: 11 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for the handing down of the judgment are deemed to be 11:00 on 04 June 2026.

Summary: Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) – categorisation of rateable property under s 8 of the Rates Act – social housing institution – whether high court entitled to grant relief *mero motu* under s 8(3) of the Rates Act compelling municipality to create additional category – constitutional challenge to definition of 'specified public benefit activity' – principle of subsidiarity – reasonableness under s 26(2) of the Constitution of the Republic of South Africa, 1996 – whether matter to be remitted or determined on appeal.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Mngadi J, sitting as court of first instance):

1. Condonation for the late filing of the notice of appeal is granted. The appellant is to pay the costs of the application for condonation, including the costs of two counsel where so employed.
2. The appeal is upheld.
3. The cross-appeal is dismissed.
4. The order of the high court is set aside and replaced with the following: ‘The application is dismissed. There is no order as to costs.’
5. There is no order as to costs in this Court.

JUDGMENT

Matojane and Kgoele JJA (Cloete AJA concurring):

Introduction

[1] This appeal concerns the rating of immovable property used for social housing under the Local Government: Municipal Property Rates Act 6 of 2004 (the Rates Act) and the rates policy of the appellant, the Msunduzi Municipality (the Municipality). The first respondent, Capital City Housing NPC (Capital City), is a non-profit company incorporated in terms of the Companies Act 71 of 2008 and an accredited social housing institution under the Social Housing Act 16 of 2008 (the Social Housing Act). It is also an approved public benefit organisation (PBO) registered in terms of s 30 of the Income Tax Act 58 of 1962. The second respondent is the duly appointed business rescue practitioner of

Capital City. The third to eighth respondents are organs of state who, except for the fourth and fifth respondents, abide by this Court's decision.

[2] Capital City owns three blocks of residential units in the Msunduzi municipal area: Acacia Park (311 units), Aloe Ridge (952 units) and Signal Hill (393 units), totalling 1 656 units. Each block is registered as a single cadastral unit. The municipal valuations of the three properties are R66.6 million, R178.5 million and R92.8 million, respectively. The Municipality categorises the three properties as residential property under s 8(2)(a) of the Rates Act and clause 17.1.5 of its rates policy, with the consequence that only the first R15 000 of the market value of each cadastral unit is excluded from rates. The practical benefit in Capital City's case is a rebate of R45 000 in aggregate. Capital City contends that, properly classified as a PBO property under s 8(2)(h) of the Rates Act, it would be entitled to a rebate measured in millions of rands. The dispute concerns whether, and on what basis, that classification can be achieved.

[3] Capital City and its business rescue practitioner approached the KwaZulu-Natal Division of the High Court, Pietermaritzburg (the high court), seeking a declaration that clause 1.32 of the Municipality's rates policy and the definition of 'specified public benefit activity' in s 1 of the Rates Act are inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution); an order amending those provisions to include item 3 (land and housing) of Part I of the Ninth Schedule to the Income Tax Act (Part I of the Ninth Schedule); including ancillary relief reassessing rates levied since 30 July 2019. The Municipality opposed the application. The fourth and fifth respondents also opposed it. The third, sixth, seventh, and eighth respondents elected to abide by the high court's decision.

[4] Mngadi J declined to grant the relief sought in the notice of motion. He held instead that Capital City had ‘... made a case for a clear distinct category of rateable property’, that the Municipality ‘... has not determined the existence of the said category ...’, and that the Municipality had ‘... failed to provide for it in its [r]ates [p]olicy’. The high court accordingly ordered the Municipality to determine, in terms of s 8(3) of the Rates Act, that the three properties constitute an additional category of rateable property described as ‘social housing properties’; to amend its rates policy to incorporate that determination; and to recalculate rates levied on the properties from the time it began levying rates on them.¹

[5] The Municipality appeals against the whole of that order with the leave of the high court. Capital City cross-appeals against the high court’s refusal to declare the impugned provisions unconstitutional and to grant the relief originally sought, also with the leave of the high court.

[6] Three issues fall for determination. The first is whether the high court was entitled to grant the relief it did, in circumstances where it was not sought. The second is whether the constitutional challenge to s 1 of the Rates Act and clause 1.32 of the rates policy of the Municipality ought to succeed. The third is the question of costs. A subsidiary question, raised in the dissenting judgment of Coppin JA and Opperman AJA (the second judgment), is whether, if the high court order cannot stand, the constitutional challenge ought to be remitted for reconsideration. For the reasons that follow, all three principal issues must be decided in favour of the Municipality, and the question of remittal must be answered in the negative.

¹ *Capital City Housing NPC and Another v Msunduzi Municipality and Others* (1046/2021P) 2023 JDR 3227 (KZP); [2023] ZAKZPHC 91. The order is reproduced in para 43 of the judgment.

Condonation

[7] The Municipality's notice of appeal was lodged some eight months out of time. The delay is substantial. The reasons advanced – the death of the official handling the matter, the death of the erstwhile counsel, and an administrative correction to the order granting leave to appeal – are not in all respects satisfactory. There is, in particular, an unexplained period of approximately three months between the correction of the order on 25 April 2024 and the lodging of the appeal on 25 July 2024. Counsel for Capital City correctly highlighted these gaps.

[8] The standard for condonation is well established. The applicant must give a full, detailed, and accurate account of the cause of the delay, and the prospects of success on appeal are an important factor.² The matter raises questions of constitutional importance affecting the rating regime applied to social housing institutions throughout the country. The Municipality has shown reasonable prospects of success, as appears below. Capital City has not shown that any prejudice will be caused by condonation other than the general inconvenience of opposing the appeal. In those circumstances, the interests of justice favour the grant of condonation. The Municipality must, however, bear the costs occasioned by its default.

Factual background

[9] It is common cause that Capital City was registered as a PBO on 27 January 2003 under the name Msunduzi Housing Association. It acquired the three properties between April 2003 and December 2006. Each property is registered as a single erf or portion of an erf, on which a block of residential units has been

² *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC); [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) paras 20-22. See also *North West Provincial Department of Agriculture, Conservation, Environmental and Rural Development and Another v Bosigo Investment & Trading CC and Another* 2026 (3) SA 80 (SCA); [2025] ZASCA 191; 2026 (3) SA 80 (SCA) para 11.

constructed. Capital City lets the units to qualifying tenants whose monthly household income falls between R2 000 and R15 000. Government grants assist with capital expenditure, and the Social Housing Regulatory Authority regulates rentals. Capital City has been in business rescue since 2024.

[10] On 30 July 2019, Capital City applied, under clause 19.3 of the Municipality's 2020/2021 rates policy, to have its three properties determined as PBO properties. The Municipality refused the application on 29 August 2019. Its reason was straightforward: clause 1.32 of the rates policy defines 'public benefit organisation property' by reference to the definition of 'specified public benefit activity' in s 1 of the Rates Act, which includes only items 1 (welfare and humanitarian), 2 (health care) and 4 (education and development) of Part I of the Ninth Schedule. Item 3 (land and housing) is excluded. The Municipality, therefore, had no power, in its own version, to grant Capital City the categorisation it sought.

[11] On 19 February 2021, the present application was launched. As foreshadowed above, the relief sought was a declaration of constitutional invalidity, a textual amendment of the impugned provisions, and consequential rates relief. The high court refused that relief but granted relief of its own.

The statutory framework

[12] A municipality's power to levy rates on property derives directly from s 229(1)(a) of the Constitution, making it an original constitutional power, not a delegated one.³ Section 229(2) of the Constitution provides that the power may be regulated by national legislation. The Rates Act is the national legislation contemplated.

³ *CDA Boerdery (Edms) Bpk and Others v Nelson Mandela Metropolitan Municipality and Others* [2007] ZASCA 1; 2007 (4) SA 276 (SCA); 69 SATC 177 paras 33-37.

[13] Two features of the Rates Act bear on the present dispute. The first is the obligation, under s 7, to levy rates on all rateable property in the municipal area. The second is the power, in terms of s 8(1), to levy different rates on different categories of rateable property determined according to the use, the permitted use, or a combination of the use and permitted use of the property. Section 8(2) of the Rates Act lists the categories that a municipality must determine whether they exist within its area. These include residential properties (s 8(2)(a) of the Rates Act); business and commercial properties (s 8(2)(c) of the Rates Act); properties owned by an organ of state and used for public service purposes (s 8(2)(f) of the Rates Act); and the category at the centre of the dispute, namely—
‘properties owned by public benefit organisations and used for specified public benefit activities’ (s 8(2)(h) of the Rates Act).

[14] Section 8(3) of the Rates Act confers a residual power. It permits a municipality to determine —
‘... additional categories of rateable property, including vacant land: Provided that, with the exception of vacant land, the determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).’

[15] The expression ‘specified public benefit activity’ is defined in s 1 of the Rates Act as ‘an activity listed in item 1 (welfare and humanitarian), item 2 (health care) and item 4 (education and development) of Part I of the Ninth Schedule to the Income Tax Act’. The definition is exhaustive. Item 3 (land and housing) is not listed within the definition. Items 5 to 11 (religion, culture, conservation, research and consumer rights, sport, the provision of funds, and ‘general’) are likewise excluded. Clause 1.32 of the Municipality’s rates policy mirrors the statutory definition.

[16] Three further provisions in the Rates Act are of relevance. Section 5 requires a municipality to undertake an annual review of its rates policy, with

community participation. Section 15 empowers the municipality, in its rates policy, to grant exemptions, rebates and reductions to particular categories of owners of rateable property. Section 16(3)(a) permits any ‘sector of the economy’ to request the Minister of Finance to evaluate evidence that a particular rate is materially and unreasonably prejudicing the matters identified in s 16(1) of the Rates Act.⁴ These provisions, taken together, equip ratepayers and sectors of the economy with avenues for influencing the rating regime to which they are subject.

The high court order: relief not sought

[17] It is a settled principle of our adversarial system that the parties define the issues, and the court adjudicates them. In *Fischer and Another v Ramahlele and Others (Fischer)*,⁵ Theron and Wallis JJA expressed the principle as follows:

‘Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution ... It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them.’

[18] Capital City’s case in the high court was one of constitutional invalidity. The pleaded complaint was that the definition of ‘specified public benefit activity’ unjustifiably excluded social housing from the benefits of s 8(2)(h) read with s 8(1) of the Rates Act, and that this exclusion contravened ss 9 and 26 of the Constitution and the principle of legality. The relief sought, in conformity with that complaint, was a declaration of invalidity coupled with a textual

⁴ Sections 5(1) and (2) of the Rates Act provide for community participation in the annual review of the rates policy. Section 15 empowers the municipality, in terms of its rates policy, to grant exemptions, rebates and reductions to specified categories of owners of rateable property.

⁵ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA); [2014] ZASCA 88; [2014] 3 All SA 395 (SCA) paras 13-14. See also *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC); [2016] ZACC 6; paras 27-28; *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); [2014] ZACC 23; 2014 (6) SA 123 (CC) para 202.

reading-in of item 3 (land and housing). The Municipality answered that case. So did the fourth and fifth respondents. None of the parties asked the high court to consider the residual category-creating power in s 8(3) of the Rates Act. None of them led evidence on whether such an additional category would, or would not, ‘circumvent’ the mandatory categories under s 8(2) of the Rates Act. The point was not in issue.

[19] The high court nevertheless took it upon itself to grant relief premised on s 8(3) of the Rates Act. It did so in terms which are difficult to reconcile with *Fischer*. In the impugned passage, Mngadi J said that ‘the applicant, inexplicably in my view, did not consider a relief that the first respondent, in terms of section 8 of the Rates Act, adds in terms of section 8(3) an additional categorisation of social housing property’. Whatever Capital City’s reasons for not considering that relief, they were not for the high court to override. As *Fischer* makes plain, the parties may have considered that route legally untenable; they may have foreseen evidential difficulties they were unwilling to confront; they may have wished the issues already identified to be determined. The choice was theirs.

[20] The second judgment correctly diagnoses this difficulty in paras 55 to 60, but reaches a conclusion which we cannot share. Having recognised that the high court’s order in terms of s 8(3) of the Rates Act conflicts with *Fischer*, and having expressed the prima facie view that an order made under s 8(3) of the Rates Act cannot circumvent s 8(2)(h) thereof without a prior declaration of constitutional invalidity, the second judgment proposes that the matter be remitted so that the constitutional challenge may be re-examined.⁶ For the reasons that follow, that is not the proper response to the high court’s misdirection.

⁶ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); [2009] ZACC 32; 2010 (3) BCLR 177 (CC) at para 97. The Constitutional Court there held that a just and equitable order under s 172(1)(b) may be granted even where the dispute does not turn on the constitutional invalidity of legislation or conduct. The premise of that proposition is, however, that the dispute itself is one before the court; the principle does not authorise the court to invent disputes that the parties have not

The constitutional challenge

[21] Capital City’s constitutional challenge has two limbs. The first is that the impugned provisions are inconsistent with s 26(2) of the Constitution because they impede the progressive realisation of the right of access to adequate housing. The second is that the differentiation between PBOs whose activities are listed in items 1, 2 and 4 of Part I of the Ninth Schedule and PBOs whose activities are listed in item 3 (or items 5 to 11) is irrational and so contravenes the principle of legality and s 9(1) of the Constitution. We deal with the limbs in turn.

Section 26(2) of the Constitution and the principle of subsidiarity

[22] The principle of constitutional subsidiarity, as it operates in the context of s 26, is stated as follows. Where the impugned conduct or instrument is itself a measure adopted to give effect to s 26 – a provision of the Housing Act 107 of 1997 (the Housing Act), the Social Housing Act, or Spatial Land Use Management Act 16 of 2013 (SPLUMA) – a litigant who complains that the measure gives inadequate effect to s 26 must mount the challenge against the measure, and not against s 26 in the abstract. That is the rule in *My Vote Counts NPC v Speaker of the National Assembly and Others (My Vote Counts)*.⁷

[23] As developed by the Constitutional Court, the principle requires a litigant who seeks to enforce a constitutional right that has been the subject of legislative implementation to rely on, or attack the implementing legislation rather than the constitutional provision directly.⁸ The principle exists to prevent the wholesale displacement of statutory regimes by direct constitutional challenge, and to ensure that legislative architecture is given its proper effect.

advanced. Dictum applied in *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* 2021 (5) SA 1 (CC); [2021] ZACC 2; 2021 (5) BCLR 542 (CC) para 110-111.

⁷ *My Vote Counts NPC v Speaker of the National Assembly and Others* 2016 (1) SA 132 (CC); [2015] ZACC 31; paras 53-63 (per Cameron J for the majority).

⁸ *My Vote Counts* fn 7 above paras 53-54. See also *Mazibuko and Others v City of Johannesburg and Others*; 2010 (4) SA 1 (CC); [2009] ZACC 28 para 73; *Minister of Health and Another NO v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); [2005] ZACC 14; paras 96 and 437.

[24] A litigant who contends that the State has failed to take reasonable legislative and other measures to achieve the progressive realisation of the right of access to adequate housing, must ordinarily mount the challenge against the statutes that give effect to that right.⁹ The Social Housing Act sets out the duties of social housing institutions and of the three spheres of government that interact with them. The Housing Act sets out the broader policy framework and the funding mechanisms. Neither Act requires municipalities to grant rate rebates to social housing institutions. The Rates Act, by contrast, concerns the rating of property, not the realisation of the right of access to housing. The role assigned to s 26 in the Rates Act¹⁰ is reflected in s 3(3)(g) of the Rates Act, which requires a municipality's rates policy to 'take into account' the effect of rates on PBOs registered under the Income Tax Act. That obligation has been complied with: clause 17.1.5 of the rates policy applies, and clause 19.3 affords PBO properties a path to differential rating.

[25] Capital City's case treats the absence of rate relief at the municipal level as itself rendering the overall statutory regime constitutionally inadequate. That contention has no evidential foundation in the affidavits. There is no allegation that the Social Housing Act, the Housing Act or the policies promulgated under them are unreasonable, that they have been inadequately implemented, or that the

⁹ *My Vote Counts* fn 7 above paras 53-63 (per Cameron J for the majority). See also *Commissioner, South African Revenue Service and Another v Richards Bay Coal Terminal (Pty) Ltd* 2025 (5) SA 617 (CC); [2025] ZACC 3; 2025 (6) BCLR 639 (CC); 88 SATC 162 paras 124-133. *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC); [2009] ZACC 28; 2010 (3) BCLR 239 (CC) para 73. *Minister of Health and Another N O v New Clicks SA (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC); [2005] ZACC 14; BCLR 1 (CC) paras 96 and 437.

¹⁰ Section 26 of the Rates Act provides that:

'Method and time of payment

(1) A municipality may recover a rate-

(a) on a monthly basis or less often as may be prescribed in terms of the Municipal Finance Management Act; or
(b) annually, as may be agreed to with the owner of the property.

(2) (a) If a rate is payable in a single amount annually it must be paid on or before a date determined by the municipality.

(b) If a rate is payable in instalments it must be paid on or before a date in each period determined by the municipality.

(3) Payment of a rate may be deferred but only in special circumstances.'

various funding streams to which Capital City has access – capital grants from the National Department of Human Settlements, restructuring zone subsidies and the like- are insufficient to advance the right of access to adequate housing. The challenge is, in substance, an attempt to invoke s 26 of the Constitution directly, and to do so against legislation whose primary subject is rating, to secure a benefit not provided for by the legislation that the legislature did enact to give effect to s 26 of the Constitution.

[26] The second judgment, in para 63, characterises this analysis as a misreading of Capital City’s case. It says the case is not a direct invocation of s 26 of the Constitution but rather a challenge to the Rates Act and the rates policy on the ground that they ‘diminish the progressive realisation of the s 26 right to housing’. With respect, this is a distinction without a difference. The asserted unconstitutionality of the impugned provisions is measured by reference to s 26(2) of the Constitution, which, as the Constitutional Court has repeatedly held, requires reasonable measures, judged in their totality, to be taken within the State’s available resources to achieve progressive realisation. To assess whether a particular feature of one statute is consistent with that obligation, the court must ordinarily examine the totality of the State’s response. Capital City has not done so. It has identified the absence of rate relief in the Rates Act and treated that, in isolation, as a constitutional infraction.

Differentiation and rationality

[27] Capital City’s second limb is that the differentiation between PBOs whose activities fall within items 1, 2 and 4 of Part I of the Ninth Schedule and PBOs whose activities fall within item 3 (and items 5 to 11) is arbitrary. The constitutional touchstone, where unfair discrimination is not pleaded, and Capital City does not rely on s 9(3) of the Constitution, is rationality. Mere differentiation

does not offend the Constitution. It does so only where it bears no rational connection to a legitimate government purpose.¹¹

[28] The exclusion of item 3 from the definition of ‘specified public benefit activity’ is rationally connected to a legitimate government purpose. The activities listed in items 1, 2 and 4 of Part I of the Ninth Schedule – welfare and humanitarian work, health care, and education and development – are characteristically delivered through institutions that provide services to indigent and vulnerable beneficiaries directly, and which would otherwise have to be supplied by, or subsidised by, the State. Item 3 (land and housing), by contrast, is a sector in which the State already provides substantial direct subsidisation through capital grants under the Housing Act and the Social Housing Act, through restructuring zone subsidies, and through the regulatory framework administered by the Social Housing Regulatory Authority. Capital City has, on its own version, been the recipient of all three. The legislature’s decision to direct rate relief to PBO sectors that are not so subsidised, and to leave PBOs in the housing sector to alternative funding mechanisms specifically designed for them, is not arbitrary. It reflects a reasoned allocation of fiscal support.

[29] That conclusion is reinforced by this Court’s previous decisions on the rating regime. In *City of Tshwane v Marius Blom & GC Germishuizen Inc and Another (Blom)*¹² and in *Blair Atholl Homeowners Association v Tshwane City (Blair Atholl)*,¹³ this Court emphasised that decisions on the categorisation of rateable property and on differential rating involve polycentric policy choices that lie at the core of municipal autonomy. A court is slow to question such choices.

¹¹ *Prinsloo v Van der Linde and Another* 1997 BCLR 759 (CC); [1997] ZACC 5; 1997 (3) SA 1012 (CC); paras 25-26. *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); [1997] ZACC 12; 1997 BCLR 1489 (CC) para 53; *Weare and Another v Ndebele NO and Others* 2009 (1) SA 600 (CC); [2008] ZACC 20; 2009 (4) BCLR 370 (CC) paras 46-47.

¹² *City of Tshwane v Marius Blom & GC Germishuizen Inc and Another* 2014 (1) SA 341; [2013] ZASCA 154; (SC this very pointA); [2013] 3 All SA 481 (SCA) paras 17-18.

¹³ *Blair Atholl Homeowners Association and Others v Tshwane City* 2016 (2) SA 167 (SCA); [2015] ZASCA 195; paras 14-16.

Provided the regime treats ratepayers equitably and is consistent with the Constitution and the Rates Act, the choices made by the legislature and by the municipality stand. There is, on the present record, no basis to depart from that approach.

Section 229(2)(a) of the Constitution

[30] Capital City also relies on s 229(2)(a) of the Constitution, which provides that a municipality may not exercise its rating power to prejudice national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour. This Court held in *Nokeng tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others*¹⁴ that a complaint under s 229(2)(a) is not generally justiciable. It involves political and intergovernmental considerations that courts are not best placed to adjudicate. Capital City has, in any event, not identified the national economic policy said to be prejudiced, nor has it invoked the s 16(3)(a)¹⁵ procedure designed to address such complaints. Capital City made out no case in its founding affidavit as to why it could not invoke s 16(3)(a) of the Rates Act. This was dealt with for the first time in its replying affidavit, in response to this very difficulty, raised in the answering affidavit of the fourth respondent (Minister of Co-Operative Government and Traditional Affairs). Capital City's bland retort was that it is not 'a sector of the economy'. The reliance on s 229(2)(a) thus takes Capital City's case no further.

Remittal

[31] The second judgment, having found that the high court erred in granting relief that was not sought, would set aside the order, dismiss the constitutional challenge as a matter of first instance, and remit it to the high court for

¹⁴ *Nokeng tsa Taemane Local Municipality v Dinokeng Property Owners Association and Others* 2010 JDR 1160; [2010] ZASCA 128; [2011] 2 All SA 46 (SCA); para 8.

¹⁵ Section 16(3)(a) of the Rates Act 6 of 2004.

reconsideration. Three principal reasons are advanced. First, that there are unventilated questions concerning the s 16(3)(a) standing point in the Rates Act and the application of the principles of ‘spatial justice’ and ‘non-retrogression’ articulated in *Thubakgale v Ekurhuleni Metropolitan Municipality (Thubakgale)*¹⁶ and in *Charnelle Commando and Others v City of Cape Town and Another (Commando)*.¹⁷ Secondly, the case would benefit from the assistance of an *amicus curiae*, such as the Socio-Economic Rights Institute of South Africa. Thirdly, the high court ought to have applied itself expressly to the interim consequences contemplated in s 172(2)(b) of the Constitution.

[32] The principles governing remittal are well known. They were collated by this Court in *Theron and Another v Loubser N O and Others; In re Theron N O v Loubser (Theron)*.¹⁸ The factors to be weighed include whether the interests of justice and convenience will best be served by the appellate court itself determining the outstanding issues; whether the issues have been fully canvassed in the affidavits and in argument; whether a party or interested party is likely to suffer prejudice if the matter is not remitted; and whether the parties have asked the appellate court to finalise the matter. The list is not closed. The overarching question is one of justice and convenience.

[33] Each of the relevant factors here points away from remittal. The constitutional challenge has been fully ventilated in the affidavits. The Municipality, the Minister, and the MEC have all delivered answering affidavits in response to the constitutional complaint. Capital City has replied. The challenge has been fully argued before this Court. Both Capital City and the

¹⁶ *Thubakgale v Ekurhuleni Metropolitan Municipality* 2021 JDR 3200 (CC); [2021] ZACC 45; 2022 (8) BCLR 985 (CC); para 104-108.

¹⁷ *Charnell Commando and Others v City of Cape Town and Another* 2025 (3) SA 1 (CC); [2024] ZACC 27; 2025 (3) BCLR 243 (CC); para 153-156.

¹⁸ *Theron and Another NNO v Loubser NO and Others; In re Theron NO v Loubser* 2014 (3) SA 323 (SCA); [2013] ZASCA 195; [2014] 1 All SA 460 (SCA) para 21; *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk; Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 415B-416A.

Municipality have asked this Court to finalise the matter. No party has sought remittal. There is no procedural or evidential prejudice to any party in this Court determining the constitutional challenge: the relevant statutory framework is a matter of law, the limited common cause facts are sufficient for the rationality and s 26 enquiries, and any disputes of fact – such as the proper computation of the prospective PBO rebate – are immaterial to the constitutional question.

[34] The second judgment’s reliance on ‘spatial justice’ and ‘non-retrogression’, while drawing on important strands of jurisprudence, does not support remittal. Those concepts have, to date, been deployed in the context of evictions and the relocation of vulnerable communities. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (Blue Moonlight)*,¹⁹ the Constitutional Court was concerned with a municipality’s obligations to provide alternative accommodation to persons threatened with eviction.²⁰ In *Thubakgale*, the question was the enforcement of a court order requiring the provision of subsidised housing to particular beneficiaries.²¹ In *Commando*, the Constitutional Court considered the proper allocation of inner-city land between competing housing claimants. None of those decisions establishes a free-standing constitutional duty on municipalities to grant rate rebates to PBOs in the housing sector. They were not pleaded in support of any such duty in the high court. To remit on the basis that they should now be canvassed would be to ask the high court to entertain a case different from the one Capital City has chosen to bring – a course of conduct that *Fischer* precludes.

[35] Indeed, the most recent of those decisions, *Commando*, warns against the very approach the second judgment would invite. The Constitutional Court there observed, in para 86, that ‘... social housing is undoubtedly important, [but] it

¹⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); [2011] ZACC 33; 2012 BCLR (CC).

²⁰ *Ibid* paras 88-92.

²¹ *Thubakgale* paras 100-105 (per Madlanga J in dissent).

should not come at the expense of the human rights of others and their basic dignity’, and that a municipality must ‘strike a balance’ involving its housing development goals. The grant of rate rebates affects the municipal fiscus, thereby reducing the resources available for other services for other ratepayers and residents. That balance is one for the municipality to strike in the first instance. It is not a balance the courts are equipped to strike afresh on remittal.

[36] The second judgment also identifies, as an unventilated issue, Capital City’s contention that it cannot itself invoke s 16(3)(a) of the Rates Act because it is not a ‘sector of the economy’. The point does not warrant remittal. Whether or not s 16(3)(a) of the Rates Act is in terms available to Capital City, the existence of that mechanism remains relevant to the rationality enquiry. It demonstrates that the legislative scheme provides a route by which complaints of the present kind, where they affect a sector, may be channelled to the responsible Minister for evaluation. The reliance on s 16(3)(a) of the Rates Act is not the only avenue available. Sections 4 and 5 of the Rates Act provide for community participation and annual review. The picture, taken as a whole, is of a regime that does not foreclose representations of the kind Capital City wishes to make. That, for present purposes, is sufficient.

[37] Nor is the suggestion that an *amicus curiae* might assist the high court a sufficient reason to remit. An *amicus* may be admitted by this Court no less than by a court of first instance. The notice in terms of rule 16A(1) (a) and (b) of the Uniform Rules of Court was issued to the potential *amicus curiae*. None had applied to be joined. Experienced senior and junior counsel have fully argued the case on both sides. The substantive constitutional question is one of law, on common cause facts, capable of being resolved on the present record.

[38] The second judgment's observation that the high court ought to have considered the interim relief contemplated in s 172(2)(b) of the Constitution assumes that the high court would have made an order of constitutional invalidity. The question of confirmation under s 172(2)(a) of the Constitution would arise only if such an order were to be made.²² For the reasons we have given, no such order should be made. The premise of the suggested remittal, therefore, falls away.

[39] In short, the constitutional challenge fails on the merits. The high court was wrong to grant the relief that it did, and was correct, on the case advanced before it, not to grant the relief sought in the notice of motion. To remit a challenge that has no prospect of success would not serve the interests of justice; it would burden the parties and the high court with a further round of litigation and prolong uncertainty for ratepayers, residents and the Municipality. This is not a case where, as in *Theron*, issues remain undecided in the court below. The high court decided the case before it, albeit by a route that was not open to it. There is nothing left to remit.

Costs

[40] Two related questions arise on costs. The first is whether the high court's order awarding costs against the Municipality should stand. The second is the costs of the appeal. Capital City urged that the principle in *Biowatch Trust v Registrar, Genetic Resources, and Others (Biowatch)*²³ shields it from any adverse costs order.

²² Section 172(2)(a) of the Constitution requires confirmation by the Constitutional Court before an order of constitutional invalidity in respect of an Act of Parliament has any force. Section 172(2)(b) permits a court that has made an order of constitutional invalidity to grant any temporary interdict or other temporary relief pending confirmation.

²³ *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC); [2009] ZACC 14; 2009 (1) BCLR 1014 (CC) paras 16 and 21-24. See also *HOD, Western Cape Education Department and Others v Equal Education Law Centre and Others* 2026 (1) SA 372 (SCA); [2025] ZASCA 116; para 27. *Corruption Watch (RF) NPC v Speaker, National Assembly and e e* [2025] ZACC 15; 2025 (10) BCLR 1117 (CC) para 76 and *Jordaan and Others v Minister of Home Affairs and Another* 2025 (6) SA 323 (CC); [2025] ZACC 19; 2025 (11) BCLR 1249 (CC) para 84.

[41] The *Biowatch* principle protects private litigants who, in good faith, vindicate constitutional rights against the State. It is not absolute. It does not insulate from costs litigation that is essentially commercial in character but formulated in constitutional terms, nor does it preclude an adverse costs order against a non-State litigant where the State has succeeded.

[42] Capital City's reliance on *Biowatch* is not free of difficulty. The litigation, though framed as a constitutional challenge, is, in practical effect, concerned with the financial sustainability of Capital City's social housing operation. The benefit sought is a recurring rate rebate. The right of access to adequate housing in s 26 of the Constitution is one that Capital City does not itself bear: it is borne by the natural persons whom Capital City's operations serve. That said, Capital City is the only registered social housing institution in the Msunduzi municipal area and one of only some 102 in the country. The litigation, although unsuccessful, was not brought lightly, and the issues are important to the social housing sector generally. The proper exercise of the discretion is not, in our view, to mulct Capital City in costs. The appropriate exercise of discretion is to make no order as to costs in this Court and in the high court.

Order

[43] The following order is made:

1. Condonation for the late filing of the notice of appeal is granted. The appellant is to pay the costs of the application for condonation, including the costs of two counsel where so employed.
2. The appeal is upheld.
3. The cross-appeal is dismissed.
4. The order of the high court is set aside and replaced with the following:
'The application is dismissed. There is no order as to costs.'

5. There is no order as to costs in this Court.

MATOJANE K E
JUDGE OF APPEAL

KGOELE A M
JUDGE OF APPEAL

Coppin JA and Opperman AJA (dissenting):

[44] We have read the judgment of our brother Matojane JA and our sister Kgoele JA (first judgment). We are indebted to them for the overview of the facts of the matter and the summation of the litigation history. We are unable to agree for the reasons as set out hereunder.

[45] In our view, the issues, besides condonation, that have crystallised for determination are first, whether the high court erred in deciding the matter on the basis that it did and whether it was justified to grant the relief it ordered and, second, and if not, whether it is appropriate for this Court to decide the constitutional challenge as a court of first instance or remit it to the high court. We agree that condonation should be granted.

What did Capital City ask the court to do?

[46] Capital City sought the following relief:

‘1.

It is declared that the following legislative provisions are inconsistent with the Constitution of the Republic of South Africa, no. 108 of 1996 (“the Constitution”)

- 1.1. section 1.32 of First Respondent’s Rates Policy (“the Msunduzi Rates Policy”).
- 1.2. the definition of the term “specified public benefit activity” contained in section 1 of the Local Government: Municipal Property Rates Act, no.6 of 2004 (“the Rates Act”).

2.

The said provisions are amended as follows:

- 2.1. In respect of Section 1.32 of the Msunduzi Rates Policy:
 - 2.1.1 the exclusion of item 3 of the Ninth Schedule to the Income Tax Act is deleted.
 - 2.1.2 the words “for items 1, 2 and 4 of the schedule” are deleted from the second sentence.
- 2.2. In respect of the said definition in section 1 of the Rates Act: the words “and item 3 (land and housing)” are added after the words “item 2 (health care)”.

3.

Applicant is granted leave to apply in terms of clause 19.3 of the Msunduzi Rates Policy, in respect of any municipal year in respect of which such application has been precluded by the unamended section 1.32, for any rebate or other rates relief may be granted pursuant to the said section 19.3 and the First Respondent is directed to:

- 3.1 Consider or reconsider any such application with due regard to the amendments that have been ordered in terms of para 2 above.
- 3.2 Reassess, accordingly, Applicant liability for rates, credit and/or refund Applicant accordingly:

4.

Subject to para 3 above, the order granted in terms 1 and 2, shall not operate retrospectively.’

[47] The case that the high court was requested to consider, in essence, was whether the exclusion of social housing institution public benefit organisations (PBO’s), in this instance Capital City, from the benefits of s 8(2)(h) read with

s 8(1) of the Rates Act, diminishes the progressive realisation of the s 26 of the Constitution right to housing.

Why was the high court asked to do this?

[48] Under s 19.3 of the Msunduzi Rates Policy (the Rates Policy), a procedure exists for ratepayers to apply to the Municipality’s chief financial officer to have properties determined as public benefit organisation properties (PBO’s). On 30 July 2019, Capital City brought such applications in respect of each of its three properties.

[49] The applications were refused by the Municipality on 29 August 2019. The reason advanced by the Municipality was that the term ‘public benefit organisation property’ in s 1.32 of the Rates Policy excludes property used for social housing, more particularly for activities listed in item 3 of schedule 9 of the Income Tax Act 58 of 1962 (ITA) ‘where rates, reductions and exemptions have already been considered under impermissible rates’.

What was the consequence of this exclusion?

[50] Capital City is a duly accredited social housing institution that has acquired and developed three properties within the Msunduzi municipal district which are owned and managed by Capital City for the purposes of providing “social housing” as defined in the Social Housing Act, 16 of 2008. These properties are:

- (a) Acacia Park at Oribi Road which consists of 311 residential units;
- (b) Aloe Ridge at White Road which consists of 952 residential units; and
- (c) Signal Hill at Nienaber Road, which consists of 393 residential units.

In total there are 1656 residential units.

[51] Capital City’s properties are residential properties. The Municipality’s position is that in terms of s 17.1.5 of its Rates Policy (and s 17(1)(h) of the Rates

Act), it is not permitted to charge rates on the first R15,000 of the market value of such residential properties. Consequently, in terms of the Rates Policy, a social housing institution such as Capital City cannot receive any rates relief beyond the fact that, like an ordinary owner of residential property, Capital City is not charged rates on the first R15,000 of the market value of each of its three properties. This would translate to R45,000, as the R15,000 threshold is only applied against the value of a cadastral unit and Capital City has three such properties. It is not applied against the value of each residential unit.

[52] Capital City argues that the benefit derived from s 17.1.5 of the Rates Policy read with s 17(1)(h) of the Rates Act is, in practical effect, worthless to a social housing institution such as Capital City. It contends that if it were treated as a public benefit organisation property it would receive a 75% rebate on the value of each of its three properties. The value of such rebates would then be quantified as follows: (a) The municipal value of the Oribi Road property is assessed at R66.6 million. 75% of this value is R49.95 million; (b) the municipal value of the Aloe Ridge property is assessed at R178.5 million. 75% of this value is R133.875 million; (c) the municipal value of the Nienaber Road property is assessed at R92.8 million. 75% of this value is R69.6 million.²⁴ In total it would thus be entitled to a rebate of R250.425 million. The Minister contends that the total rebate, correctly calculated, would be R1 081 280, in total, for the three properties. This dispute is not relevant to the issues which fall for determination in this case. Whether it is R250.425 million or R1 081 280, it is considerably more than R45 000.

²⁴ The Minister contends that it is incorrect to say that a 75% rebate applies to the ratable value of the properties that are categorised as PBO properties. She contends that the applicable rebate is that which requires that PBO properties be rated at up to 25% of the residential rate. This, she argues, in terms of regulations on the ratios between residential and non-residential categories of properties. Therefore, she contends, the cent in the rand rate for PBO properties is discounted by 75%. This she argues translates into, for the Oribi Road property, R213,120; the Aloe Ridge property, R571,200 and the Nienaber Road R296,960. There is a dispute of fact about the extent of the benefit the PBO or Capital City would be entitled to.

What did the high court do?

[53] The high court found that Capital City had:

‘... made a case for a clear, distinct, category of rateable property. That such category exists within the municipality area. The municipality has not determined the existence of the said category and has failed to provide for it in its Rates Policy. Instead, the municipality forces the applicants’ rateable property to a category it does not belong resulting in over burdensome rates levied on the applicants, which is irrational and unlawful’.

[54] The high court then ordered the Municipality to:

‘... determine in terms of s 8(3) of the Local Government Municipal Property Rates Act no. 6 of 2004 that the following properties owned by [Capital City] are an additional category of rateable property of “social housing properties”’.

Why is this order incompetent?

[55] Section 8(3) of the Rates Act provides:

‘In addition to the categories of rateable property determined in terms of subsection (2), a municipality may determine additional categories of rateable property, including vacant land: *Provided that, with the exception of vacant land, the determination of such property categories does not circumvent the categories of rateable property that must be determined in terms of subsection (2).*’ (Emphasis added.)

[56] Section 8(2)(h) of the Rates Act provides:

‘A municipality must determine the following categories of rateable property in terms of subsection (1): Provided such property category exists within the municipal jurisdiction:

....

(h) properties owned by public benefit organisations and *used for specified public benefit activities*;

....’

[57] ‘Specified public benefit activity’ in s 1 of the Rates Act is defined as: ‘an activity listed in item 1 (welfare and humanitarian), item 2 (healthcare) and item

4 (education and development) of Part 1 of the Ninth Schedule to the Income Tax Act’.

[58] The PBOs applicable to Capital City are thus expressly excluded and it would appear (the term ‘appear’ is used advisedly) that s 8(3) of the Rates Act cannot be used to circumvent s 8(2) of the Rates Act, as the high court effectively did, without first declaring s 8(2)(h) of the Rates Act unconstitutional. Such a declaration would have triggered the court’s powers in terms of s 172(1)(b) of the Constitution. The high court expressly refrained from doing this by finding that ‘the relief sought by [Capital City] in the notice of motion is not granted...’.

[59] Our courts have repeatedly stated that it is for the parties to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues.²⁵ In *Fischer and Another v Ramahlele and Others (Fischer)*,²⁶ this Court, per Theron JA and Wallis JA, held as follows:

‘Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for “[i]t is impermissible for a party to rely on a constitutional complaint that was not pleaded”. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

²⁵ *Fischer and Another v Ramahlele and Others* 2014 (4) SA 614 (SCA); [2014] ZASCA 88 (*Fischer*) paras 13 and 14, *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); [2014] ZACC 23; (2014 (10) BCLR 1195 para 210; *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC); [2016] ZACC 6; 2016 (7) BCLR 839 (CC) paras 27 and 28; *Four Wheel Drive Accessory Distributors CC v Rattan NO* [2018] ZASCA 124; 2019 (3) SA 451 (SCA) para 22; *DB v CB* 2024 (5) SA 335 (CC); [2024] ZACC 9; 2024 (8) BCLR 1080 para 44; *Botha v Smuts and Another* 2025 (1) SA 581 (CC); [2024] ZACC 22; 2024 (12) BCLR 1477 para 56.

²⁶ *Ibid Fischer*.

It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.’²⁷ (Emphasis added.)

[60] The high court did exactly what this Court cautioned against when it pronounced:

‘It seems [Capital City], inexplicably in my view, did not consider a relief that the [Municipality] in terms of section 8 of the Rates Act adds in terms of section 8(3) an additional categorisation of social housing property.’

Perhaps Capital City thought, as do we,²⁸ that such relief contradicts the provisions of s 8(2)(h) of the Rates Act and is thus legally incompetent. Whatever their reasons for not having explored that route, it was not for the high court ‘to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it’.

[61] The powers that the high court appropriated to itself when it pronounced that it was ‘not confined to granting the relief as prayed for in the notice of motion’, is not supported by the quoted authority. Had the high court however declared s 1 of the Rates Act and s 1.32 of the Rates Policy unconstitutional for

²⁷ Ibid *Fischer* paras 13 and 14.

²⁸ This is our *prima facie* view but no legal argument was presented on this feature of the case. Because we will remit, should we command the majority, this aspect can be revisited by the high court.

excluding social housing PBO's, the provisions of s 172(1)(b) of the Constitution would have been triggered and the court's wide remedial powers would have kicked in. 'A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct', as held by the Constitutional Court in *Head of Department, Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*.²⁹ but then the relief should be compatible with existing legislation. The relief granted by the high court, on the face of it, conflicts with the provisions of s 8(2)(h) of the Rates Act.

[62] The first judgment argues, that Capital City was obliged to challenge 'the Housing Act, the Social Housing Act, or SPLUMA' as failing to give adequate effect to s 26 of the Constitution. It says Capital City is invoking s 26 of the Constitution directly and this is impermissible as it transgresses the principle of subsidiarity.

[63] In our view, this is an incorrect summary of the case: Capital City argues that the exclusion of the PBO's from the benefits of s 8(2)(h) read with s 8(1) of the Rates Act, diminishes the progressive realisation of the s 26 right to housing. The high court found that Capital City had standing for such a challenge but then did not deal with the case presented. The first judgment also accepts that Capital City has standing but says it should be aimed at other Acts. We disagree. It is the Rates Act and the Rates Policy which are correctly under attack and upon which Capital City based its challenge.

What is this Court to do?

[64] The Court could decide the constitutional challenge as a court of first instance or it could remit the matter.

²⁹ *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another* 2010 (2) SA 415 (CC); [2009] ZACC 32; 2010 (3) BCLR 177 para 97.

[65] This cross-road does not present a novel issue. This Court, other Appellate Courts and the Constitutional Court have often encountered it. In *Theron and Others NNO v Loubser NO (Theron)*,³⁰ the lower court had decided one issue but had declined to consider the other issues in the matter. Even though this Court set aside the decision on the one issue, it had reservations about sitting as a court of first instance and as a court of appeal in respect of those undecided issues. Considering all the relevant factors, and what had been held by this Court in, amongst other cases, *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*,³¹ it decided to remit the matter to the lower court to determine those outstanding issues.

[66] The approach in *Theron* has been referred to with approval in the Constitutional Court. In *Premier, Gauteng and Others v Democratic Alliance and Others*,³² having referred to, amongst others, this Court's decision on the issue in *Theron*, the following was stated in a minority, dissenting judgment, which concisely summarises the position:

‘As a rule, our courts have declined to decide on appeal issues not determined by the court of first instance. Ordinarily, this Court does not adjudicate matters as a court of first and last instance. The underlying principle being that the losing party would be deprived of its constitutional right to appeal even where an appeal would have been allowed. In *M&G Media*, the High Court had invoked incorrect legislation in deciding the issues raised by the parties. On appeal, this Court identified the correct provision but declined deciding the matter: The Court reasoned:

³⁰ *Theron and Another NNO v Loubser NO and Others* 2014 (3) SA 323 (SCA); *In re Theron N.O. v Loubser* [2013] ZASCA 195; [2014] 1 All SA 460 (SCA); 2014 (3) SA 323 (SCA) (*Theron*) para 21.

³¹ *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Red Head Boer Goat (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk*; *Sleutelfontein (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk* 1994 (3) SA 407 (A) at 415B-416A.

³² *Premier, Gauteng and Others v Democratic Alliance and Others* 2022 (1) SA 16 (CC); *All Tswana Councillors who are members of the Economic Freedom Fighters and Another v Democratic Alliance and Others*; *African National Congress v Democratic Alliance and Others* [2021] ZACC 34;; 2021 (12) BCLR 1406 (CC) para 217.

“I have concluded that the High Court should have invoked the provisions of section 80. However, the merits of the exemptions claimed, as well as the legality of the refusal to disclose the report, still need to be decided. These must now be decided in the light of the contents of the report sought ... All these matters require further consideration and further issues may arise in the course of the hearing that may require further attention. These issues must be considered by the High Court in the first instance.

M&G has argued that remittal will necessarily entail wasted costs “when the matter will in all likelihood end up before this Court for final determination again...”

In all the circumstances, the just and equitable order to make is to remit the matter to the High Court to enable it to examine the report pursuant to the provision of s 80 and thereafter to decide the merits of the exemptions claimed...” (Citations omitted).

[67] Generally, the following factors, which are not a closed list, are taken into account in determining whether a remittal to the high court is the best course to adopt:³³ (a) whether the interests of justice and convenience will be best served by the appellate court itself determining the outstanding issues and finalising the matter; (b) whether the issues were fully canvassed in the high court (ie in the pleadings or affidavits) and in the appellate court in argument; (c) whether a party or potential interested party is likely to suffer prejudice if the matter is not remitted; and (d) whether the parties before the appellate court requested it to finalise the matter.

[68] In what follows, we discuss the considerations which, in our view, militate against deciding the constitutional challenge as a court of first instance. In our view, the first judgment incorrectly summarises this second judgment’s reasons for remittal. The reasons are set out in what follows.

³³ See, *inter alia*, *Theron*; *Neethling v Du Preez and Others*; *Neethling v Weekly Mail and Others* 1995 (1) SA 292 (A) [1994] ZASCA 133; [1995] 1 ALL SA 441; at 297-302; *Stokwe v Member of the Executive Council, Department of Education, Eastern Cape & Others* (2019) 40 ILJ 773 (CC); [2019] ZACC 3; 2019 (4) BCLR 506 (CC) para 87.

[69] The first judgment, in paragraph 25, argues that the contention, that the absence of rate relief at the municipal level renders the overall statutory scheme constitutionally inadequate, has no evidential foundation. This statement places insufficient weight on a host of factors. We would argue that the evidential weight is significant. It includes (a) that Capital City is in business rescue; (b) that Capital City provides subsidised housing for lower income salary earners – too poor to qualify for mortgaged loans from the commercial institutions but not poor enough to receive housing from state sponsored housing programs (RDP housing); (c) that Capital City is the only social housing institution in Pietermaritzburg and the only one which owns properties within the Msunduzi municipal district; (d) that Capital City contends that rates relief is essential for the sustainability of its business and its ability to provide access to social housing. It says that it is mainly through such government-sponsored relief that social housing institutions are able to provide residential accommodation at sub-economic cost and thereby to provide access to housing to persons who would otherwise be deprived of such constitutional right; (e) that if Capital City has to charge rentals equal to those charged by commercial landlords, the objective to provide access to housing at sub-economic cost is defeated. Capital City has, in the last four years, increased rentals at a rate of 8% per annum. It says it is generally accepted in the social housing industry that, to provide effective access to housing, annual escalations should not exceed 6%; (f) that the rebate to which Capital City is entitled currently is, in practical effect, worthless. The R45 000 contended for by the Municipality stands in stark contrast to the amounts Capital City contends for, ie approximately R250 million.

[70] The Minister argued that Capital City ought to have submitted a request in terms of s 16(3)(a)³⁴ of the Rates Act. Neither the high court nor the first judgment

³⁴ Section 16(3)(a) of the Rates Act provides:

‘Any sector of the economy, after consulting the relevant municipality or municipalities and organised local government, may, through its organised structures, request the Minister to evaluate evidence to the effect that a

engages with the counter argument raised by Capital City in respect of the alleged s 16(3)(a) of the Rates Act failure. Capital City argues that it does not have standing to make such a request to the national minister as it is only a ‘sector of the economy’ which may do so and it has no authority or right to represent any such sector nor to make a request on behalf of such a sector. Capital City argues that this remedy is not available to it and any argument based on this is misconceived. This argument impacts on ripeness and this Court would benefit from the reasoning of the high court on this aspect.

[71] Capital City argued that the high court, in granting the relief it did, effectively declared the relevant provisions unconstitutional. That may be so. However, such a result must be expressly stated. Furthermore, the declaration of invalidity in respect of the definition of ‘specified public benefit activity’ contained in s 1 of the Rates Act would have no force unless confirmed by the Constitutional Court.³⁵ The high court should then also have applied itself expressly to the interim situation and might have granted an interdict as contemplated in s 172(2)(b) of the Constitution.

[72] The first judgment has not dealt with the Municipality’s insistence that Capital City has the option to sectionalise its properties. Capital City attached pro-forma conveyancer accounts showing that the costs of such a conversion would be in excess of R1 million. Crucially though, it argues that such a conversion would not advance the interests of social housing, nor would it increase access to housing. It argues that the contrary is true, as the intended beneficiaries of social housing, and indeed of s 26 of the Constitution, cannot afford to purchase sectional titles units. It argues that it is likely that the residential

rate on any specific category of properties, or a rate on any specific category of properties above a specific amount in the Rand, is materially and unreasonably prejudicing any of the matters listed in subsection (1).’

³⁵ Section 172(2) of the Constitution.

units would be lost to social housing if ownership were sectionalised and not retained by a social housing institution such as Capital City.

[73] Capital City argued that this argument exposes the ‘irrationality and arbitrariness’ of the impugned provisions of the Rates Policy. The first judgment does not engage with this compelling argument that insistence on sectionalising the properties, undermines the proposition that the relief sought will substantially affect the Municipality’s rates collection. If the properties are sectionalised, the Municipality won’t receive the rates they currently do.

[74] What was not explored or considered by the high court is whether the Municipality complied with its obligations to progressively realise the right to access social housing of the only kind available in Pietermaritzburg, whether these properties are near or within the inner city and to what extent excluding Capital City from rebates, undermines its obligations to address spatial injustice.

[75] The measures aimed at realising the s 26(2) of the Constitution right must be reasonable³⁶. That is the enquiry that the high court failed to tackle head on. It has a business rescue practitioner before it who could provide reports informing the relevant considerations. The high court ought to have considered the entire scope of the s 26(2) of the Constitution right which includes the principle of non-retrogression. The application of this principle might well entail an obligation on the State to ensure that this social housing PBO, Capital City, is not liquidated so that these housing units are not lost to the Pietermaritzburg community.

[76] It is to be emphasised that there are only 102 registered social housing institutions within South Africa. The State has already invested significantly in establishing the only such PBO in Pietermaritzburg. Without being prescriptive,

³⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) paras 41-44.

the high court might well benefit significantly from the assistance of an *amicus curiae* (friend of the court) such as Socio-Economic Rights Institute of South-Africa (SERI) to decide whether the conduct of the Municipality is reasonable having regard to, amongst other considerations, historical context and the location significance of the three properties. If this social housing PBO, the only one in Pietermaritzburg, is liquidated and the properties are sold to pay its creditors, what will this do to the opportunities for people of this economic level to access Pietermaritzburg's economic opportunities, healthcare, education and political life? What would this do to the residents, dare we say families, occupying the 1656 residential units?

[77] The spatial justice theory was introduced into s 26 jurisprudence by *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*³⁷ and *Charnelle Commando and Others v City of Cape Town and Another*.³⁸ In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*,³⁹ the Court acknowledged that the location of a building is crucial to occupiers' income and that transportation costs would be prohibitive if such occupiers were to live elsewhere. None of these factors have been considered by the high court or the first judgment. In our view, these are weighty issues which are best dealt with, with caution and after full ventilation.

[78] The first judgment in paragraph 34 argues that this judgment's reliance on 'spatial justice' and 'non-retrogression':

'... while drawing on important strands of jurisprudence, does not support remittal. Those concepts have, to date, been deployed in the context of evictions and the relocation of vulnerable communities.....They were not pleaded in support of any such duty in the high

³⁷ *Thubakgale v Ekurhuleni Metropolitan Municipality* JDR 3200 (CC); [2021] ZACC 45; 2022 (8) BCLR 985 (CC) para 105.

³⁸ *Charnelle Commando and Others v City of Cape Town and Another* 2025 (3) SA 1 (CC); [2024] ZACC 27; 2025 (3) BCLR 243 (CC).

³⁹ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); [2011] ZACC 33; 2012 (2) BCLR 150 (CC).

court. To remit on the basis that they should now be canvassed would be to ask the high court to entertain a case different from one Capital City has chosen to bring – a course of conduct *Fischer* precludes.’

In our view, the first judgment conflates two distinct enquiries. The first is to identify the issues placed before the high court by the parties. In this instance it was a constitutional challenge not dealt with head on by the high court. In this regard, the high court’s approach fell short of *Fischer*. The second enquiry is how the actual constitutional challenge must be approached. We argue that in considering the constitutional challenge the entire scope of the s 26(2) of the Constitution right should be considered. It is the content of the s 26(2) of the Constitution right with all its facets, which is to be applied to the facts of this case. Such an approach is obligatory and has very little to do with the principles distilled in *Fischer*. In sum: the case that the high court was requested to consider was whether the exclusion of Capital City from the benefits of s 8(2)(h) read with s 8(1) of the Rates Act, diminishes the progressive realisation of the s 26 of the Constitution right to housing. ‘Spatial justice’ and ‘non-retrogression’ are part of the factors and principles which ought to have been considered but were not. To remit and to require a consideration of these factors and principles is certainly not to ask the high court to entertain a case different from the one Capital City chose to bring. What it requires the high court to do is to test Capital City’s exclusion from the benefits of s 8(2)(h) read with s 8(1) of the Rates Act against the full content of the s 26 of the Constitution right which includes an obligation to address spatial injustice and to apply the principle of non-retrogression. Put differently, by relying on s 26 of the Constitution, these concepts are invoked by operation of the meaning to be ascribed to s 26 of the Constitution. If anything, the argument in the first judgment supports a remittal as it would afford both Capital City and the Municipality the opportunity to be heard on the full meaning of s 26 of the Constitution and its application to the facts of this case.

[79] If we had commanded the majority, we would have granted the following order:

1. The late delivery of the notice of appeal is condoned and the appellant is to bear the costs of the condonation application;
2. The appeal and the cross-appeal succeed partially;
3. The order of the high court is set aside in its entirety;
4. The matter is remitted to the high court for it to decide the constitutional challenge of the first respondent (Capital City) and for all necessary parties to be joined to the proceedings;
5. The costs of the appeal and the cross-appeal shall include the costs of two counsel where so employed and are to be costs in the cause of the remitted high court proceedings.

P COPPIN
JUDGE OF APPEAL

I OPPERMAN
ACTING JUDGE OF APPEAL

Appearances

For the appellant: A Potgieter SC and T Palmer
Instructed by: Matthew Francis Inc, Pietermaritzburg
Hendre Conradie Inc, Bloemfontein

For the 1st & 2nd respondents: A J Rall SC and D P Crampton
Instructed by: Hay & Scott Attorneys, Pietermaritzburg
Phatshoane Henney Attorneys, Bloemfontein.