THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 158/2015

In the matter between:

CITY OF CAPE TOWN	**APPELLANT**
and	
KHAYA PROJECTS (PTY) LTD	**FIRST RESPONDENT**
PEER AFRICA (PTY) LTD	**SECOND RESPONDENT**
THE MINISTER FOR HUMAN SETTLEMENTS, WESTERN CAPE	**THIRD RESPONDENT**
JONATHAN MITCHELL	**FOURTH RESPONDENT**
WITSAND "IEEECO" HOUSING BENEFICIARY SUPPORT ORGANISATION	**FIFTH RESPONDENT**
WITSAND PHASE ONE COMMITTEE	**SIXTH RESPONDENT**

Neutral Citation: *City of Cape Town v Khaya (Pty) Ltd* (158/15) [2016] ZASCA 107 (26 July 2016)

Coram: Maya DP, Majiedt, Seriti, Willis JJA and Victor AJA

Heard: 10 May 2016

Delivered: 26 July 2016

Summary: Constitution - right to adequate housing – private construction company not an organ of state and incurs no constitutional obligations independent of any statutory or contractual obligations when it contracts to build low cost housing funded by the State - houses allegedly defectively built – arbitration pending between developer and construction company – City of Cape Town not a party to the arbitration and has no locus standi to have the arbitration declared lapsed – principle of subsidiarity applies where parties seek to enforce socio economic rights – should first rely on existing statutes or challenge those instruments as unreasonable.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mantame J sitting as court of first instance), reported *sub nom City of Cape Town v Khaya (Pty) Ltd & others* 2015 (1) SA 421 (WCC):

1 Save as set out below, the appeal is dismissed with costs, including the costs of two counsel.

2 The order of the court a quo that the appellant is to pay the costs of the amicus curiae is set aside.

JUDGMENT

Victor AJA (Maya DP, Majiedt, Seriti, Willis JJA concurring)

[1] Witsand is a triangular piece of land situated in Atlantis, north of Cape Town, and is strategically placed in relation to road networks and places of employment. Witsand was previously an informal settlement. In consultation with the Witsand community, the appellant, the City of Cape Town (the City) developed Witsand into a formal township for residents in the lower income group. It was intended to be an integral part of the Atlantis urban complex. The City also hoped for the housing development to be a show case model demonstrating the use of energy and environmentally cost effective methods. The building project was also intended to allow for job creation and transfer of technical skills to the people of the area.

[2] The second respondent, Peer Africa (Pty) Ltd (Peer Africa), was appointed by the City as a developer to oversee the building project at Witsand. The first

respondent, Khaya (Pty) Ltd (Khaya), was contracted by Peer Africa to build the houses in Witsand.

[3] The essence of the City's case is that whilst it bears a positive constitutional obligation as an organ of state to provide adequate housing, because of the widespread problem of contractors building defective low cost housing, an order from a court will provide clarity to housing developers that when building for the State, they are also bound by constitutional obligations. The City wants all construction companies to incur a constitutional obligation not to build defective houses. On that basis it sought a declarator in the Western Cape Division of the High Court (Cape Town) that Khaya failed to comply with its constitutional obligation to construct adequate housing in terms of section 26 of the Constitution, alternatively, a declarator that Khaya, in concluding the contract to provide and construct housing as part of the Witsand Project, undertook constitutional obligations as set out in s 26(1) of the Constitution. The South African Federation of Civil Engineering Contractors was admitted as an amicus curiae to the proceedings. The court a quo dismissed the application with costs but granted leave to appeal to this court.

[4] The City developed its argument in respect of the constitutional relief by asking three questions: a) whether Khaya bears constitutional obligations with regard to the Witsand development, b) if so, what is the content of those obligations and c) did Khaya breach those obligations. This appeal further raised three procedural issues relating to: (a) the practical effect of the order sought; b) the City's standing to have an arbitration award declared lapsed; and (c) the costs of the amicus in the court a quo.

The practical effect of the order sought

[5] This court raised the issue whether the appeal would have any practical effect and, if not, whether, in terms of s 16(2) *(a)*(i) of the Superior Courts Act 10 of 2013, on that basis alone the appeal should be dismissed as the declarator on the constitutional issue would have no practical effect as the building work is complete

and the contractual claims for alleged defective workmanship have all prescribed. In response, the City relied on the principle that the Constitution significantly expands the standing of litigants and the remedial powers of courts in matters involving the Bill of Rights, and s 38 of the Constitution allows a court to grant 'appropriate relief, including a declaration of rights' when a constitutional right is infringed or threatened. In addition, the City relied on s 172(1) *(b)* of the Constitution which provides that when deciding a constitutional matter a court may make an order which is just and equitable. Such an order will cure the malaise of defective building practices in low socio-economic housing projects, so it was argued.

[6] The City placed reliance on *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* [2004] ZACC 20; 2005 (2) SA 359 (CC) (paras 106-107) in which it was held:

'Unlike under s 172(1)*(a)* [of the Constitution], the courts are not obliged to grant a declaration of rights but may do so where they consider it to constitute appropriate relief . . . though of course the constitutional setting may at times require consideration of different or additional matters.'

'It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own.'

[7] The City argued that the issue is important since the building of defective lower income housing was a general problem in South Africa and that the constitutionality of Khaya's actions remains a live and ongoing dispute between the parties. Further, Khaya instituted arbitration proceedings against Peer Africa over the non-payment of money by Peer Africa which remain a live issue as the City also sought an order that it had lapsed, despite not being a party thereto.

[8] An additional factor affecting the determination of the s 16(2) *(a)*(i) issue was the submission by the amicus that a building contractor such as Khaya is not an organ of state and that no socio-economic constitutional duty is imposed on it. The amicus also asserted that in any event, there were sufficient statutes and building regulations in place to deal with any alleged defective building work. Both the amicus and Khaya contended that in the light of *Mazibuko & others v City of Johannesburg & others* [2009] ZACC 28, 2010 (4) SA 1 (CC), the City first had to exhaust its contractual and statutory rights and remedies. The amicus also asserted that where a tender does not expressly include a constitutional obligation it would have an unfair effect to impose one after the event. Both Khaya and the amicus argued that it is the State's duty to provide housing and this particular constitutional duty cannot be outsourced. In addition, a contracting party might have tendered for a different amount had it known the contract attracted a constitutional obligation.

[9] There is merit in these submissions. The importance and novelty of the issues raised regarding the effect of legal and constitutional obligations of private parties contracting to take on construction work within the context of a State project to realise socio economic rights, as in this case, justified that the matter to be dealt with in the interests of justice and not dismissed on the practical effect issue.

Contractual Background

[10] On 3 December 2001 the City concluded a development agreement with Peer Africa (the development agreement), for the management of the erection of housing units at Witsand. The purpose of this agreement was clearly that Peer Africa would bear the sole risk and responsibility for the project as the development agreement specifically provided:

'the Municipality [ie the City] does not accept any responsibility for the execution of the project or for the rectification of defects which come to light as a result of the inspection or for any other reason.'

[11] Peer Africa undertook to make sure that the buildings would comply with all legal requirements and regulations. This involved, inter alia, ensuring compliance with the government's national housing code and requirements of the Western Cape Provincial Housing Development Board and the City.

[12] Khaya commenced the building work and Peer Africa supervised the work and issued payment certificates. The relevant amounts were duly paid by the City to Peer Africa, who in turn paid Khaya. Peer Africa eventually issued the final completion certificates signifying acceptance of the houses. Very shortly after the first house was handed over, however, severe defects are alleged to have become apparent and one of the houses apparently collapsed completely. Khaya disputed this allegation and submits that it was a wall that collapsed and this was caused by the home owner not following instructions about protecting the foundation from erosion. The City alleges that the roofs were defectively installed. In the founding affidavit the deponent relies upon the report of Mr Swart, Khaya's structural engineer for its assertion that the roofs were defective. The City fails to quote Mr Swart's factual finding in full. Mr Swart while conceding some shoddy workmanship states that there is nothing wrong with the structural integrity of the steel roof design. He stated: 'there is nothing wrong with the structural integrity of the steel roof designs. . . . some shoddy workmanship spoiled the finished product but it can be corrected with a bit of effort.'

[13] Khaya contended that the City only dealt with a selected few units and all of them are not defective. The City claimed that several fires broke out as a result of compromised fire safety precautions and poor workmanship. Khaya disputed this. According to it, there was one fire resulting from a family's negligence and only smoke got into the adjoining unit. Khaya alleged an untoward relationship between the City and Peer Africa. Khaya referred to the fact that the City gave permission to Peer Africa to use the R1 Million it had paid for Khaya's claim and to use the money for its own purpose. On 30 April 2009, Khaya instituted arbitration proceedings for an

amount of R1 069 535, 67 in respect of outstanding amounts due by Peer Africa. By 19 June 2009, after an inspection in loco at Witsand, the arbitration had not progressed any further. The City undertook that in the event that Peer Africa is ordered by the arbitrator to pay the R1million it would pay on behalf of Peer Africa.

[14] The Khaya/Peer Africa contract, in clause 17.5 read with clause 1.5.2 and 1.5.4, provided that the latent defects liability period would expire within three months of the signing of the final completion certificate or in accordance with the Cape Town and Provincial norms and standards. The final completion certificate was signed on 28 February 2010 and the last owner's occupation certificate was signed on 2 November 2007. In the result any claim arising from the building contract would have prescribed.

[15] Peer Africa defended the claim by Khaya in the arbitration and instituted a counter claim of R400 000 which it later withdrew. The City alleged that remediation would cost close to R17 million. Khaya asserted that an important reason for the delay in the arbitration was attributable to the City refusing to produce critically important documentation for the arbitration that confirmed that the work executed by Khaya was correctly done. These arbitration proceedings have not been completed. The fourth respondent, Mr J Mitchell, the arbitrator, confirmed that the arbitration remains incomplete, despite running for some five years. As stated, the counterclaim by Peer Africa for poor workmanship against Khaya was withdrawn and any contractual claim which the City against Peer Africa or the latter against Khaya had prescribed a long time ago. The City made no attempt to sue Peer Africa for its failure to oversee the project in accordance with the agreement.

[16] The preamble to the contract between the City and Peer Africa acknowledged that it would complete planning and infrastructure development works including the service of erven in the township of Witsand. Peer Africa undertook to make sure that the buildings would comply with all legal requirements and regulations. There was no contractual nexus between the City and Khaya. There was also no reference at all to

any constitutional obligation on the part of Khaya when it concluded the agreement with Peer Africa. In the preamble in the agreement between Peer Africa and Khaya, there is reference to the fact that it is a community housing project, but other than that there is no reference to Khaya taking on any constitutional obligations at all. The City contended that notwithstanding the absence of such clauses in the agreement, Khaya nonetheless undertook a constitutional obligation in regard to the Witsand development and that it breached those obligations.

The Constitutional relief

[17] The amicus and Khaya raised the argument of constitutional subsidiarity. This question relates to whether the City should not have first exhausted the available and relevant contractual, statutory and regulatory provisions before seeking constitutional relief to deal with the alleged defective buildings. The City attempted to counter the subsidiarity argument by asserting that when private parties contract to build houses as part of a government project, certain constitutional obligations arise in addition to whatever obligations they contracted for apart from any obligations imposed by statutory or industry regulations.

[18] The subsidiarity argument rests on the dictum in *Mazibuko* at para 72 referred to above in which the residents of one of the poorer areas of Johannesburg and challenged the constitutionality of the City of Johannesburg's decision to supply six kilolitres of free water per month to every account-holder in the city on the ground that the policy was in conflict with s 27(1)(b) of the Constitution, which provides that everyone has the right to access to sufficient water. The Constitutional Court held that parties in seeking to enforce socio economic rights against the government should first rely on existing statutes or challenge those instruments as unreasonable. The appeal was dismissed on that basis.

[19] The City submitted that the subsidiarity argument is only aimed at the *content* of the constitutional obligation and not its *existence*. As stated above, the City does not seek an order declaring and specifying the content of the constitutional obligation. Nor does it require the remediation of the defects. It simply seeks a

declarator that Khaya does hold constitutional obligations. In this regard, the City seeks to distinguish the relief sought from that in *Mazibuko*, because the declarator sought does not require compliance with non-constitutional remedies that give effect to constitutional rights, or that the defects must be repaired. As indicated, in *Mazibuko* the Constitutional Court held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution. There are a number of statutes and regulations that regulate proper building practices.[1] A closer look at the available remedies the City seeks to avoid using, suggests that it seeks to by-pass the statutory and contractual process. In other words, the City has failed to act against Khaya and has not requested it to enforce the contractual provisions of the Khaya/Peer Africa agreement in respect of the building defects. It wants to hold Khaya accountable on a constitutional basis. This it cannot do in the light of the settled law. The subsidiarity argument raised by Khaya and the amicus must succeed.

The application of the socio-economic right of access to housing to a private construction company

[20] A second constitutional issue raised was the application of the Bill of Rights to private relationships. Section 8(1) provides for direct constitutional scrutiny in the area of common law private relationships such as between Khaya and Peer Africa. Section 8(2) provides that:

'A provision in the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right'. As explained by Woolman,[2] s 8(2) eliminates any doubt (i) about the application of the substantive provisions of the Bill of Rights to disputes between private parties, in general; and (ii) about the ability to use the Bill of Rights to develop new rules of law and new remedies that will give adequate effect to the specific provisions of the Bill of Rights, in particular. The City seeks to parachute s 8 rights into a building contract between non state parties and thereby develop new rules of law and remedies to overcome what they perceive

[1] For example, the National Building Regulations and Building Standards Act 103 of 1977. See also the JBCC and Fidic standard form building contracts.

[2] See Stuart Woolman's chapter on 'Application' in Stuart Woolman and Michael Bishop (Eds) *Constitutional Law of South Africa* 2 ed (Revision Service 6, 2014) at 73.

to be a problem with the delivery of poor quality houses built by private contractors with state funds. Section 8(3) of the Constitution provides:

'When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court —

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that *legislation does not give effect to that right*; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).' (own emphasis)

As I have said, there are a number of building laws and regulations and standard building industry contracts that generally ensure the enforcement of good building standards. It follows therefore that s 8 (3) (a) needs only to be applied to the extent that legislation does not give effect to that right.

[21] In juxtaposing s 26 rights and the application of s 8(2) the City contends that in this context of socio economic obligations a private party attracts constitutional obligations. The City submitted in its heads of argument that it was not obliged to restrict itself to the vertical rights between it and Peer Africa, and it could proceed on the basis of a horizontal application of socio-economic rights. As the argument developed, counsel for the City submitted that Khaya, for the purpose of the building low cost housing funded by the state, became an organ of state. However, this reveals a degree of conceptual misunderstanding. If Khaya was an organ of state, s 8(2) of the Constitution would not be applicable, and the Bill of Rights would not apply horizontally to it. Instead, the applicable section would be s 8(1), which deals with vertical application, and provides that the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

[22] The City's argument rested on Khaya being an organ of state. A closer look at the proposition that Khaya could become an organ of state is therefore necessary. An organ of State as defined in s 239 of the Constitution includes 'any other functionary or institution exercising a power or performing a function in terms of the Constitution or exercising a public power or performing a public function in terms of any legislation. The Constitution provides expressly that those institutions and individuals who exercise 'public power' or engage in a 'public function' in terms of

some underlying legislation or constitutional provision can be characterized as organs of state even if these institutions and individuals need not be an 'intrinsic part' of what we have commonly or historically considered to be the 'government'.[3] To qualify as an organ of state the entity need not be subject to the effective control of elected legislative or executive bodies.

[23] In this regard, the City argued that a private company in the position of Khaya is an institution engaging in a public function by building State funded housing. Reliance was placed on *Allpay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* [2014] ZACC 12; 2014 (4) SA 179 (CC) *(Allpay2).* There, the award of the tender by the South African Social Security Agency (SASSA) to Cash Paymaster Services (Pty) Ltd (Cash Paymaster) for the administration and payment of social grants to beneficiaries on its behalf throughout the country was declared constitutionally invalid. In paras 54 and 55 Froneman J held as follows:

'54. SASSA must administer social assistance in terms of the Assistance Act. It is legislation that seeks to give effect to the right of access to social security in terms of ss 27(1)*(c)* and 27(2) of the Constitution. SASSA may enter into an agreement with any person 'to ensure effective payments to beneficiaries' in terms of s 4(2) *(a)* of the Agency Act. In terms of the agreement between SASSA and Cash Paymaster the latter administers the payment of social grants on SASSA's behalf. In doing so, Cash Paymaster exercises a public power and performs a public function in terms of the Agency Act, enacted to give effect to the right to social security.'

'55. But it does more than that. It plays a unique and central role as the gatekeeper of the right to social security and effectively controls beneficiaries' access to social assistance. For all practical purposes it is not only the face, but also the operational arm, of the "administration in the national . . . sphere of government", insofar as the payment of social grants is concerned.'

[24] Counsel on behalf of the City placed great reliance on the above dicta in *Allpay 2*, in particular the following phrase: '[f]or all practical purposes it is not only the face, but also the operational arm' of the government. He argued that Khaya was

[3] See Woolman 'Application in Woolman and Bishop (Eds) *Constitutional Law of South Africa (above)* at 105

the operational arm of the City in respect of the houses built in Witsand, and accordingly analogous to Cash Paymaster. But this is incorrect as the words 'operational arm' must be read in context. It seems to me that the import of the words 'operational arm' read in context meant that Cash Paymaster was the operational arm of *the entire* administration insofar as the payment of social grants was concerned. It was described as the 'gatekeeper' of the right to social security, which 'effectively controls' access to social assistance. It was, in other words, not the operational arm in relation to a single aspect or minor portion of the duties of a government department, but the entire operation for the country. Khaya cannot be described as the operational arm of the City for the entire administration of housing projects or indeed for the entire nation as was the case with Cash Paymaster.

[25] Even assuming in favour of the City that an entity can be described as the 'operational arm' of a municipality when it is only involved in a single project among many (which, it seems to me, is not what was contemplated in the dictum quoted above and would be an extension of *Allpay 2*), then on these facts the only entity that could ever be described in this manner would be Peer Africa and not Khaya.

[26] In *Allpay 2*, SASSA was obligated to provide social assistance in terms of s 27 of the Constitution. It could enter into agreements 'to ensure effective payments to beneficiaries'. These agreements were regulated by legislation, and in para 48 of the judgment the following was noted:

'The agreement must include provisions to ensure the effective and economical use of funds for payment to beneficiaries; the promotion and protection of the human dignity of beneficiaries; the protection of confidential information held by the agency; honest, impartial, fair and equitable service delivery; mechanisms to regulate community participation and consultation; and financial penalties for non-compliance.'

[27] Therefore, by entering into the contract with SASSA, Cash Paymaster was entering into a contract which was regulated by legislation, and in which it effectively agreed to assume responsibility for the delivery of social grants payable by SASSA

to beneficiaries. In other words, it agreed to ensure that SASSA's positive constitutional obligations in respect of the payment of social grants were fulfilled.

[28] Froneman J in *Allpay 2* stated (para 52):

'That SASSA is an organ of state is clear. But for the purposes of the impugned contract, so too is Cash Paymaster. In determining whether an entity is an organ of state, the presence or absence of governmental control over that entity is a factor, but in our constitutional era is not determinative. In Cash Paymaster's case the 'control test' is not helpful; although it may be independent from SASSA's control, the function that it performs — the countrywide administration of the payment of social grants — is fundamentally public in nature. Accordingly there is no basis for finding on the facts in this case that Khaya, a construction company which is neither controlled by the City nor performs a nationwide public function is an entity analogous to Cash Paymaster.

[29] In the present case, Khaya agreed with Peer Africa (and not the City of Cape Town) to construct houses. However, Khaya did not enter into any contract with the City, and it also did not undertake that the City's positive constitutional obligations would be effectively achieved in regard to the housing project. It merely agreed to build houses according to the specifications provided by Peer Africa. It was Peer Africa that the City contracted with to take responsibility for the housing project, and it was Peer Africa that was supposed to oversee the project. Khaya was simply a subcontractor hired by Peer Africa.

[30] A further issue argued by the City was that the contract between Khaya and Peer Africa does refer to the context of the housing project. In the preamble to the contract there is reference to the constitutional context of the housing project.[4]

[4] The preamble to the contract reads:

"Whereas the Blaauwberg Municipality/City of Cape Town is the project developer, has appointed PEER Africa and Associates as the Implementing Agent for the project PEER Africa (Pty) Ltd., *in conjunction with the community housing committee* shall be referred to as the Primary Support Organisation." (my emphasis)

"Whereas the *Witsand Community* in conjunction with the Blaauwberg Municipality/City of Cape Town has called for proposals via public tender from persons interested in constructing houses in the township and Khaya Projects (Pty) Ltd was successfully short listed."(my emphasis)

However, care must be taken to distinguish provisions in a contract imposing obligations and mere recitals which are not intended to create any obligations. The position is explained by Cameron JA in *Absa Bank Ltd v Swanepoel NO* 2004 (6) SA 178 (SCA) para 6 as follows:

'At its simplest, a contract is an enforceable promise to do or not do something. But when parties record an agreement in writing, they often add provisions that do not embody such promises. A contract may have a preamble. It may contain 'recordals' and 'recitals'. It may document prior events, or record the parties' future intentions. It may contain clarificatory or explanatory statements. The parties may place on record matters that bear on the interpretation of what they have undertaken. It is therefore wrong to approach a written contract as though every provision is intended to create contractual obligations.'

Whether a provision imposes contractual obligations and when it is merely a preamble or recital depends on a proper interpretation of the provision itself (Brand JA in *Consol Ltd t/a Consol Glass v Twee Jonge Gezellen (Pty) Ltd* 2005 (6) SA 1 (SCA) para 13).

[31] The question, then, is whether the provisions referred to by the City, read in context, created obligations or were merely intended to introduce the contract. Counsel for the City could only refer to provisions in the preamble. I think it is quite clear that these were not intended to create constitutional obligations. The scope of responsibility undertaken by Khaya was materially different to that undertaken by Cash Paymaster in *AllPay 2*.

[32] A further important contrasting feature is that the tender by SASSA also made clear that the tender was subject to the Constitution. The procurement contract was very clear in its terms that the contract had important constitutional consequences. The Court also emphasised the purpose of the tender. It was undisputed that SASSA was in terms of the applicable legislative framework responsible for the administration, management and payment of social grants in line with the Constitution.

[33] The City's conduct in this matter also requires analysis. In the light of its constitutional imperative it cannot remain supine during the course of the contract. It

cannot outsource all its obligations to Peer Africa. Of importance in this regard is the dictum at para 58 of *AllPay 2.*

'SASSA does not, by the conclusion of the contract, divest itself of its constitutional responsibility and public accountability for rendering the public services. It remains accountable to the people of South Africa for the performance of those functions by Cash Paymaster. In its own case, accountability is ensured by financial compliance with the Public Finance Management Act and general ministerial oversight.'

This principle was also dealt with in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council & another* [2006] ZACC 9; 2007 (1) SA 343 (CC) where Yacoob J, writing for the majority stated (para 40):

'Our Constitution ensures . . . that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.'

It follows therefore that the City itself should have played a far more active role during the project rather than import a constitutional obligation on Khaya to remedy the issues of prescription and its failure to call Peer Africa to book.

[34] The amicus argued that s 217 of the Constitution provides for procurement and if the declarator sought is granted then this would violate the right to freedom of trade and undermine the right to contract with the state in a transparent and fair manner. The amicus' concern in this regard was the far reaching impact such a declaratory order would have on the rights of building contractors if they were to take on constitutional obligations without having contracted or tendered for such obligation. Its concern was that the effect of the order would amount to re-ordering private relations beyond the contracts between the City, Peer Africa and Khaya. The further concern was that this should occur not only after the conclusion of a contract between the State and a service provider but also during or after the execution of the contract itself. In particular the construction industry should have an opportunity to address the imposition of a constitutional obligation before its members conclude building contracts. The City on the other hand argued that the defective work carried out by Khaya was contrary to the provisions of s 217 of the Constitution and therefore not to grant a constitutional declarator meant that defective workmanship was acceptable.

[35] The City's submission does not follow logically from an interpretation of s 217. In my view, it would be wrong to impose a constitutional obligation ex post facto the procurement event. This would be inconsistent with the principles of fairness and would not be equitable and transparent. In the light of this finding that there is no constitutional obligation on Khaya there cannot be a declaration as sought. The appeal on the constitutional issue must fail.

Has the arbitration lapsed?

[36] The City also seeks an order that the arbitration between Khaya and Peer Africa has lapsed in terms of s 23*(a)* of the Arbitration Act 42 of 1965 (the Arbitration Act), which provides a time limit in which an arbitrator may make an award.

[37] The relevant portion of section 23 of the Arbitration Act reads:

'The arbitration tribunal, shall, unless the arbitration agreement otherwise provides, make its award–

(a) . . . within four months after the date on which the arbitrator entered on the reference . . . or . . . on or before any later date to which the parties by any writing signed by them may from time to time extend the time for making the award . . . .'

[38] Mr Mitchell, the arbitrator and fourth respondent, did not allow the City to enter the arbitration proceedings on the basis that it did not have standing. The City failed to apply for a review of that decision, and so that issue is not directly before us. However, a similar problem arises with the City's new attack on the arbitration, on the basis that it has lapsed in terms of s 23*(a)* of the Arbitration Act. The City submitted that even though it is not a party to the proceedings it had standing on two grounds: First, it is Peer Africa's principal and therefore is entitled to be a party to the arbitration. Secondly, s 23*(a)* of the Arbitration Act is designed to protect third parties to the arbitration.

[39] At the first arbitration meeting, the parties expressly agreed to extend the date on which the award was to be made and also included a clause to the effect that the conduct of the arbitration would be within the discretion of the arbitrator. There is insufficient evidence in the papers detailing the reasons for the delay. The reasons suggested for the delay are in dispute and cannot be resolved in application proceedings. In any event, having regard to the fact that the parties expressly agreed to extend the periods provided for in s 23*(a)* of the Arbitration Act, it is impossible for this court to make a finding that the arbitration was unduly delayed and that an order declaring that it has lapsed is justified.

[40] The City seeks to attain its standing to interfere in the arbitration process based on its claim that Peer Africa is its agent and therefore as principal it has locus standi to seek a declarator. As explained above, the development contract does not create an agency relationship, and so this is clearly incorrect. It follows therefore that the City's claim is a contractual claim against Peer Africa based on the agreement between it and Peer Africa. The arbitration, on the other hand, concerns a contractual claim by Peer Africa against Khaya based on a different contract. If the houses are indeed defective, then the City would have had a claim against Peer Africa.

[41] Counsel for the City argued that the arbitration agreement did not provide for the extension of the arbitration. However, clause 31.2 of the minutes of preliminary meeting in the arbitration, signed by representatives of both parties, reads as follows:
'These signed minutes constitute consent by the parties, in writing, that the Arbitrator may extend the time limits stipulated in terms of the Arbitration Act.'
Nevertheless, counsel for the City argued that this clause was ineffective because:
Where a timeline for an award is extended in terms of s 23*(a)*, it must be to a *specific* date, and this was not the case here; and
A provision allowing for a timeline to be extended by the arbitrator where reasonably necessary must be part of the 'arbitration agreement', and these were merely minutes of a preliminary meeting in the arbitration.

[42] No authority was provided for either of these propositions. However, even assuming that the Arbitration Act does make the conceptual distinction described in proposition (a) above, ie between the arbitration agreement altering the default timeline set out in the Act, and ad hoc extensions of the time for making an award once the arbitration has started, the City's argument still fails on the facts. It must be accepted that the arbitration agreement was amended and the default timeline was altered by the parties prior to the commencement of the arbitration. In other words, proposition (a) is irrelevant, and the requirements of proposition (b) are satisfied.

[43] Therefore, it seems to me that there is no reason why the parties could not by written agreement signed by their representatives, amend the provisions of the arbitration agreement relating to the timelines of the arbitration. In addition, both Khaya and the arbitrator have stated that the arbitration has not lapsed. In light of the above facts, and in the absence of any party with standing challenging the arbitration's continuation, I think that this assertion should be accepted.

Appeal against the cost order granted by the High Court to the amicus

[44] The court a quo ordered that the City must pay the costs of the amicus curiae. The City appeals this order. In *Hoffman v South African Airways* [2000] ZACC 17; 2001 (1) SA 1 para 63 the court held:

'An amicus curiae assists the Court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the Court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the Court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the Court because of its expertise on or interest in the matter before the Court. It chooses the side it wishes to join unless requested by the Court to urge a particular position. An amicus, regardless of the side it joins, is neither a loser nor a winner and is generally not entitled to be awarded costs.'

These remarks are apposite here. The order of the court below that the appellant is to pay the amicus's costs must be set aside.

[45] In the result the following order is made:

1 Save as set out below, the appeal is dismissed with costs, including the costs of two counsel.
2 The order of the court a quo that the appellant is to pay the costs of the amicus curiae is set aside.

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M Victor

Acting Judge of Appeal

Appearances:

For the appellant:	A Katz SC (and M Bishop)
	Instructed by:
	Hayes Incorporated, Cape Town
	Webbers, Bloemfontein
For the first respondent:	J W Olivier SC (and M Verster)
	Instructed by:
	Smit Kruger Inc., Durbanville
	Symington & De Kok, Bloemfontein
For the amicus curiae:	M Schreuder
	Instructed by:
	MHI Attorneys, Bellville
	McIntyre Van der Post, Bloemfontein