



Mr Lungisa Fuzile
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Dear Mr Fuzile

DISPOSAL OF TAFELBERG SITE

Your letter pertaining to the above matter, dated 30 March 2017 but sent by yourselves and received by us on 5 April 2017, refers.

1. We note that you have placed reliance on "*stated reasons*" for the contents of your letter under reply. It is presumed that you relied on our media statement for those "*stated reasons*". For your convenience and information, we accordingly attach the actual minute reflecting that decision, which was taken and the reasons for it.
2. We presume in the circumstances that for the purposes of your letter that you relied on media coverage for your view that the decision made by the Provincial Cabinet was "*specifically based on the National Treasury directives for 'fiscal austerity' and revenue enhancement*". As will be apparent to you from the attached Minute, this view is not correct.
3. You will note from the Minute that, whilst the need for fiscal austerity in the current economic climate was indeed a factor in the decision not to resile from the agreement of sale, it was by no means the sole reason for the decision. It constituted one amongst a range of factors, in a complex situation, taken into account by the Cabinet in reaching the decision it did.
4. The above notwithstanding, it is certainly the case that the need for fiscal restraint was a factor in the decision-making process. The need for fiscal restraint is generally required of government in all spheres, self-evidently, but it is presently particularly pronounced at provincial level in view of the following:
 - The public service wage agreement process of 2015 resulted in the conclusion of a wage agreement by the National Department of Public Service and Administration (DPSA), the terms of which included significant increases in the salaries payable to provincial employees, and caused massive shortfalls in the

medium term expenditure framework (MTEF) budgets of all the provinces. This took place before the economic meltdown suffered at the end of the 2015 year (of which you will be acutely aware).

- Our consistent position, as the Western Cape Government (WCG), has been that we were not a meaningful participant in the negotiations: no mandate for the percentage increases resulting from the aforesaid process and agreement was sought by the DPSA from any of the provinces. This, despite the fact that the WCG alone has some 85 000 employees. Given both this lack of consultation and the prior instruction from National Treasury as to the budget assumptions to be made by us in this regard (being 5.8%, which was considerably below what was ultimately agreed), the WCG was left having to deal with the financial consequences of an agreement concluded by DPSA providing for increases significantly above those that had already been provided for in terms of our MTEF budget.
- National Treasury initially took the view that the effect of any increases which were agreed above the stipulated CPI index was the Provincial Government's problem, and stated as follows:

*"Institutions are expected to budget for compensation of employees within their existing baselines.... **Where MTEF compensation of employee baseline budgets is inadequate to maintain personnel headcounts, institutions must realign and reprioritise their budgets to rectify this.**"*
(Emphasis added.)

- It, however, went on:
"An amount of R45 billion was set aside in the 2015 Budget as a reserve to be allocated at a later stage. This amount provides for unforeseeable and unavoidable occurrences that may take place in the 2017/18 financial year, as well as for policy priorities in that financial year. The quantum of funding remaining in the reserve also depends on funding decisions taken in respect of the 2015 public sector wage agreement..."
(MTEF Technical Guidelines June 2015)

This opened the door for provinces to access those funds which had been set aside for "*unforeseeable and unavoidable consequences*", in order to make up the shortfalls occasioned by the terms of the agreement.

- On 9 June 2015 our concerns over the process by which this agreement had been reached, and its effect on our budget, were voiced in correspondence to the office of then Minister Nene, by Acting Western Cape Premier Madikizela, together with our Minister Meyer, as well as to Minister Mthethwa. We stated that the resultant differential between the budget assumptions (and pursuant allocations) and the negotiated increases was a net shortfall of R3.2 billion over MTEF for the WCG, which was, simply put, not acceptable.
- On 21 October 2015 National Treasury took heed of our concerns and wrote to our Head Official: Provincial Treasury, Mr Hoosain, as follows:

*"The 2015 three year wage settlement for the public sector came in higher than was budgeted for. To the extent possible, additional funds have been allocated to provinces to cushion the improved conditions of service shortfall through additions to the provincial equitable share (PES). **With prevailing fiscal constraints it is impossible to fully cover the shortfall that both national and provincial governments now face as a result of the wage settlement. As such, provinces must re-allocate their budgets to cover any shortfall over the 2016 MTEF....** The Extended Cabinet approved increases to the PES of R6.9 billion in 2016/17, R18.7 billion in 2017/18 and R22.9 billion in 2018/19."*
(Emphasis added.)"

- Thereafter, and as you are aware, various factors, including the decision of the President regarding no university fee increases for 2016, the drought, the Rand's dramatic devaluation, unemployment levels in the country, and the general economic volatility internationally, have led to further massive budget cuts now being applied by National Treasury to provincial budgets across the country over the remaining term of the MTEF period and beyond.
 - The effects of the increased baseline cuts that are now being applied, and which totalled R1.5 billion in 2016/17, R5.8 billion in 2017/18 and R7.6 billion in 2018/19, are exacerbated by a depleted contingency fund - with no bail-out in sight - and provinces thus being requested to "... **investigate how and where their budgets can be reprioritised to accommodate the (new) baseline reductions...**" (emphasis added).
5. Our Executive heeded the call for an investigation as to how to accommodate the reductions imposed on us and, at the same time, maintain service delivery. One of the outcomes of that investigation was that the Provincial Department of Transport and Public Works (DoTPW) agreed to identify potential underutilised or surplus land for potential realisation within the legal framework that applies, and the regeneration programme already in place. This resulted in an estimation of approximately R230 million in revenue being identified as potentially available, along with a R78 million estimation of what could be derived from internal reprioritisation by DoTPW to support wage agreement pressures.
 6. In addition to the above, at the request of the Budget Policy Committee, the DoTPW also agreed to reduce its acquisition budget from R72 million per annum to nil for the MTEF cycle in question, so as to recover an additional R150 million across the MTEF. This money has, accordingly, now been removed from the budget of the DoTPW by our Provincial Treasury, notwithstanding its prior allocation to that function.
 7. The Tafelberg site in Sea Point, Cape Town formed part of a pre-identified list of surplus sites – having been vacated by the Provincial Education Department (WCED) in 2007 – for regeneration in terms of a Cabinet mandate of 2010. It contains an old school building which has significant heritage value. The presentations made to the Cabinet in response to the call for investigations as to how to accommodate the baseline reductions being experienced, accordingly included the Tafelberg site as one of a number of sites that could be realised. No other users required the property. The Provincial Department of Human Settlements (DHS), whilst initially indicating an interest in the site, had by this stage withdrawn its interest and concluded a memorandum of

agreement with the DoTPW in terms of which identified properties under the custody of the DoTPW would be made available for DHS's housing purposes.

8. The call for tenders for this site resulted in what was considered by the WCG to be an above-market-value offer being received, for use as a school. The proceeds of the proposed Tafelberg site sale are currently specified to be used for the completion of the upgrade to the WCG's building in Dorp Street, Cape Town. This is earmarked for occupation by the WCED in terms of a public-private partnership, with National Treasury's knowledge and approval. The DoTPW is currently leasing offices and parking in Golden Acre and Grand Central for use by the WCED at a cost of approximately R8.5 million per month.
9. The reduction of our provincial budget, and the repeated requests made to us to make up such shortfalls as and where we can, are factors that are taken into account in every decision in relation to asset management. However, this by no means implies (as I have already stated, and as is apparent from the Cabinet minute) either that it was the imperative that drove this process or that the Cabinet in any way disregarded the need to give due priority to our current housing and development programmes in reaching the decision it did on this site.
10. Notwithstanding the fact that neither the City of Cape Town nor the National Department of Human Settlements tendered for this property when it was published for sale, detailed consideration was given to the proposed use of it for affordable housing by the Cabinet. I refer you, in this regard, to the DHS's programme for affordable housing projects, which is annexed hereto and which was presented to the Cabinet prior to the decision being taken. Please note that regard was had to this presentation in terms of both an identified and extensive pipeline of housing projects with associated budgets, and an assessment of the holistic basket of opportunities and properties available to the WCG, i.e. as opposed to an *ad hoc* consideration of the use of this property in isolation. The Cabinet's view is that it would be irrational and unreasonable to have regard only to this property when assessing whether our current housing and development programmes are meeting our constitutional and legislative obligations, specifically in relation to affordable housing. The National Treasury would no doubt concur with that view, at least as a matter of approach.
11. The WCG again denies that the ostensible reasons for the Cabinet's decision, upon which you have based your request, correctly reflect those reasons. We also deny that any regulatory, legislative or policy framework was breached by our Executive in taking the decision it did. In so far as National Treasury appears to wish to explore unspecified "*opportunities for alternative development outcomes on this site*", the WCG has already followed a very extensive and comprehensive process in regard to such opportunities. The fact that a decision has been made by the Cabinet means that finality has now been reached. The Cabinet is *functus officio*. Only a Court would be able to set aside the decision, but it is unclear to us on what basis in law this could be done.
12. Notwithstanding this, and subject to the absolute constraint that the law places on any administrative body in regard to a decision that has been finally made, the WCG remains open to engaging with you further in respect of the decision that our Executive has taken, the reasons for its decision (of which you are now in possession),

and the basis on which you might disagree with the decision and assert otherwise. Ms Jacqui Gooch, our Head of Department in the DoTPW (the current custodian of the land in question), and Ms Fiona Stewart in our legal services department are the relevant persons to whom any future correspondence and/or requests for engagement on this issue may be addressed. Their contact details are as follows:

Ms Jacqui Gooch
Head: Department of Transport & Public Works
Tel: 021 483 2826
Fax: 021 483 5068
Email: jacqui.gooch@westerncape.gov.za

Ms Fiona Stewart
Department of the Premier: Legal Services
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Email: Fiona.stewart@westerncape.gov.za

Yours sincerely



Adv. B Gerber
Director-General

Date: 18/4/2017

= MINUTE NO. 78/2017

CABINET DECISION IN RESPECT OF WHETHER TO RESILE OR NOT FROM
THE SALE AGREEMENT PERTAINING TO THE TAFELBERG SITE

(Department of Transport and Public Works
Department of Human Settlements
Department of the Premier)

RESOVED that –

1. Having taken into account the comments submitted out of the public participation processes applied in this matter to date, along with the recommendation of the custodian, the legal advice received and the presentations by the various officials, the Cabinet considered the following factors to be material during the course of its deliberations on whether or not to resile from the Tafelberg sale agreement:
 - 1.1 The current proposed and future initiatives being undertaken by the DOHS in relation to the progressive realisation of the right to adequate housing by the citizens of the Western Cape, and specifically the pipeline of 40 000 affordable housing opportunities reported to cabinet by DOHS in this regard. In relation to social housing, specifically, the pipeline includes 10 810 units at a cost of R1,2 billion over the next 10 years in the metro and 14 008 units at a cost of R1,57 billion in the non-metro area of the Western Cape.
 - 1.2 The Memorandum of Understanding between DOHS and DOTPW, and the result thereof, i.e. the identification of 18 parcels of land by DOHS for human settlement purposes, including but not limited to land within the City of Cape Town.
 - 1.3 The prior decisions of Cabinet on 22 March 2017 in relation to the proposed use and/or disposal of the Woodstock hospital site and the Helen Bowden Nurses Home site (both within the metro) as contained in the presentation by DOTPW in this regard. More specifically the request by Cabinet that any proposed disposal and/or use of the Woodstock site (in whole or in part) be referred to Cabinet so as to enable it to ensure that affordable housing is best achieved on that site given its locality and size. Similarly with respect to the Green Point Helen Bowden site, that any RFP that is developed contain within it the requirement for the maximum quantum of affordable housing as will make the development of the site viable.
 - 1.4 The identified legal risks in a social housing development under the auspices of the Social Housing Act on this site currently, including, inter alia:
 - 1.4.1 The legal advice obtained from senior counsel pertaining to the comment made by the Phyllis Jowell Jewish Day School, in relation to the definition of a “Restructuring Zone” in the Social Housing Act, read with the National Minister’s designations and the City’s currently identified Restructuring Zones. Counsel’s advice is that the Tafelberg site does not currently fall within such a Zone as defined, rendering the availability of the restructuring capital grant unavailable to any social housing institution for a project on that site currently.. All social housing proposals received to date as part of the public participation process presume a restructuring capital grant is available. Cabinet notes that the National Minister may be approached to amend the Restructuring Zone designations but, as of 22 March 2017, counsel’s advice is that Sea Point does not fall within such a designated area.

- 1.4.2 That the current income bands and associated grants applicable to social housing projects are in the process of amendment. Such amendments have not, to date, come into operation. Necessary legislative amendments, to enable any social housing project in Sea Point or Green Point to benefit from a restructuring capital grant and increased income bands, are required and probable but as of the date of this Cabinet decision, neither of the necessary suite of amendments is in operation.
- 1.5 Whilst Cabinet accepts that social housing is notionally an option on any piece of land owned by the Western Cape Government, in addition to what has been set out above, the value of the land which has been achieved in this sale, the high construction costs acknowledged in the public participation process, the acknowledgement out of the public participation process that extensive cross-subsidisation is required to render the project financially feasible and the inherent land use restrictions which apply to this site, including, inter alia, heritage and zoning requirements, render this specific site sub-optimal for social housing.
- 1.6 The loss of injection of revenue of R135 million earmarked for other infrastructure required for the provincial government, in a climate of fiscal austerity and under a direct instruction from the National Treasury to optimise the use of its assets for, inter alia, revenue-raising measures.

RESOLVED further that –

2. Accepting that –

- a rational approach to a policy-laden decision of this nature, encompasses a basket of legal and policy considerations;
- the expertise and comment of the administration are necessary;
- Cabinet is entitled to accord its interpretation of the facts and law to the matter at hand, subject to no fraud, corruption or mala fides being in evidence,

the Cabinet is of the view that a holistic approach to the utilisation of provincial assets and the methods by which the Western Cape Government is pursuing its legislative obligations and policies in that regard, is preferable to an ad hoc site-by-site determination, i.e. of trying to achieving all its objectives on every site. The recommendation in this regard, by the custodian, that an integrated wide-angle approach be adopted is one which is rational and accepted.

RESOLVED further that –

3. Cabinet is accordingly of the view that a decision to uphold the contract of sale is rational, prudent and appropriate, and accordingly decides not to resile from the current contract of sale concluded with the Phyllis Jowell Jewish Day School.

(Item 2.1)

The content of the resolution [Minute 78/2017] is approved in anticipation of confirmation by Cabinet.


HELEN ZILLE
PREMIER
Date: 03/04/2017