



DISPUTES

Constitutional subsidiarity: An important clarification

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Constitutional subsidiarity is an important principle of South African law. While the term sounds technical, the principle itself is relatively simple: if Parliament enacts legislation to give effect to a constitutional right, litigants should rely on the provisions of that legislation rather than directly on the provisions of the Constitution of the Republic of South Africa, 1996. Effectively, that legislation becomes the primary source through which the right must be enforced.

That means a person cannot simply ignore the legislation and rely directly on the Constitution. Instead, they must either rely on the applicable legislation or challenge the legislation as unconstitutional if they believe that it does not meet constitutional standards.

This principle was formulated to respect the doctrine of separation of powers by recognising Parliament's role in giving practical content to constitutional rights.

The courts have routinely applied this principle for years. However, on 2 July 2026, the Constitutional Court in *Adonisi and Others v Minister for Transport and Public Works, Western Cape and Others; Minister of Human Settlements and Another v Minister for Transport and Public Works, Western Cape and Others* [2026] ZACC 29 formulated a nuanced approach on how it may apply. The Court dealt with the constitutional obligations of government and state organs to use state-owned property to address spatial inequality.

The applicants argued that by selling off a state-owned property (colloquially referred to as the Tafelberg property)—which is located in Sea Point, a seaside suburb in Cape Town, close to educational facilities, health facilities, transport nodes, and social amenities—government had failed to fulfil its constitutional obligations to use such properties to address the enduring legacy of spatial apartheid and to progressively provide access to adequate housing. The respondents counterargued that by directly invoking the Constitution instead of existing housing legislation (such as the Housing Act, the Social Housing Act, and the Spatial Planning and Land Use Management Act, amongst others) the applicants had contravened the principle of constitutional subsidiarity.

The Supreme Court of Appeal accepted the argument. However, the Constitutional Court rejected the argument and adopted a more purposive interpretation.

The Constitutional Court clarified that while subsidiarity is a vital principle, it is not an absolute barrier to blocking constitutional accountability because not all constitutional rights are structured in the same way. The court explained that some constitutional provisions expressly require Parliament to give effect to the right in question (for example, section 9(4) of the Constitution states: "*National legislation must be enacted to prevent or prohibit unfair discrimination*"). In such instances, constitutional subsidiarity must be fully applied because the Constitution itself identifies legislation as the primary means of enforcing the right.

However, the socio-economic rights in sections 26 and 27 of the Constitution (which protect the rights of access to housing, healthcare, food, water and social security) differ in that they require the State to take "*reasonable legislative and other measures*" (my emphasis) to progressively achieve these rights. This means government has a constitutional obligation to adopt and implement reasonable policies, programmes, plans and executive actions. Accordingly, even where legislation exists, courts may still examine whether government's conduct is reasonable in light of the constitutional right. In other words, subsidiarity does not prevent courts from measuring the State's conduct directly against constitutional standards.

The Court found that it could directly evaluate whether the relevant local and provincial governments (i.e. City of Cape Town and the Western Cape Province respectively) acted reasonably under the Constitution when they failed to provide affordable housing in the inner-city and surrounds. The Court ultimately found that they had failed to meet this constitutional standard.

While the primary importance of this judgment is its finding that government or state organs can and should be held accountable for failing to meet their constitutional obligations to combat spatial inequality, it is also important for clarifying that constitutional subsidiarity is not always the end of the enquiry, particularly where courts are asked to assess whether government or state organs have reasonably implemented constitutional rights.

It is important to note that the Court's interpretation does not create an exception to constitutional subsidiarity, nor does it abandon the principle—it merely qualifies it. By adopting this approach, the Constitutional Court has contributed to redressing the spatial injustice inherited from apartheid, and to advancing social justice and transformation.



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