

**REPUBLIC OF SOUTH AFRICA**



**IN THE TAX COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG**

**CASE NO: 14106**

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....	.....
DATE	SIGNATURE

In the matter between:

**ABC COMPANY**

Appellant

and

**COMMISSIONER OF THE SOUTH AFRICAN  
REVENUE SERVICES**

Respondent

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**J U D G M E N T**

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**INTRODUCTION**

[1] This is an appeal in terms of section 3(4)(b) of the Income Tax Act.<sup>1</sup> At issue is whether the Appellant (“ABC”), is entitled to be approved as a “public benefit organisation” (“PBO”) in terms of section 30(3) of the Income Tax Act, and whether it consequently qualifies for a tax exemption under section 10(1)(cN)(ii).

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<sup>1</sup> 58 of 1962.

[2] ABC operates as a private sector, non-profit company. It rents out remodelled or developed units in buildings for residential accommodation to *inter alia* low and medium income households. ABC applied for approval as a PBO in 2013. The respondent, the Commissioner of the South African Revenue Services (“the Commissioner”), rejected the application on 30 March 2015. ABC objected to the decision which objection was disallowed on 19 August 2015. ABC appealed the decision and seeks an order setting aside the Commissioner’s rejection of ABC’s PBO application and for ABC to be recognised as a PBO with effect from the June 2013 year of assessment.

[3] In terms of section 30(1) of the Income Tax Act, a company qualifies as a PBO if:

- (a) It is a non-profit company as defined in the Companies Act;<sup>2</sup>
- (b) Its “*sole or principal object*” is to carry on “*one or more public benefit activity*”, as defined in Part 1 of the Ninth Schedule to the Income Tax Act or by the Minister of Finance by notice;
- (c) It conducts its activities in a non-profit manner or with an altruistic and philanthropic intent, and where such activity is not intended to promote, directly or indirectly, the economic self-interest of any employee or fiduciary of that company.

[4] “*One or more public benefit activity*” as defined in paragraph 3(a) in Part 1 of the Ninth Schedule of the Income Tax Act (“paragraph 3(a)”) includes the following:

“The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000 or any greater amount determined by the Minister of Finance by notice in the Gazette after consultation with the Minister of Housing”.

The Minister of Finance has not since determined an amount greater than R15 000.

[5] In other words, in order to qualify as a PBO, ABC’s sole or principal object must be the development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000.

[6] ABC is approved in terms of the Social Housing Act<sup>3</sup>, as a ‘*social housing institution*’. Approval to qualify as a social housing institution follows a process and it is required from such institution to operate within the parameters set out in the Regulations of the Social

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<sup>2</sup> 71 of 2008.

<sup>3</sup> Act 16 of 2008.

Housing Act. The Social Housing Regulations published on 26 January 2012,<sup>4</sup> *inter alia*, enumerate the qualifying criteria for accreditation of social housing institutions to be granted by the Social Housing Regulator Authority (“the SHRA”). It is common cause that ABC has achieved ‘full accreditation’ status from the SHRA and has been accredited every year since the SHRA was established in 2012.

[7] The Social Housing Act provides that in order for a social housing institution to comply with the criteria of good governance, the social housing institution must have a business strategy with the object of supporting its main object of providing social housing. Its strategic plan must include a purpose which links to the broader policy; strategic goals that link to the performance indications; an annual or business operation plan; a budget; and provision for an annual review.

[8] ABC’s main objects are set out in its Memorandum of Incorporation. The relevant object is contained in Clause 3.1.1 and provides:

“3.1.1 the development, holding, letting or other disposal of affordable residential accommodation to and **for the benefit of low to medium households;**”

(Our emphasis)

[9] The central issue in dispute is whether it can be said that the sole or principal object of ABC is to carry on the public benefit activity as listed in paragraph 3(a) namely the development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly household income is equal to or less than R15 000.

[10] ABC’s main contention is that paragraph 3(a) encapsulates the principal object of any accredited social housing institution that complies with the requirements of the Social Housing Act and the Housing Code.<sup>5</sup> Social housing institutions that fulfil the requirements of the Social Housing Act and which are accredited therefore automatically qualify for PBO status.

[11] The Commissioner disagrees and contends that although the requirements of the Social Housing Act and of paragraph 3(a) may overlap, they are not the same. In consequence, not all social housing institutions will qualify for PBO status. The Commissioner submits that although ABC in fact provides substantial housing within the meaning of paragraph 3(a), that is not always the case and is not required by ABC’s Memorandum of Incorporation.

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<sup>4</sup> Regulation 3 of GNR.51 of 26 January 2012: Social Housing Regulation (*Government Gazette* No 34970).

<sup>5</sup> The Housing Code was published in terms of section 4 of the Housing Act 107 of 1997.

## **DO ACCREDITED SOCIAL HOUSING INSTITUTIONS AUTOMATICALLY QUALIFY FOR PBO STATUS?**

[12] Counsel on behalf of ABC, contends that paragraph 3(a) is drafted to confer PBO status on all social housing institutions that comply with the requirements of the Social Housing Act and the National Housing Code. Because ABC is accredited under the Social Housing Act, the Commissioner is obliged as a matter of law to approve it as complying with paragraph 3(a). As ABC has consistently met the requirements for a housing institution, and has been accredited every year since the SHRA was established, it automatically qualifies for PBO status. Counsel submits that it is clear from the legislative regime governing social housing that accredited social housing institutions are intended to enjoy tax exempt status and paragraph 3(a) is crafted to ensure that they do. The Commissioner disagrees with these contentions.

### ***Legislative regime governing social housing.***

[13] The Social Housing Policy<sup>6</sup> was approved in June 2005. The policy recognised social housing as part of its housing framework, designed to provide affordable and decent rental accommodation to low and medium income households. The policy foreshadowed that social housing institutions would be accredited and monitored by a government regulator and may be eligible for tax exemptions.<sup>7</sup> The policy expressly recognised that the legislative regime did not, at the time, adequately cater for social housing institutions and would require amendment.<sup>8</sup> It identified the Income Tax Act as legislation that may require amendment to provide for income tax exemptions to social housing institutions.<sup>9</sup>

[14] Pursuant to these policies, the Social Housing Act was enacted with effect from 1 September 2009. In its preamble the Social Housing Act recognises that there is a dire need for affordable rental housing for low to medium income households which cannot access rental housing in the open market, and a need for social housing to be regulated. Section 14 of this Act, *inter alia*, requires a social housing institution to:

- (a) promote the creation of quality living environments for **primarily low-income** residents; (our emphasis)
- (b) re-invest operational surpluses generated as a result of funding provided in terms of the social housing programme, in further projects;
- (c) observe and operate within government policy on social housing;

<sup>6</sup> Social Housing Policy for South Africa “Towards an enabling environment for social housing development”.

<sup>7</sup> Social Housing Policy p 39 para 9.5.

<sup>8</sup> Social Housing Policy, pp 19-20 para 7.1.

<sup>9</sup> Social Housing Policy, Annexure A, p 44.

- (d) seek permission from the SHRA for the sale of any properties in their ownership on the basis that such sale will not endanger the security of tenure of existing residents meeting the conditions of their tenancy and that the grant component of the proceeds received from such sale will be used to provide social housing.

[15] In terms of s 14(2) of the Social Housing Act all social housing institutions must comply with the provisions of the Social Housing Act, as well as any social housing programme or guidelines adopted by the government and any other law.

[16] Section 7 of the Social Housing Act established the SHRA. The SHRA is empowered, under s 11, to accredit institutions that satisfy its accreditation requirements as social housing institutions and to maintain a register of such institutions. In terms of s 12 it is authorized to intervene where a social housing institution is implicated in maladministration. Social housing institutions are obliged to report to the SHRA at least annually, and to make information available to it when requested to do so.<sup>10</sup>

[17] The Social Housing Regulations<sup>11</sup> stipulate the process and requirements for accreditation. In terms of these regulations social housing institutions are constrained to using their funds only for the provision of housing to low and medium income households. They may not distribute their funds for any other purpose.

[18] Regulation 3(5)(a) provides that in order to comply with the criteria of good governance, social housing institutions' main object must be the provision of rental or co-operative housing options for the low to medium income households. Section 1 of the Social Housing Act defines low to medium income households as "*those households falling within the income categories as determined by the Minister from time to time*". The Minister has not published any determination to date.

[19] In terms of Regulation 23(3) social housing institutions are obliged to provide accommodation to tenants with a household income of less than R7 500. Regulation 23 provides as follows:

**"23. Rentals/Levies and Tenure Costs.—**

...

(3) Target rentals/levies must be as follows—

- (a) a minimum of 30% of the units must support rentals/levies for households earning less than R 3,500 per month; and
- (b) a maximum of 70% of the units must support rentals/levies for households earning between R 3,501 and R 7,500 per month."

<sup>10</sup> Section 16(1)(b) and Section 16(3).

<sup>11</sup> Section 19 of the Social Housing Act.

[20] ABC submits that regulation 23(3) does not set the eligibility thresholds for low and medium income households but rather ensures that social housing institutions provide mixed income rental accommodation. This is achieved by stipulating the minimum proportion of households earning below R3 500 per month, and the maximum proportion earning (capable of earning) between R3 501 and R7 000. Mr X, the founding CEO of ABC and Ms V, the current CEO of ABC, who both testified on behalf of ABC, confirmed that maintaining a mixed income spread was crucial to ensure the financial viability and the social upliftment of social housing projects.

[21] Regulation 23(4) stipulates the maximum household income that a tenant can earn to qualify for social housing. Households earning more than R7 500 per month do not qualify for social housing “*other than if it is amended in the Housing Code.*” The Housing Code was published in terms of s 4 of the Housing Act<sup>12</sup> and enacted in 2009. It sets out national housing policy, and administrative and procedural guidelines for the effective implementation and application of such policy. It is binding on all spheres of government. Chapter 6 of Volume 4 of the Housing Code deals with social housing. It broadly defines “low income persons” as those whose household income is below R7 500 per month.<sup>13</sup> It also increased the upper limit for eligibility for social housing subsidies from R3 500 per month to R7 500 per month. It also provided for the escalation of the upper limit each year at Consumer Price Index excluding mortgage costs (“CPIX”).<sup>14</sup>

[22] Ms V testified that ABC tracks CPIX in the course of its ordinary business activities. She presented her calculation applying CPIX to the 2009 threshold of R7 500 to determine the escalated values of the R7 500 threshold for the years 2009 to 2016 (the CIPX adjusted medium-income level of R7500) for such years. The application of CPIX increased the threshold value, for 2012 to R9 808; 2013 to R10 715; 2015 to R12 647; 2015 to R12 647; and for 2016 to R13 971 as recorded on Exhibit A. No such calculations were provided for the years of 2010, 2011 and 2014. A further analysis of ABC’s household of tenant profiles were presented in Exhibit B. ABC’s calculations in exhibit B, purports to demonstrate the extent to which the tenant profiles were within the escalated threshold categories. In 2011, 3 347 of 3 462 tenants, or 97% of tenants were within the escalated threshold value; in 2012, 3 349 of 3 615 tenants, or 93% of tenants were within the escalated threshold value; in 2013, 3 753 of 4 320 tenants, or 87% of tenants were within the escalated threshold value. Although the escalated threshold value for 2014 was not provided Exhibit B recorded that all 4 343 of 4 343 tenants were within the escalated threshold value for 2014. In 2015, all 4 349 of 4 349 tenants were within the escalated threshold value; in 2016, 4 291 of 4 349

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<sup>12</sup> 107 of 1997.

<sup>13</sup> National Housing Code, p 197.

<sup>14</sup> National Housing Code, p 215.

tenants, or 99% of tenants were within the escalated threshold value of R13 971. Ms V confirmed the 2016 escalated threshold value of R13 971 and 99% percentage of tenants in her testimony. All these escalated threshold amounts are lower than the R15 000 threshold that was applicable since 1 March 2012. It is contended by ABC that this means that under the Social Housing Act, read with the Housing Code, only households whose total income is less than R15 000 qualify as low or medium income households eligible for social housing. Ms V confirmed that ABC regards low income households as those earning less than the R7 500 thresholds, as escalated by CPIX, and medium income households as those earning less than R15 000. Its funders similarly treat the cut-off threshold for eligibility for social housing at R15 000.

[23] Exhibit B only provided a few numbers and two sets of bar graphs in a single chart. No source documentation or analysis of the spread of tenant household income was provided to substantiate the numbers. Ms V did not testify as to their accuracy nor by whom in ABC and how the numbers were compiled. The method of determination of household income of tenants was also not elaborated on.

### ***The evolution of paragraph 3(a)***

[24] ABC submits that congruent with the legislative framework referred to above, paragraph 3(a) has been amended over time to cover the public benefit activities undertaken by social housing institutions (as well as other bodies that provide housing to the poor). ABC submits that the link between the State's social housing regime and the public benefit activity in paragraph 3(a) is both compelling and clear.

[25] When paragraph 3(a) was first enacted, it framed the public benefit activity as follows:

“The development, construction, upgrading, conversion or procurement of housing units for the benefit of poor and needy persons”.<sup>15</sup>

[26] In 2003, the provision was amended with effect from 1 January 2005, to provide as follows:

“The development, construction, upgrading, conversion or procurement of housing units for the benefit of persons whose monthly income falls within the housing subsidy eligibility requirements in the National Housing Code published pursuant to section 4 of the Housing Act, 1997”.<sup>16</sup>

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<sup>15</sup> See section 125(1)(a) of the Revenue Laws Amendment Act 45 of 2003 (“the 2003 Act”), which includes the wording of clause 3(a) prior to amendment.

<sup>16</sup> Section 125(1)(a) and section 125(2) of the 2003 Act.

[27] Paragraph 3(a) was again amended in 2006,<sup>17</sup> in providing that the development, construction, upgrading, conversion or procurement of housing units is for the benefit of persons whose monthly income “is equal to or less than R3 500 or any greater amount determined by the Minister of Finance by notice in the Gazette after consultation with the Minister of Housing.”<sup>18</sup> In the explanatory memorandum to the 2006 Act (prior to its enactment) the reason for the amendment was explained as follows:

“In 2003, Government expanded the scope of exempt housing PBO activities. Firstly, the PBO limitation on housing assistance to poor and needy recipients was liberalised so that exempt housing PBO activities could additionally include assistance for the benefit of low-income earners (i.e. households with income up to R3 500 (as is consistent with the Housing Code). Secondly, housing PBO activities became eligible to receive tax-deductible donations. Thirdly, current legislation not only covers direct procurement but other forms of housing assistance, such as subsidised housing loans (but this last group of PBOs only receives exemption; not eligibility for tax deductible loans).

Despite the liberalisation in 2003, the scope of PBO housing activities is still too limited. Many legitimate organisations remain outside PBO relief.”<sup>19</sup>

[28] ABC submits that the amendment effected by the 2006 Act was intended to expand the category of organisations eligible for recognition as PBOs, to include institutions (like social housing institutions) that provided indirect housing assistance. The explanatory memorandum also anticipated that the income ceiling would be increased over time. It stated:

“The proposed level of increase will not be stated in the legislation but instead left to the Ministerial discretion, taking into account the existing Housing Policy established by the Department of Housing”.<sup>20</sup>

[29] The income ceiling in paragraph 3(a) was amended to R7 500 with effect from 1 March 2008,<sup>21</sup> and to R15 000 with effect from 1 March 2012.<sup>22</sup>

[30] Appellant’s counsel submits that the recognition and development of social housing institutions is one of the measures adopted by the State to progressively realise the right to housing (as required by s 26 of the Constitution). Social housing institutions benefit from public funds paid over in the form of capital grants, thereby subsidizing development costs

<sup>17</sup> Revenue Laws Amendment Act 20 of 2006.

<sup>18</sup> Section 60 of the 2006 Act.

<sup>19</sup> Explanatory memorandum, p 31 para 2.

<sup>20</sup> Explanatory memorandum, p 32 para A.

<sup>21</sup> Section 1(1)(c) of the Taxation Laws Amendment Act, read with table 16 of Part II of Appendix I.

<sup>22</sup> Section 12 of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 3 of 2012.



and reducing the debt to be recouped through rental. In turn, social housing institutions must maintain rental rates at levels that are affordable to low and medium income households. The threshold for low and medium income households were, in 2016, those that earned less than R13 971 per month. Appellant's Counsel contends that paragraph 3(a) was plainly enacted, and subsequently developed, to give recognition to the public function undertaken by social housing institutions, and to afford them the tax exemptions that the housing scheme anticipated. It must be read in conjunction with – and not isolated from – the Social Housing Act. It is submitted that in law context is everything,<sup>23</sup> and the constitutional context of the enactment of paragraph 3(a), in the full knowledge of the imperative need of giving effect to s 26(2) of the Constitution, makes it unthinkable that the drafter of paragraph 3(a) was unmindful of the link between s 26(2) of the Constitution and the Social Housing Act. Paragraph 3(a) he concluded, falls to be interpreted accordingly.

[31] In conclusion ABC submits that the social housing regime anticipates that social housing institutions will benefit from tax exemptions – presumably to safeguard the State's investment in their operations. Congruently, paragraph 3(a) recognises that social housing institutions that fulfil their statutory obligations perform a public benefit activity within its terms. It is, however, not for the Commissioner to determine whether a social housing institution fulfils this function. That assessment falls to the SHRA, which is an expert body expressly empowered to regulate and accredit social housing institutions. Once the SHRA has accredited a social housing institution, the Commissioner is not entitled to disregard this decision and is obliged to register the social housing institution as a PBO. The SHRA accreditation decision thus has legal effect unless and until it is set aside by a court on review.<sup>24</sup> As an accredited social housing institution, ABC is therefore entitled to be granted PBO status for the period at issue.

[32] The Commissioner disagrees and contends that ABC's reasoning is wrong for the following reasons:

- (a) If that is what the legislator had intended when it amended the Income Tax Act in 2012, it would have said so;
- (b) The Income Tax Act gives the Commissioner, not the Social Housing Regulatory Authority, the power to decide whether to approve an application for PBO status;

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<sup>23</sup> *Aktiebolaget Hässle and Another v Triomed (Pty) Ltd* 2003 (1) SA 155 (SCA), para 1.

<sup>24</sup> *Oudekraal Estates (Pty) Ltd v City of Cape Town & others* 2004 (6) SA 222 (SCA), para 26; *MEC for Health, Eastern Cape & another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC), paras 98-99.

- (c) The Social Housing Act confers on the Minister of Human Settlements the power to determine the ambit of social housing; The Income Tax Act gives the Minister of Finance the power to determine the ambit of PBO status under paragraph 3(a);
- (d) The purpose of accreditation under the Social Housing Act differs from the purpose of tax exemption;
- (e) Reliance can in any event not be placed upon ABC's accreditation by the SHRA: The facts show that ABC has not complied with the Social Housing Regulations, which prescribe the meaning of "*low to medium income households*", as provided for in section 1 of the Social Housing Act.

### ***Interpretation of paragraph 3(a)***

[33] As set out above, in 2006 the qualifying monthly household income provided for in paragraph 3(a) was R3 500. In 2008, it was increased to R7 500. The Social Housing Act came into effect on 1 September 2009. It made provision for the establishment of the SHRA, and gave that body the power to accredit social housing institutions.

[34] In 2012, paragraph 3(a) was again amended<sup>25</sup> in order to make provision for a monthly household income equal to or less than R15 000, or another amount to be determined by the Minister of Finance. The amendment in 2012 came three years after the Social Housing Act and the Housing Code were enacted. We agree with counsel for the Commissioner, Mr *Budlender*, that if Parliament had intended that an accredited social housing institution was automatically also a PBO, it would have said so at the time of the amendment of paragraph 3(a). It did not do so, but instead chose to continue the system of requiring compliance with a fixed income cap, and giving the Minister of Finance the power to amend the cap.

[35] In terms of s 30 of the Income Tax Act the Commissioner is empowered and in duty obliged to decide the approval of an applicant as a PBO. If ABC is correct in contending that its accreditation automatically qualified it as a PBO, it would confer on SRHA the power to decide whether an entity is a PBO when it accredits the institution under the Social Housing Act. It surely cannot be the intention to confer the power pursuant to tax legislation upon a body established under the housing legislation. The consequence would be, as correctly argued by Respondent's counsel to deprive the Commissioner of its statutory power and duty under the Income Tax Act, and to confer that power on the SHRA – and then notably, only by inference. We conclude that there is no basis for such an interpretation.

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<sup>25</sup> Rates and Monetary Amounts and Amendments of Revenue Laws Act 13 of 2012.

[36] Another important aspect raised by the Commissioner is the following: The Social Housing Act confers on the Minister of Human Settlements the power to determine the ambit of social housing. The Income Tax Act under para 3(a) in turn confers on the Minister of Finance the power to determine the ambit of PBO status. In discharging the duty, the Minister of Finance must act “after consultation” with the Minister of Human Settlements, but the decision remains his decision. Consultation with the Minister of Human Settlements, and the need to consider his views expressed are required, but the decision-making power is held by the Minister of Finance. If ABC’s approach is correct, the Minister of Human Settlements would be entitled to determine the entitlement to tax exemption status under paragraph 3(a), in determining the meaning of “*low to medium income households*” under the Social Housing Act, and by deciding which institutions will be accredited as social housing institutions. That, as correctly submitted *by Mr Budlender* would indeed be an odd result, which would deprive the Minister of Finance of his statutory power and duty to determine the qualification for tax exemption, once again only by inference. Nothing in either of the statutes suggests that this is the case. The Minister of Human Settlements does not have the power, by making regulations dealing with the qualification of social housing institutions, to decide on behalf of the Minister of Finance which organisations qualify for PBO status under the Income Tax Act.

[37] The main purpose of accreditation of social housing institutions under the Social Housing Act is to determine which housing organisations qualify to claim social housing subsidies. The purpose of tax exemption is fundamentally different, which is, to relieve the taxpayer of the obligation to pay income and other taxes to the fiscus. The Commissioner submits that there is nothing inherently contradictory in an organisation receiving certain benefits from the State, albeit being required to pay income tax on its profits.

[38] ABC relied on policy statements in terms of which social housing institutions ought to be able to claim tax benefits. That undoubtedly is correct: accredited social housing institutions are entitled to claim tax exemption having been approved as a PBO as long as they bring themselves within the ambit of paragraph 3(a).

[39] ABC contends that the fact that it is accredited as a social housing institution means that its beneficiaries meet the income qualifications of the regulations under the Social Housing Act; and that those qualifications “dovetail” with the threshold in paragraph 3(a).

[40] Section 1 of the Social Housing Act provides that the Minister of Human Settlements must determine the meaning of “*low to medium income households*”. In 2012, the Minister published Regulations under the Social Housing Act. In terms of Regulation 23(3) a minimum of 30% of the units must support rentals/levies for households earning less than

R3 500 per month, and a maximum of 70% of the units must support rentals/levies for households earning between R3 501 and R7 500 per month.

[41] In cross-examination, Ms V was confronted with Customer Service Surveys with regard to service levels of ABC. These Customer Service Surveys were compiled by independent contractors on the basis of interviews with small samples of persons (tenants) as requirements from Social Welfare Authorities. These reflected the following:

- (a) In 2012, 6.3% of the persons surveyed had an income of less than R3 500 per month;
- (b) In 2013, 5.6% of the persons surveyed had an income of less than R3 500 per month;
- (c) In 2015, 4.6% of the persons surveyed had an income of less than R3 750 per month;
- (d) In 2016, 2.5% of the persons surveyed had an income of less than R3 750 per month;

[42] Ms V was confronted with the fact that it appears as if ABC has not brought itself within the R7 500 upper limit. Her explanation was that it had been intended that the amounts in the Regulations would be increased to allow for inflation. She accepted, however, that this has not happened, and that the regulations are what they purport to be. Her explanation concerning ABC's non-compliance with the Regulations was that "*...running a social housing institution and what the Act says is (sic) two different things.*" The definition in the Regulations, she opined, was "*not practical*". Ms V was adamant in this regard: she said that ABC's position is that if only 40% of the tenants qualify for subsidy, ABC is nevertheless acting in accordance with its Memorandum of Incorporation.

[43] Ms V testified that only 433 of 4000 ABC tenants receive a rental subsidy. If that is taken as correct, accreditation under the Social Housing Act does not necessarily lead to the conclusion that the majority of the tenants satisfy the Income Tax qualification. This courts function is not to determine the appropriateness of the accreditation of ABC by the SHRA. What is however clear from her evidence is that accreditation under the Social Housing Act cannot provide a basis for a finding that ABC "necessarily" complies with the requirement of paragraph 3(a).

[44] In our view there is no basis for reading "accredited social housing institution" into the definition of a PBO or public benefit activity. An accredited social housing institution that complies with the Social Housing Act and its Regulations does not automatically qualify for PBO status.

### **DOES ABC QUALIFY AS A PBO?**

[45] Section 30(1) of the Income Tax Act provides that a company qualifies as a PBO if its sole or principal object is to carry on one or more public benefit activity as defined in paragraph 3(a).

[46] In order for ABC to succeed, it must prove that:

- (a) Its "*sole or principal object*", in terms of its Memorandum of Incorporation is to carry one or more public benefit activities. (That sole or principal object must fit the definition of "*public benefit activity*"); and
- (b) It in fact carries on principally a public benefit activity.

[47] The Commissioner contends, in our view correctly, that if ABC's sole or principal object does not fall within the exemption, the non-compliance with the first requirement brings the matter to an end. It is only in the event of compliance with the first requirement that its actual activities must be reviewed in order to establish entitlement.

### ***What is ABC's principal object and does it differ from the defined public benefit activity?***

[48] ABC's principal object is set out in clause 3.1.1 of its Memorandum of Incorporation. Clause 3.1.1 states that the object of the Company shall be, inter alia, "*the development, holding, letting or other disposal of affordable residential accommodation to and for the benefit of low to medium income households*". (our emphasis)

[49] The question requiring determination is whether the meaning of "*low and medium income households*" in clause 3.1.1 is the same as the meaning "*for the benefit of persons whose monthly income is equal to or less than R 15 000*" as provided for in paragraph 3(a), and/or does ABC principal object fall wholly within the meaning of the public benefit activity described in paragraph 3(a)?

[50] ABC submits that the reference to low and medium income households in clause 3.1.1 refers to "*persons whose monthly household income is equal to less than R15 000*", as per paragraph 3(a). In support of its contentions ABC relies on the evidence of Ms V. She testified that the Memorandum of Incorporation did not stipulate numerical thresholds for eligible income levels because it was intended to be a permanent document, rather than one that would change over time. She confirmed that its intention was to align as closely as possible with the requirements of the Social Housing Act, the Regulations and the Housing Code, which define low and medium households as households with a monthly income, (in 2016), of less than R13 961. Ms V also confirmed that ABC, and its funders, regard low and medium households as those falling below thresholds of R3 500 and R7 500 respectively.

Tenants falling within these income ranges are targeted through rent-setting, as required by the Social Housing Policy. Thus, the provision of accommodation to medium income household tenants is equivalent to the provision of accommodation for the benefit of persons whose “*monthly household income is equal to or less than R15 000*”, as required by paragraph 3(a). Both context and purpose suggest that there was, and is, no conflict or friction between paragraph 3(a) and the wording of ABC’s first object in its Memorandum of Incorporation.

[51] ABC submits that if consideration is given to the context and to the purpose of ABC’s Memorandum of Incorporation as a whole, its main or principal object is not at odds with paragraph 3(a), but falls squarely within the meaning of paragraph 3(a). It is submitted that ABC’s main or principal object in its Memorandum of Incorporation must be read in the context of its objects as a whole. The meaning of clause 3.1.1 – the object of developing, holding, letting or other disposal of affordable residential accommodation to and for the benefit of low to medium income households – must, in accordance with the principle *noscitur a sociis*, be ascertained with reference to the other three objects clauses that follow namely; to promote the creation of quality living environments for low income tenants; to promote the establishment, development and maintenance of socially and economically viable communities; safe and healthy living conditions to ensure the elimination and prevention of slums and slum conditions; and to consult with municipalities with a view to developing social housing stock.

[52] The Commissioner submits that the evidence of Ms V negates ABC’s argument completely as her evidence shows that: (A) the phrase low to middle income households does not have the same meaning as the public benefit activity listed in paragraph 3(a); (B) ABC itself says that the two do not mean the same; and (C) ABC’s practise shows that the two are not the same.

A: Does the phrase low to middle income households have the same meaning as the public benefit activity listed in paragraph 3(a)?

[53] The Commissioner contends that the standard in the Memorandum of Incorporation and the standard in paragraph 3(a) are fundamentally different in their nature. Their content may coincide at times, and may differ at times. The fact that they may coincide at a particular time does not mean that they have the same meaning. For example: The current limit of R15 000 in paragraph 3(a) was determined in 2012. If one assumes that in 2012 that amount meant the same as “*low to medium income*”, then it follows inexorably that it cannot also mean the same as “*low to medium income*” in 2017, after five years of inflation. And if it means the same as “*low to medium income*” today, it will not necessarily mean the same as “*low to medium income*” tomorrow. The meaning of “*low to medium income*” inevitably

changes from year to year. By contrast, the meaning of paragraph 3(a) remains unchanged until the Minister of Finance decides to change it – which he has not done for six years.

[54] A plain reading of the phrase “*low to medium income households*”, as correctly contended for by Mr *Budlender*, bears a meaning clearly distinguishable from “*R15 000 or any greater amount determined by the Minister of Finance*”. The two concepts are fundamentally different. A “*low to medium income household*” is a household which has an income of a kind which is determined by reference to other incomes. Its meaning calls for the exercise of judgment in assessing the factual question. It does not involve the exercise of any discretion. The question whether a household’s income is “*R15 000 or any greater amount determined by the Minister of Finance*” falls in a completely different realm. It does not call for the exercise of judgment, because it refers to a specific amount. The amount is fixed until the Minister decides to change it. The Minister might at any particular time determine an amount which covers only low income households; an amount which has regard to additional criteria, such as the size of the households/family occupying the housing; or an amount which is determined according to entirely different criteria. “*Low to medium income*” is an amount which automatically changes from year to year through the effects of inflation. The Minister’s determination, by contrast, is fixed and remains as such. In determining the paragraph 3(a) amount, the Minister is not bound to embark upon a process of attempting to approximate the income of a “*low to medium income*” household; his discretion is unfettered. He may vary from time to time for example, when the fiscus is strong, he may apply a more generous limit; when it is weak, he may apply a narrower limit.

[55] Ms V testified that ABC had not asked experts for advice as to the meaning of “*low to medium income*” as they are the experts. Their method is taking figures in the National Housing Code of 2009, and increasing them by CPIX. She stated that affordability of the accommodation provided by ABC does not determine the meaning of “*low to medium income*”. She further testified that low income is currently R3 500 and R7 500 and medium income is R15 000. These are the figures referred to in the 2012 Social Housing Regulations, without any adjustment and are “*essentially the figures introduced by a variety of our loan funders*”.

[56] The Commissioner contends that this explanation provides no rational basis for determining the meaning of “*low to medium income*”, or for awarding tax exemption on the basis that accommodation is being provided mainly to “*low to medium income households*”. “Low” and “medium” are both relative terms: their meaning can only be determined by reference to actual incomes of other members of the population. It is contended that the meaning of the phrase can only be determined from analysis of the information such as census figures.

[57] We agree with counsel for the Commissioner that the explanations which ABC gives as to how it arrives at its figures provide no basis at all for the determination of the meaning of “*low to medium income*”. The phrase “*low to medium income households*” is inherently imprecise. That is why the phrase “*low and medium income*” in ABC’s Memorandum of Incorporation cannot be equated with the fixed amount determined under the Income Tax Act. The two qualifications are fundamentally different in their nature: one is an amount of Rand per month, and the other is an imprecise and changing classification of sectors of the population.

B: ABC itself says that the two are not the same.

[58] Ms V testified that ABC’s definition of “*low to medium income*” is based on its understanding of what the term means and ABC’s definition of “*low to medium income*” is not necessarily the same as the cap imposed by the Minister of Finance. She conceded that ABC’s understanding of what is “*low to medium income*” is not based on the Minister’s determination under the Income Tax Act, but is based on ABC’s understanding of what “*low to medium income*” means. She testified that ABC takes its own view as to what it can and should do and the majority of its tenants currently have a threshold income below R15 000 not because that is what the Minister of Finance had determined, but because its own calculations as per the Social Housing Act have brought it to its conclusion.

C: ABC’s practice also shows that the two are not the same.

[59] ABC contends that during the period from 1 July 2012, it in fact provided a majority of its housing units to persons with a monthly household income equal to or less than R15 000, which brings it within the provision of paragraph 3(a), which so the argument went, substantiates the veracity of its principal object’s clause and shows that ABC actually performed its principal object, which qualified it for approval as a PBO.

[60] In support of its contention ABC relies on the evidence of Mr X and Ms V. Mr X testified that ABC’s business model relied on cross-subsidisation of low income households by higher income households, to ensure that the institution was sustainable. It is submitted that even the provision of rental accommodation to households that earned a monthly household income of R15 000 or more was done “*for the benefit of*” persons with a monthly household income of less than R15 000, as required by paragraph 3(a). Ms V confirmed that cross-subsidisation was necessary to maintain affordable rental rates for low income tenants, and that “*balance sheet cross-subsidisation*” was required by certain lenders. She testified that two units provided to medium income tenants would cross-subsidise one unit provided to a low income tenant. Accommodation provided to medium income households



therefore subsidised, and subsidises, accommodation provided to low income households, and operates for the benefit of the latter.

[61] ABC submits that it is always the case that the provision of accommodation to ABC's tenants is for the benefit of low income tenants: either directly, by the letting of units to low income households, or indirectly, where the accommodation provided for medium income households always cross-subsidised accommodation provided for the benefit of low income tenants. Both these categories fall within the meaning of the words in paragraph 3(a) namely "*for the benefit of persons whose monthly income is equal to or less than R15 000*". ABC's Memorandum of Incorporation did not, and does not, permit it, pursuant to its principal object, to provide residential accommodation for the benefit of a majority of persons with a household income in excess of R15 000 per month. It follows, so it is argued, that ABC's principal object is plainly the undertaking of the public benefit activity under paragraph 3(a). On a proper interpretation and in light of the constitutional imperative represented by section 26(2) of the Constitution, it is submitted that it is clear that the provision of accommodation to low and medium income households by ABC was, and was required to be, "*for the benefit of persons whose monthly household income is equal to or less than R15 000*".

[62] The Commissioner contends that ABC's practise shows that "*low to medium income households*" is not the same as the public benefit meaning under paragraph 3(a). In support of its argument the Commissioner relies on ABC Customer Service Surveys which shows the following: In 2011, the household income determined by the Minister of Finance for the purpose of paragraph 3(a) was R7 500 per month. The ABC Customer Service Survey for 2011 showed that 36,29% of ABC's occupants and tenants surveyed had a household income of R8 000 or less. Ms V's evidence was that it fell within the principal object in clause 3.1.1 of its Memorandum of Incorporation namely, to provide accommodation to "*low to medium income households*". It follows that in 2011, at least 63% of ABC's surveyed tenants fell outside the income cap then specified in the Income Tax Act. According to Exhibit B, the household income of 97% tenants were below the CPIX escalated threshold of R9 808. However, in that year the threshold of R7 500 had not yet been increased to R15 000. The actual spread of tenant according to household income is not available. That year, ABC did not meet the qualifications set out by the Minister of Finance, even though its activities fell within the Memorandum of Incorporation (our emphasis).

[63] It is therefore clear from Ms V's evidence, that the phrase "*low to medium income households*" in clause 3.1.1 of the Memorandum of Incorporation did not require ABC to follow the amount determined by the Minister of Finance in respect of the paragraph 3(a) public benefit activity. And this is precisely the issue: the phrase "*low to medium income households*" does not have the same meaning as the household income determined under

the Income Tax Act. It permits a main activity which falls outside the public benefit activity determined by the Minister of Finance. It follows logically that also in 2014, when application was made for PBO approval, clause 3.1.1 of ABC's Memorandum of Incorporation did not mean that ABC was required to comply with the amount determined by the Minister of Finance in respect of the paragraph 3(a) public benefit activity. It permitted a main activity which falls outside the public benefit activity determined by the Minister of Finance.

[64] We agree with counsel for the Commissioner that these facts unavoidably lead to the conclusion that the phrase "*low to medium income households*" in ABC principal object does not have the same meaning as, and does not fall wholly within the meaning of, the public benefit activity described in paragraph 3(a). They may coincide sometimes, but as a matter of fact they have not always so coincided – and there is no reason to assume that they will coincide in the future.

### ***The date of construction***

[65] The most compelling issue in the determination of this appeal, in our view, is what is stated by ABC in its Notice of Motion of Appeal. ABC states that if the housing is provided to qualifying households at the time when it is developed or constructed, ABC is entitled later to provide the housing to households which did not qualify. The Notice of Appeal reads as follows:

- "47. At the time of their "development, construction, upgrading, conversion or procurement, ABC's housing units were for the "benefit of persons whose monthly household income is equal to or less than [the relevant amount].
- 48. Even if the percentages measured by samples dropped by 50%, that does not distract from the requirement that, at the relevant time, the ABC housing units were for the benefit of persons whose monthly household income was equal to or less than [the relevant amount]".

[66] Ms V testified that what this means is that if ABC builds or procures flats for people who meet the R15 000 limit, it is entitled, after the initial tenants have left, to rent to people who do not qualify, even if overall non-qualifying tenants are the majority.

[67] We agree with Mr *Budlender* that this is inconsistent with the definition of the "public benefit activity". ABC claims it is entitled to provide accommodation to a wealthy person or people, and be exempt from income tax, as long as the initial tenant fell within "*low to medium income*". That would defeat the purpose of the tax exemption and would invite tax evasion.

[68] ABC asserts that its Memorandum of Incorporation permits it to act in this fashion. This further demonstrates that ABC's approach to what it is permitted to do, in accordance

with the Memorandum of Incorporation, is inconsistent with the public benefit activity defined in paragraph 3(a).

### ***The Constitution***

[69] ABC relies on section 26(2) of the Constitution. This subsection requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to have access to adequate housing. The Social Housing Act and paragraph 3(a) are two of those legislative measures.

[70] Legislation must be interpreted in the manner that best gives effect to the spirit, purport and objects of the Bill of Rights. But this does not require or entitle a court to give a statute a meaning which its words cannot reasonably bear. The principal object of ABC in its Memorandum of Incorporation is “*the development, holding, letting or disposal of affordable residential accommodation to and for the benefit of low to medium income households*”. That is simply not the same object as the “activity” referred to in paragraph 3(a). Although there is some degree of overlap between them, the object and the activity differ materially. The Constitution neither requires nor permits paragraph 3.1.1 of the Memorandum of Incorporation to be interpreted to have the same meaning as paragraph 3(a).

### **CONCLUSION**

[71] ABC may qualify for exemption once registered as a PBO. To qualify it must comply with paragraph 3(a) which requires that the sole or principal object of an applicant organisation must be to accommodate people falling within an income bracket defined by reference to a specific amount of money.

[72] To determine the sole or principal object of ABC regard must be had to its Memorandum of Incorporation. This is demonstrated by the fact that in order to qualify as a PBO, the organisation must submit its constitution or other founding document (e.g. Memorandum of Incorporation) to the Commissioner and the constitution must require the organisation “to utilise its funds solely for the object for which it has been established”. It is not determined by its activities at a particular time as an organisation’s activities may change from time to time, and it cannot oscillate from year to year between being a PBO and not being a PBO, depending on the activities which it undertakes in that year. Its tax status depends in the first instance on what its Memorandum of Incorporation permits and requires it to do.

[73] When ABC applied for approval as a PBO in 2013, the Commissioner was faced with a situation in which ABC did not demonstrate that it had always acted in such a manner that the household income of its tenants fell mainly within the cap stipulated by paragraph 3(a).

2011 is a stark example of that. In addition, ABC is not required by its Memorandum of Incorporation to act in such a manner and there was no basis on which the Commissioner could reasonably be satisfied that ABC would consistently in the future act in this manner. ABC says, in answer to this last point, that “no-one can predict the future”. That is precisely the problem with a main object which provides a definitional frame (*“low to medium income households”*) which is fundamentally different from paragraph 3(a) (a specified amount of money). The result is that their content may coincide at times, and may differ at times.

[74] ABC was previously exempt from income tax under the then section 10(1)(f) of the Income Tax Act. Section 10(1)(f) was repealed by section 21(1)(a) of Act 30 of 2000, and the “public benefit organisation” provisions were introduced. Paragraph 3(a), in our view, is clear. If ABC wanted to continue its tax exempt status, it was obliged to bring itself within the terms of the new exemption scheme, and if necessary, amend its Memorandum of Incorporation for that purpose. It is not clear why it is not prepared to do so. All it would have to do is state that its main object is to carry on the public benefit activity set out in paragraph 3(a).

[75] If the main object is framed in a manner that is squarely consistent with the defined public benefit activity, then the Commissioner can reasonably anticipate that the activities of ABC will in future fall within the paragraph 3(a) definition, because that is what its Memorandum of Incorporation requires. In the circumstances, for so long as ABC maintains its present Memorandum of Incorporation, it cannot satisfy the requirements of paragraph 3(a) and be approved as a PBO: it has not shown that its “*sole or principal object*”, in terms of its Memorandum of Incorporation is to carry on a public benefit activity as defined. Its sole or principal object differs from the definition of “*public benefit activity*”.

[76] The section 10(1)(cN)(ii)(aa) claim is dependent on ABC being approved as a PBO. If the PBO claim fails, then that claim must also fail.

[77] In the result, the following order is made:

[77.1] The appeal is dismissed;

[77.2] No order as to costs.

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**L. WINDELL**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG LOCAL DIVISION, JOHANNESBURG**