

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: 124/2016

In the matter between:

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|-----------------------------|--------------------|
| ELLEN NOMSA DLADLA | First Applicant |
| SAMUNKELISWE MKWEBU | Second Applicant |
| SIFISO JALI | Third Applicant |
| THULANI ZONDI | Fourth Applicant |
| SIBUSISO CHAMANE | Fifth Applicant |
| THULISILE ZUNGU | Sixth Applicant |
| ZITHULELE NTHULI | Seventh Applicant |
| PAUL MOABELO | Eighth Applicant |
| FRANS TEFU | Ninth Applicant |
| MAGDELINE MALINDISA | Tenth Applicant |
| HLONIPHOKWAKHE GOGHE | Eleventh Applicant |

and

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| CITY OF JOHANNESBURG | First Respondent |
| METROPOLITAN EVANGELICAL SERVICES | Second Respondent |

and

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|---|----------------------|
| CENTRE FOR APPLIED LEGAL STUDIES | First Amicus Curiae |
| CENTRE FOR CHILD LAW | Second Amicus Curiae |

**AMICUS CURIAE'S WRITTEN SUBMISSIONS:
CENTRE FOR APPLIED LEGAL STUDIES**

INTRODUCTION

1. The Centre for Applied Legal Studies' ("CALS")¹ submits that the conditions imposed at the Ekuthuleni shelter (in particular, the daytime lockout rule and the gendered separation of families) place particular burdens on the women living at the shelter, and impact disproportionately and unreasonably on their right of access to adequate housing and associated rights to family life, dignity and security.
2. This runs contrary to international law on the right to adequate housing, which calls upon States to implement gender-sensitive housing laws and policies that respond to the particular housing needs and vulnerabilities of women and children.
3. CALS submits that the gendered perspective on the right to adequate housing in international human rights law should inform this court's interpretation of the right to housing under section 26 of the Constitution, and any assessment of the reasonableness of the City's conduct in providing temporary accommodation at the Ekuthuleni shelter. This flows from the interpretive injunctions under sections 39 and 233 of the Constitution.²
4. In defending the impugned rules, the City relies heavily on the difference between temporary and permanent accommodation. It focuses on the concept of a 'home' and maintains that the residents of the shelter are not entitled to the

¹ CALS was admitted by this Court as an amicus curiae on 5 December 2016.

² In terms of section 39(1)(b) of the Constitution, a court interpreting the Bill of Rights "*must consider international law*". Section 233 of the Constitution provides that "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with it.*"

While a Court will give greater weight to binding international law instruments (such as treaties that have been ratified and incorporated by the Republic), our courts also have regard to non-binding international instruments (such as United Nations resolutions, treaty monitoring committee recommendations) in interpreting a right in the Bill of Rights and legislation. Sources of non-binding or "soft" international law are important in that they reflect collective and authoritative (albeit not binding) interpretations of State commitments and legal obligations. They may also reflect the development of new norms of customary international law. *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 35; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 45 (CC) at paras 26 – 30, 45; *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 346 (CC) at paras 88 – 103.

same level of protection or freedom as they would be entitled to in their permanent homes.

- 4.1. This incorrectly frames the test – the test is not whether the rights, privileges and amenities enjoyed in temporary accommodation should be equivalent to those of an ordinary home; the test is whether the conditions imposed on the residents of Ekuthuleni are reasonable in the circumstances, as required by section 26(2) of the Constitution.³
 - 4.2. The City uses the concept of a “home” to draw a blunt, binary distinction between the rights and amenities associated with permanent housing and those associated with temporary emergency housing. By contrast, the standard of reasonableness is flexible. It requires that each measure be evaluated within the particular context in which it was implemented.
5. The ostensibly gender-neutral rules that the City has imposed on the residents fall short of the reasonableness standard. The rules put women at increased risk of physical violence, worsen their burden of childcare and infringe upon women’s rights of privacy, dignity and family life. As the applicants have demonstrated, the City’s purported justification of the impugned rules (i.e. the cost implications and the need to discourage “an attitude of dependence”) is unacceptable.⁴ When considering the implications of the rules, the City simply ignores their disproportionate impact on women.
 6. Notably, the City maintains that the Ekuthuleni facility is a “pilot project”. Pending the outcome of this case, the City intends to roll out the Managed Care Model (including the impugned rules) in other buildings in Johannesburg.⁵ Hence, it is important that this Court determines the constitutionality of the

³ Section 26(1) and (2) of the Constitution provide that:

(1) *Everyone has the right to have access to adequate housing.*

(2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.*

⁴ Applicants’ Heads of Argument at paragraphs 73 – 79.

⁵ City’s AA in the Constitutional Court, para 56 - 57: vol 17, p 1502.

lockout rule and the gendered separation of families, as the disproportionate impact of such rules on women will arise again in the future.

7. The structure of these submissions is as follows:
 - 7.1. First, we discuss the recognition of women's right to adequate housing in international law and describe the most important statements on women and housing rights in international treaties and by international monitoring bodies;
 - 7.2. Second, we explain why the gendered perspective on the right to housing is necessary and relevant to the present case; and
 - 7.3. Finally, we summarise the implications of applying the international law on women's right to adequate housing in this case.

WOMEN'S RIGHT TO ADEQUATE HOUSING IN INTERNATIONAL LAW

8. The right to adequate housing is recognized in international human rights law as both a self-standing right and as a component of the right to an adequate standard of living.
9. Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR") is the essential codification of the right to adequate housing in international law. South Africa ratified the ICESCR on 12 January 2015, rendering the Covenant binding under South African law with effect from 12 April 2015.⁶
 - 9.1. Article 11(1) provides that States parties "*recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing*" and commits States parties to "*take appropriate steps to ensure the realisation of this right*".

⁶ The ratification instrument is available at http://www.seri-sa.org/images/ICESCR_CN_23_2015-ENG.pdf.

- 9.2. Article 11(1) must be read with Article 2(1), which obliges each State Party “to take steps to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”
10. In General Comments 4, 7 and 16, the UN Committee on Economic, Social and Cultural Rights (“the Committee”) has provided considered guidance on the content and significance of the right to adequate housing under the ICESCR. In these Comments, the Committee has –
- 10.1. emphasised the importance of the right to adequate housing for the enjoyment of other human rights;
 - 10.2. endorsed a generous interpretation of the right premised on the right to human dignity; and
 - 10.3. recognised that women have particular housing needs and vulnerabilities, which cannot simply be addressed by gender-neutral laws and policies.
11. Specifically –
- 11.1. In General Comment 4, the Committee recognised that the right to adequate housing “is of central importance for the enjoyment of all economic, social and cultural rights”.⁷ It emphasised that –

“The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views

⁷ UN Committee on Economic, Social and Cultural Rights, General Comment 4 (1991): The right to adequate housing (Art. 11(1) of the Covenant), para 1. Adopted at the Committee’s Sixth Session on 13 December 1991. UN Document E/1992/23.

*shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.”*⁸

11.2. Both General Comments 4 and 16 recognise the need to address gender discrimination in the enjoyment of the right to housing.⁹ In General Comment 16, the Committee emphasised the importance of a substantive notion of gender equality in the realisation of socio-economic rights, and noted that this cannot be achieved by gender-neutral laws and policies, but requires laws, policies and practices that take account of existing economic, social and cultural inequalities experienced by women.¹⁰

11.3. In General Comment 7,¹¹ the Committee focused on forced evictions as a violation of the right to adequate housing. It noted the particular vulnerability of women and children in evictions, and that women face “*particular vulnerability to acts of violence and sexual abuse when they are rendered homeless*”.¹²

12. Other international and regional instruments, which South Africa has ratified, specifically require the protection of women’s right to housing:

12.1. The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, which entered into force in 2005 and which South Africa has ratified,¹³ specifically guarantees the rights of

⁸ General Comment 4, para 7, emphasis added.

⁹ General Comment 4, para 6.

¹⁰ General Comment 16, paras 7 and 8. See also General Comment 4, para 6.

¹¹ UN Committee on Economic, Social and Cultural Rights, General Comment 7 (1997): The equal right to adequate housing (Art. 11.1 of the Covenant): forced evictions. Adopted at the Committee’s Sixteenth Session, 20 May 1997. UN Document E/C/1998/22, annex IV.

¹² General Comment 7, para 10.

¹³ African Union, ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,’ adopted by the 2nd Ordinary Session of the Assembly of the Union (Maputo, 11 July 2003), entered into force 25 Nov. 2005. South Africa ratified the Protocol on 17 December 2004.

The African Charter provides further that “*the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions*” (art. 18.3).

women to adequate housing.¹⁴ The Protocol further guarantees every woman respect for her life and the integrity and security of her person, and requires State parties to adopt and implement appropriate measures to ensure the protection of every women's right to respect for her dignity and protection from all forms of violence.¹⁵

12.2. The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)¹⁶ recognises the housing needs of rural women in particular and associates their lack of access to adequate housing with discrimination against women.¹⁷

12.3. Although the African Charter on Human and Peoples' Rights¹⁸ does not include an explicit right to housing, the African Commission on Human and Peoples' Rights recognised that it does confer a right to housing in *SERAC v Nigeria*.¹⁹ The Commission held that the right to family life in the African Charter was one of the cluster of rights whose combined effect is to guarantee the right to shelter and housing:

See also the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* at para 6, which provide that States parties submitting reports on what they have done to give effect to their socio-economic rights obligations under the African Charter must: "Provide information on legislative and practical steps taken to ensure enjoyment of the rights on a non-discriminatory basis by members of vulnerable or marginalised groups as defined in the Principles and Guidelines. Reports should particularly indicate what steps have been taken to ensure gender equality." (emphasis added)

¹⁴ Article 16.

¹⁵ Articles 3 and 4.

¹⁶ Adopted by General Assembly resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981. South Africa ratified CEDAW in 1995.

¹⁷ Article 14. The United Nations' Commission on the Elimination of All Forms of Discrimination against Women has issued a number of General Recommendations that underscore States parties' obligations to ensure adequate living conditions and housing for women, and linked this right to the enjoyment of other fundamental rights, including equality and health. See for example, UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Marriage and Family Relations' 13th session (1994), UN document A/49/38; UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 24 on Women and Health,' 20th session (1999), UN document A/54/38/Rev.1, chap. I, para 28.

¹⁸ African [Banjul] Charter on Human and Peoples' Rights (1981), adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986 and ratified by South Africa in 1996.

¹⁹ *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 ("SERAC").

*“[T]he corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.”*²⁰

13. In addition, various treaty bodies established to monitor States parties' compliance with international human rights instruments have examined the situation of women in relation to housing. These bodies have repeatedly recognised the importance of realising women's right to adequate housing for their empowerment and well-being, and have emphasised the necessity for State parties to adopt a gender-sensitive approach to housing laws and policies. Thus

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- 13.1. In 2002, the United Nations' Commission on Human Rights entrusted the Special Rapporteur on the Right to Adequate Housing with the task of conducting a global study on women and adequate housing.²¹ The Special Rapporteur presented two reports to the Commission, in 2003 and 2008.²² The Special Rapporteur identified various factors inhibiting women's access to adequate housing, and found that there is a “*clear link between violence against women and the human right to adequate housing*”.²³

²⁰ *SERAC* at para 60.

²¹ UN Commission on Human Rights, Resolution 2002/49: “Women's equal ownership of access to and control over land and the equal rights to own property and to adequate housing”.

²² Miloon Kothari, *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination*, adopted by the United Nations Commission on Human Rights at its Fifty-ninth session, March 2003. UN Document E/CN.4/2003/55; Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the United Nations Human Rights Council at its Seventh session, February 2008. UN Document A/HRC/7/16.

²³ UN Special Rapporteur (M Kothari) Second Report, 2008 at para 40.

13.2. In 2005, the United Nations' Commission on Human Rights adopted a resolution on women's equal rights to adequate housing,²⁴ in which it recognised that *"the lack of adequate housing can make women more vulnerable to various forms of violence"*. The Commission reaffirmed *"women's right to an adequate standard of living, including adequate housing"* and urged Governments to comply fully with their international and regional obligations and commitments concerning the equality of women to an adequate standard of living, including adequate housing.²⁵ It further affirmed that *"discrimination in law and practice against women with respect to . . . housing constitutes a violation of women's human right to protection against discrimination and may affect the realisation of other human rights."*²⁶

13.3. In 2011, the UN Special Rapporteur on the Right to Adequate Housing reiterated that *"Legislative and policy measures must be put in place at national and regional levels explicitly prioritising women's right to adequate housing"*.²⁷ This required, inter alia, that *"States should design, adopt and implement gender-sensitive and human rights-based law, policy and programming which (...) reflects international human rights standards related to women's right to adequate housing, and a gender-sensitive understanding of the elements of the right to adequate housing"*.²⁸

²⁴ UN Commission on Human Rights Resolution: 2005/25, "Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing", adopted at the Commission's ^{51st} meeting on 15 April 2005; UN document: E/CN.4/2005/L.10/Add.10

²⁵ Id at para 2.

²⁶ Id at para 3.

²⁷ Raquel Rolnick, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the UN Human Rights Council at its 19th Session in December 2011. UN document A/HRC/19/53. See paras 30 to 52.

²⁸ Id at para 63. See also para 70.

13.4. In Europe, the Commissioner for Human Rights observed in a 2008 Issue Paper²⁹ on Housing Rights that:

“The violation of the right to adequate housing may have different meanings for women and men. . . Women usually bear the primary responsibility for sustaining and maintaining homes, and it is vital that this critical role is recognized and their rights advanced. Any understanding of adequate housing in relation to women must take into account the context and housing and living conditions of the community and the family in which they live. The impact of inadequate living conditions and homelessness on children therefore becomes equally important for their mothers. The lives of many women are intrinsically linked to those of their families and their children. Homelessness for women carries great dangers. Accordingly, national Governments and the international community need to ensure that women are accorded substantive rather than illusory housing rights. . . . Moreover, laws and policies must be articulated and implemented in ways that recognize the specific constraints and vulnerabilities of women in relation to the right to adequate housing. The attainment of legal security of tenure is of critical importance to a large number of women. . . . Access to decent housing is a precondition for the exercise of other fundamental rights and for full participation in society.”³⁰

(Emphasis added)

13.5. In 2009, the Commissioner for Human Rights of the Council of Europe endorsed the interpretation of the right to housing under General

²⁹ Issue Papers are commissioned and published by Europe’s Commissioner for Human Rights for the purpose of contributing to debate or further reflection on a current and important human rights matter.

³⁰ Council of Europe Commissioner for Human Rights, “Housing rights: The duty to ensure housing for all” (Strasbourg, 2008). Document CommDH/IssuePaper(2008)1, section 2.2.

Comment 4,³¹ as “*the right to live somewhere in security, peace and dignity*”. The Commissioner noted that the right “*is of central importance to the enjoyment not only of other social, economic and cultural rights such as rights to water, food, health, education and work, but also to the effective enjoyment of civil and political rights such as rights to privacy and family life*”.³² The Commissioner urged States to adopt national housing strategies that “*apply a gender perspective, identify disadvantaged and vulnerable groups and include positive measures for ensuring their effective enjoyment of the right to housing*” and “*to adopt anti-violence provisions in housing legislation*”.³³

14. The commentary on international law by expert bodies and holders of mandates under treaties as set out above reflects recognition of the following principles:
 - 14.1. First, protecting women’s access to adequate housing is fundamental to their enjoyment of other human rights, including the right to family life;
 - 14.2. Second, a gendered perspective on the right to housing is necessary to ensure women’s effective enjoyment of the right to adequate housing; and
 - 14.3. Third, the protection of women’s right to adequate housing requires States to adopt focused and positive measures in legislation, policies and programmes.

WHY A GENDERED PERSPECTIVE IS IMPORTANT AND NECESSARY

15. The emphasis in international human rights law on women’s right to adequate housing is premised on the recognition that, for women especially, their right to

³¹Council of Europe Commissioner for Human Rights, “Recommendation of the Commissioner for Human Rights on the implementation of the right to housing” (Strasbourg, 30 June 2009), Document CommDH(2009)5.

³² Section 2.1.

³³ Section 5.

adequate housing is intimately connected to their security, health, livelihood and overall well-being. There are three main reasons for this:

15.1. First, women typically bear the primary responsibility for sustaining and maintaining homes. As a result women tend to spend more time at home, and are often disproportionately burdened with child-care and household chores which depend directly on the availability of the facilities and infrastructure associated with adequate housing.³⁴ The recognition that women continue to bear these responsibilities disproportionately should not be interpreted as reinforcing the old, discriminatory adage that “a women’s place is in the home”, or confining women to certain gender roles. Rather, it is about acknowledging that gender as a social construct fundamentally impacts on the ways in which women experience their housing situations and that in order for women to enjoy adequate housing on the basis of equality their needs must be understood.³⁵

15.2. Second, women are particularly vulnerable to gender-based violence outside their homes and when rendered homeless.³⁶ This consideration is clearly relevant in South Africa, which has a high rate of violence against women.³⁷

³⁴ Raquel Rolnick, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the Human Rights Council at its 19th Session in December 2011. UN document A/HRC/19/53, para 38.

³⁵ The Special Rapporteur, Raquel Rolnick, makes a similar point at para 4 of her report (ibid).

³⁶ Id at fn. 37; the UN Commission on Human Rights resolution 2004/28 on forced evictions; Miloon Kothari, *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination*, adopted by the United Nations Commission on Human Rights at its Fifty-ninth session, March 2003. UN Document E/CN.4/2003/55, para 40.

³⁷ Record, vol 15, pp. 1241–1246: CALS filed a report from the Centre for the Study of Violence and Reconciliation (CSVVR) and crime statistics, which evidenced the high rates of gender-based violence in South Africa. They also indicated that a relatively high proportion of sexual offences occurred outside, in an open space like a field or park, and in the late afternoon/early evening period. The 2012 Statistics of South Africa’s Crime Survey showed that 34% of sexual offences occurred in an outside open space. The CSVVR reported that of its study of approximately 800 reported rapes (most of which occurred in the Johannesburg Magisterial District between 1996 and 2000), some 25% of rapes took place outside, on open ground and other sites included public toilets and alleys. The study also showed a discernable increase in rape during the evening, from 4 to 6pm.

- 15.3. Third, access to adequate housing is instrumental to the social empowerment and equality of women. Inadequate and insecure housing renders women vulnerable to dependency, gender-based violence and other forms of exploitation. This results in the violation of other rights, including dignity, equality and freedom and security of the person.
16. In order for women to enjoy adequate housing and related rights, their needs must be understood and addressed in housing laws, policies and programmes.
17. Gender-neutral laws and policies that fail to take into account women's needs and vulnerabilities threaten to perpetuate gender discrimination and the exercise and enjoyment of other fundamental rights.³⁸
18. As the applicants have forcefully argued, this is indeed the effect of the City's rules at the Ekuthuleni shelter.³⁹ We do not repeat those submissions, but highlight the evidence in the record that demonstrates the disproportionate impact of the shelter rules on the women living at Ekuthuleni.

The lock-out rule

19. The impact of the lock-out rule on women's child-care is evidenced in the case of the first applicant, Nomsa Ellen Dladla and her then 8 year-old granddaughter, Ayanda, who share a room at the shelter.⁴⁰ Ms Dladla feared for her safety and that of her granddaughter when roaming the streets of Johannesburg.⁴¹ As Ms Dladla explains in her replying affidavit, she was compelled to place her granddaughter in a children's home because the shelter conditions did not enable her to provide a safe environment for the child.⁴² In February 2016, the Children's Court restored custody of Ayanda to Ms Dladla,

³⁸ See further United Nations' Office of High Commissioner for Human Rights, *Women and the Right to Adequate Housing* (New York and Geneva, 2012), UN doc: HR/PUB/11/02, pp. 42-44.

³⁹ Respondents' heads of argument at paras 84-97.

⁴⁰ FA, para 66: vol 1, p 37.

⁴¹ FA, para 72 - 73: vol 1, p 38.

⁴² RA, para 1: vol 5, p 352.

on the basis that Ms Dladla would be permitted to remain with her indoors during the day (by virtue of the interim interdict granted by Satchwell J).⁴³

20. Ms Dladla has further expressed how splitting up families and being locked out of the shelter during the day “*demeans*” and disempowers the occupants, who are made to feel like children as a result.⁴⁴ This experience of ‘infantilisation’ by women at the shelter is supported by the expert evidence of psychologist, Professor Steven,⁴⁵ who explains that:

*“The imposition of daytime lockouts tends to infantilise homeless people, undermine their dignity and impair their sense of agency. The imposition of rules separating them from their friends or relatives, or excluding them from shelter during the day, tends to produce a sense of powerlessness.”*⁴⁶

21. As a result of the daytime lockout rule, another woman staying at the shelter, Magdaline Malindsa, is forced to “*walk around the streets or sit in the nearby park*” when she does not have piecemeal work.⁴⁷ She is deprived of a secure and non-threatening environment for many days of the month, as she has little work.⁴⁸
22. The impact of the day-time lock-out rule on the occupants’ well-being, health and security is described in the report of Ms Makhanya (a social worker who assessed certain of the occupants). She explains that the occupants “*feel they have lost control of their lives and their housing situation*”; “*have become very anxious for their safety in the streets. The common worries include being hit by*

⁴³ FA in Constitutional Court, para 54.1: vol 16, p 1382.

⁴⁴ RA, paras 5 and 57: vol 5, pp. 353 and 372.

⁴⁵ Annexure A to replying affidavit: vol 12, pp. 1012-1023.

⁴⁶ Id at para 18, vol 12, p. 1017.

⁴⁷ FA, paras 114 and 115: vol 1, p 47.

⁴⁸ See Makhanya’s report, Record: vol 15, p 1249.

a car, robbed or abducted". Makhanya further explained that *"The rule denies employed clients the opportunity to rest when they are off. They related that this affects their performance at work because they are always tired"* and that the rule *"immobilises them with all of them spending their time at a local park"*.⁴⁹

23. The experience of Samunkeliswe Mkwebu, who stayed at the shelter with her then- 15 month-old daughter, also highlights the impossible constraints that the lockout rule places on women with young children. While the shelter initially made an exception Ms Mkwebu to remain at the shelter from 08h00 to 13h00 in order to care for her baby,⁵⁰ from November 2012 (when the baby was 16 months old), she was only permitted into the front yard of the shelter to feed her child.⁵¹

The separation of families

24. The separation of families and cohabiting couples at the shelter also has a detrimental impact on women. In particular, it deprives women of privacy and family life, as they are denied intimacy and the support of their partners and husbands. The rule also increases the burden that women carry in maintaining families and children, as it is the women who are made to bear the sole responsibility for child-care in the sleeping quarters. In this respect, the rule entrenches patterns of gender discrimination in the family.
25. The impact of this rule on family life is evidenced by the case of Jackinah Kganyago and Samson Maitisa, who are married under customary law. When they resided at the shelter, they were not permitted to share a room.⁵² After

⁴⁹ Makhanya's report: vol 15, pp. 1247-1254, paras 1.1.2; 1.2; 1.3; 1.5.

⁵⁰ FA, paras 100-103: vol 1, pp 44-45.

⁵¹ RA, para 59: vol 5, p 373.

⁵² FA, para 91: vol 1, p 43.

being relocated to the shelter, they were separated from their children, then aged 10 and 17 years, who they sent to live in Limpopo.⁵³

26. The separation of their family and their separation as a couple is described as being “*painful and humiliating*” for Ms Kanyago and Mr Maitisa. Ms Makhanya, a social worker who assessed certain of the residents, described the impact of the separation of the couple as “*compromising and disrupting the family unit*”; “*having created an emotional distance in their relationship*”; “*presented a loss of support for them in one another*”; and having “*created an additional financial burden on the couple’s limited financial resources because they need to travel to Limpopo to have normal intimate relations.*”⁵⁴ The couple have since moved out of the shelter.
27. The result of these experiences is that the women occupants at the shelter are deprived of the right to adequate housing at the shelter. It is not a place where they are able to live in security, peace and dignity. Their rights to family life, dignity, privacy and security are also seriously compromised by the shelter rules, and their right to equality is infringed by virtue of the fact that the shelter rules impact disproportionately on them as women.

CONCLUSION

28. International law on the right to adequate housing requires the City (and the State at large) to give special consideration to the rights of women and their particular housing needs in formulating and implementing housing policy. The international law makes it clear that the right to adequate housing – and adequate or reasonable housing laws, policies and programmes – requires a gender-sensitive approach. This is demonstrably absent from the rules imposed at Ekuthuleni. In particular the rules have no regard to the social reality that:

⁵³ FA, paras 91 and 93: vol 1, p 43.

⁵⁴ Makhanya’s Report, vol 15, p 1253

- 28.1. Women at the shelter have special housing needs due to their responsibilities as primary care-givers, and they depend more heavily on access to household infrastructure and services as a result; and
- 28.2. Women have a particular dependency on housing as a place of safety and security, for themselves, their families and their children.
29. Given their detrimental and discriminatory impact on women, the Ekuthuleni shelter rules are, we submit, unreasonable within the meaning of s 26(2) of the Constitution. The result is that the City has failed to comply with its obligation under s 26(2) of the Constitution in the implementation of its temporary accommodation programme at Ekuthuleni.
30. While the High Court was content to declare the rules invalid for violating ss 10, 12 and 14 of the Constitution, we submit that this Court ought also to declare that the rules do not meet the requirement of reasonableness under s 26(2) of the Constitution. This is important to accord with the international law on the right to housing. It is also necessary to provide certainty as to the true nature and source of the City's constitutional obligations in its provision of temporary accommodation to evictees.
31. In light of the above, CALS submits that this Court should uphold the appeal and grant the relief sought by the applicants. In particular, we respectfully submit that this Court ought to address the City's failure to comply with its obligations under s 26(2) of the Constitution.
32. As is the ordinary rule in relation to costs for amici curiae, CALS does not seek its costs in the appeal and submits that no costs should be awarded against it in the appeal. Given the City's unreasonable persistence in opposing its admission as an amicus curiae in the High Court, CALS submits that the High Court

correctly awarded costs against the City in CALS' favour.⁵⁵ There is no reason for the Court to vary that order.

EMMA WEBBER

Sandton Chambers

13 January 2017

⁵⁵ *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at para 52.