IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBER: 39502/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

In the matter between:

DLADLA, ELLEN NOMSA & OTHERS Applicants

And

CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY First Respondent

METROPOLITAN EVANGELICAL SERVICES Second Respondent

Coram: WEPENER J

Heard: 12 August 2014

Delivered: 22 August 2014

Summary: Infringement of fundamental rights enshrined in Constitution – duty to desist – right to dignity obliges local authority to respect family unit also when it is obliged by law or court order to supply homeless persons with temporary accommodation.

JUDGMENT

WEPENER J:

[1] The applicants are all persons residing at a shelter known as Ekuthuleni Overnight / Decant Shelter (Ekuthuleni). They were relocated to the shelter pursuant to an order of the Constitutional Court[1] which order reads, inter alia, as follows:

'The City of Johannesburg Metropolitan Municipality must provide those Occupiers whose names appear in the document entitled "Survey of Occupiers of 7 Saratoga Avenue, Johannesburg" filed on 30 April 2008 with temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012, provided that they are still resident at the property and have not voluntarily vacated it.'

[2] Although this order was issued on 1 December 2011, some of the applicants in this matter are those occupiers referred to in the court order and are still housed in the temporary accommodation in Ekuthuleni. The relief sought by the applicants flow from them being housed at Ekuthuleni. A number of the original residents referred to in the court order in *Blue Moonlight* have already left Ekuthuleni, but nothing turns on this fact as there are indeed some of those individuals who are still, pursuant to the court order, being accommodated by the City of Johannesburg (the City) with the assistance of the second respondent.

[3] Whilst the applicants fall in a category of persons who require temporary or emergency accommodation, they do not fall into the category of persons who normally

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[1] See *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).

visit an overnight shelter as set out hereinafter. It is also common cause that the City's policy on how to deal with persons, such as those in the category of the applicants, has not been finalised.

[5] The first respondent is the City of Johannesburg, a metropolitan municipality and the local authority that was ordered to provide the residents with temporary accommodation as set out above. The second respondent is a company incorporated not for profit in terms of the Companies Act[2]. It operates the shelter with which this application is concerned.

[6] Although it was submitted on behalf of the second respondent that it is not an organ of State which can be subject to any order in this matter, the City did not advance this submission and indeed said in its written heads of argument that:

'This managed care model is managed and implemented on behalf of the City by the Metropolitan Evangelical Services, the second respondent herein….'

The court having brought this to the attention of counsel for the second respondent during argument, the issue was not further pursued. In the circumstances, despite the second respondent being the entity providing services for the City, the matter can be approached on the basis that it is acting on behalf of the City and that any order which this court may issue binding the City would be binding on the second respondent and would have to be implemented by the second respondent.

[7] At the outset of the hearing the Centre of Applied Legal Studies (hereafter referred to as CALS) applied to be admitted as an amicus curiae in the matter in order to submit a limited argument in relation to it. Although the application was (faintly) opposed by the first respondent only, this court ordered that the amicus be allowed to present argument.

[8] The relief sought by the applicants is as follows:

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[2] 71 of 2008.

‘1. Interdicting and restraining the respondents from evicting the applicant from the Ekuthuleni Shelter, Corner De Villiers and Nugget Street, Johannesburg (‘the shelter’) without an order of court authorising them to do so.

2. Declaring that rules 3 and 4 of the ‘Ekuthuleni Overnight / Decant Shelter House Rules’ are an unjustifiable infringement of the applicants’ constitutional rights to dignity, freedom and security of the person, privacy and access to adequate housing, enshrined in section 10, 12, 14 and 26 of the Constitution of the Republic of South Africa, 1996.

3. Interdicting and restraining the respondents from enforcing rules 3 and 4 of the ‘Ekuthuleni Overnight / Decant Shelter House Rules’ as against the applicants for the duration of the applicants’ stay at the shelter.

4. Declaring that the respondents’ refusal to permit the applicants to reside in communal rooms together with their spouses or permanent life partners is an unjustifiable infringement of the applicants’ constitutional rights to dignity, privacy and access to adequate housing, enshrined in section 10, 14, and 26 of the Constitution.

5. Directing the respondents forthwith to permit those of the applicants who wish to do so, to reside together with their spouses or life partners in communal rooms at the shelter, for the duration of the applicants’ stay at the shelter.

6. In the alternative to prayers 2 to 5, an order:

6.1 reviewing and setting aside the decisions by the first respondent, alternatively the second respondent, to apply rules 3 and 4 of the respondents’ Decant Shelter Rules to the applicants and to prohibit the applicants from living in rooms with their spouses or life partners; and

6.2 directing the respondents:

6.2.1 not to apply rules 3 an 4 to the applicants; and

6.2.2 to permit the applicants to reside in rooms at the Shelter together with their life partners or spouses.

7. Declaring that accommodation at the shelter does not constitute ‘Housing Assistance in Emergency Circumstances’ within the meaning of the Emergency Housing Programme, contained in Part 3 of the National Housing Code, 2009.

8. Declaring that the first respondent's failure to provide housing assistance in emergency circumstances to persons who, such as the applicants, are unable to pay R600 or more per month in rent is in conflict with sections 9 and 26(2) of the Constitution, and the Emergency Housing Programme, contained in the National Housing Code, 2009.

9. Directing the first respondent to devise and implement, within its available resources, a programme to provide housing assistance in emergency circumstances to persons, such as the applicants, who cannot afford to pay R600 or more per month in rent.'

[9] The background facts to this application are contained in the Constitutional Court judgment in *Blue Moonlight* and of particular relevance is the discussion regarding temporary and emergency accommodation[3]. Having sketched the factual background of the matter, the Constitutional Court issued the order already referred to above.

[10] The temporary accommodation provided by the City to the applicants is provided pursuant to the order of court[4]. It is the ambit of the temporary accommodation provided by the City upon which much of the applicants' case turns.

[12] Pursuant to the order of the Constitutional Court, the City concluded that it was obliged to supply the residents with temporary relief in an emergency situation as it had been afforded a period of five months to comply with the order. The conclusion of the City was, in my view, justified if regard is had to para 96 of the *Blue Moonlight* judgment[5]. Whether this has a bearing on the duties and obligations of the City is a question of interpretation and the clear statement in para 98 of the judgment[6]. However, whether a period of six months, twelve months or longer was foreseen, is of no

[3] *Blue Moonlight* paras 78 and 81.

[4] All parties were in agreement with this fact resulting in prayer 7 of the notice of motion not being pursued by the applicants.

[5] 'The findings are briefly summarised. To the extent that it is the owner of the property and the occupation is unlawful, Blue Moonlight is entitled to an eviction order. All relevant circumstances must be taken into account though to determine whether, under which conditions, and by which date, eviction would be just and equitable. The availability of alternative housing for the Occupiers is one of the circumstances. The eviction would create an emergency situation in terms of Ch 12. The City's interpretation of Ch 12 as neither permitting nor obliging them to take measures to provide emergency accommodation, after having been refused financial assistance by the province, is incorrect. The City is obliged to provide temporary accommodation. The finding of the Supreme Court of Appeal that the City had not persuaded the court that it lacks resources to do so has not been shown to be incorrect and must stand.'

[6] 'It must be emphasised that this case concerns temporary relief in an emergency as defined in Ch 12 and not permanent housing.'

consequence as it has turned out that some of the persons who were the beneficiaries of the order of the Constitutional Court are still, some three years later, housed by the City pursuant to that order.

[13] There are some factual disputes on the papers before me and it has not been shown that the well-established approach taken by our courts over a period of many decades should not be applied. The approach has been set out as follows:

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[7]'

[14] Certain disputes arose also by virtue of the contents of the replying affidavit and the City submitted that the applicants were not entitled to introduce that new evidence[8]. In addition, at the outset of the hearing I drew the parties' attention to the principles applicable to application proceedings regarding the sets of affidavits which may be filed[9]. Having regard to the aforegoing, the applicants did not persist to rely on the additional affidavits and new matter contained in the reply and no party applied for any additional affidavits to be accepted for purposes of this hearing. On the contrary, reliance on new matter and additional affidavits was specifically abandoned.

[15] As the matter stood at the outset of the hearing, a large number of issues required determination. The first issue was whether the allegation by the applicants that Ekuthuleni is their home, is correct. The City disputed that Ekuthuleni was the home of

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[7] *NDPP v Zuma* 2009 (2) SA 277 (SCA) at para 26.
[8] See *Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd and Others* 1974 (4) SA 362 (T) at 369B.
[9] *Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* 2013 (1) SA 161 (SCA) at paras 10-14.

the applicants on the basis that it is only temporary accommodation as in the case of a hotel or university residence. The City put it thus:

'The City denies that the applicants have a clear right or any right at all. This is because the facility is not a home within the meaning of section 26 of the Constitution. It is an institutional facility akin to a hospital. It is designed to do no more than alleviate the emergency housing situation that the applicants faced at the time.'

The relevance of the question of a home lies in the provisions of the PIE Act[10] as read with s 26(3) of the Constitution[11].

However, the City, in its written argument, accepted that it will need to apply to a court for an order to exclude any of the applicants from accessing Ekuthuleni, should such an applicant refuse to vacate Ekuthuleni at the City's behest. In the circumstances, the need for an order in terms of prayer 1 of the notice of motion has fallen away and the question whether Ekuthuleni is indeed the home of the applicants is no longer alive.

[16] During argument in reply, it was also submitted that prayers 7, 8 and 9 were not necessary to be adjudicated. The latter two prayers were not persisted with as it is common cause that the City is in the process of finalising the development and adoption of a policy framework for persons in the position of the applicants, but that it has not yet been finalised. The issue in prayer 7 is common cause and correct and needs no order. The issues which then remained were whether rules 3 and 4 issued by Ekuthuleni and the imposition of a policy to separate persons by gender, and in particular spouses or permanent life partners from each other, constitutes a violation of the applicants' constitutional rights. The rules complained of are contained in a set of rules which the second respondent, (admittedly with the approval of the City), made applicable to the applicants' day to day life. The rules read:

'3. The gate for the Shelter opens at 17h30 Monday – Sunday and closes at 20h00. All residents will be required to sign the register every night.

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[10] Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.

[11] 'Housing

26(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

4. All residents will be required to vacate the shelter by 08:00 in the mornings Monday – Friday and 09:00 on Saturday and Sunday.'

[17] The signing of the register is not in issue. It is the obligation of the applicants to vacate the shelter for the entire day, every day of the week, and to return during the late afternoon. The second bone of contention is that the shelter has a policy to separate genders to the extent that it also disallows spouses or permanent life partners from staying together. Incidental thereto, is the plight of mothers caring for their children during the day.

[18] The applicants' case, put simply, is that the limitations contained in rules 3 and 4 and the prohibition of spouses of living together are a violation of their constitutional rights as enshrined in s 10, 12 and 14 of the Constitution.

[19] The alternative prayers were sought only in the event of the court finding that Ekuthuleni does not afford the applicants a home, or that there is no infringement of their constitutional rights. Having come to the conclusion below, the need to consider the review sought by the applicants falls away. The issue is whether Ekuthuleni is the home of the applicants need not be decided and much of the voluminous paper work before me (and arguments contained in the written heads) have become moot since the concession which the City had made.

[20] The applicants base their application on the fact that the temporary accommodation in which they find themselves is their home. The City sets out a policy, as well as an amended policy since the judgment in *Blue Moonlight,* and describes the various steps and programmes which it implements regarding the supply of housing as well as emergency and temporary accommodation. As far a temporary accommodation is concerned, the City facilitates a transition of evictees, such as the applicants, from their temporary accommodation at Ekuthuleni to improved accommodation options, referred to as a movement along the housing ladder where persons on the lowest rung of the ladder need complete assistance and those on the highest would be in a position of transformation to housing where no assistance is required by them.

[21] The City's version and argument were that Ekuthuleni is an overnight facility, being temporary accommodation akin to hotels, hospitals and student residences providing occupation for a limited period of time without ever constituting the occupants' home. The mere fact of residence, so it was submitted, does not make an institution, such as Ekuthuleni, a home notwithstanding the fact that an individual may have no other access to accommodation. It was further submitted that the notion of shelters as temporary accommodation would be rendered futile if residents would be allowed to claim the shelter to be their home and set up permanent residence there. The essence of temporary accommodation, so it was submitted, is that the occupants must be transitory to the higher rungs of the accommodation ladder as they progress and socially transform with assistance and care of social workers. It is in these circumstances that the supply of the temporary accommodation is referred to as a managed care program for persons in need of accommodation in contrast to permanent settlement solutions.

[22] In its quest to find service providers to supply temporary accommodation, the City engaged the second respondent who was the only entity that agreed to comply with the City's requirements. The City states that this managed care model is in place in order to assist individuals to improve their station in life. These persons, like the applicants, must actively participate in the process and co-operate in order for the model to be beneficial to them. They must consult with the social workers, participate in the needs analysis, participate in the compilation of individual development plans and pursue the goals of the individual development plans whilst attending training, job interviews and the like. It further contends that the provision of a roof over one's head is only one facet of the enhanced shelter model, employed at Ekuthuleni. The aim is to empower destitute individuals, families and communities through a holistic model that addresses their physical, emotional, mental and spiritual needs. The destitute are provided with skills and or opportunities in order to put them into a position to transition to improve their life station.

[23] The second respondent was originally formed by church organisations and has developed to a non-profit institution providing much needed help for the poor, homeless

and destitute. The managed care model, and as the name of the shelter indicates, primarily caters for the supply of overnight facilities. It is not a facility primarily developed to accommodate persons in an emergency or temporary, as ordered in *Blue Moonlight*. The City utilised existing facilities, ie the overnight facilities, in order to attempt to satisfy the order of the Constitutional Court.

[24] What is not in dispute is that the need for temporary accommodation far outweighs the City's ability to provide it. In so far as the applicants allege that they are accommodated in 'purported fulfilment of its obligations… under the National Housing Code, 2009', I have already indicated that the prayer in relation to such relief has been abandoned as the parties are aware that the City does not have a policy for this category of accommodation in place and that it is only the temporary emergency accommodation, pursuant to the order of the Constitutional Court, that is relevant.

[25] The deponent, on behalf of the second respondent, Jacques Pienaar (Pienaar), who joined the second respondent in 1996 as a volunteer, and who is currently its executive manager: finance and information technology, set out the particulars of the facilities supplied by the second respondent in some detail and I may not do justice to it in the following summary, though the broad outline is given so as to understand its make-up. The Ekuthuleni facility consists of thirty gender differentiated dormitories or rooms which can accommodate one hundred people. The relatively small rooms have bunk beds and there are common areas with kitchen and dining facilities. Each occupier has a locker for the storage of food and a trunk for personal items. Other items are locked in three locked store rooms. There are also gender differentiated ablution facilities, a communal study area, a court yard and television room.

[26] Pienaar's evidence is that the second respondent, and consequently Ekuthuleni, complies with all relevant by-laws and legislation at the facility. It is cleaned daily and has a twenty four hour guard service and security system. The facility has a manager on duty seven days a week. During October 2012 a security gate was installed between the dormitories of the men and women after incidents where a male person harassed female residents, which included sexual harassment. Pienaar relates other incidents which, in the view of the second respondent, justified the separation of males and

females by way of a security gate. Added to the accommodation there is a centre a short distance away where hot meals are served each day, social development services are offered and a crèche is supplied for young children. There are computers available for use. Internet and local newspapers are made available for purposes of investigating employment opportunities and assistance is given for the compiling of curriculum vitae for submission for employment opportunities. There is, in addition, a health care clinic and hospice which has an in-patient unit and which provides health care services to the occupiers of all the second respondent's facilities, including the occupiers of Ekuthuleni. There is also a soccer field for five-a-side soccer available. All the above facilities are supplied to residents at no charge. Pienaar alleges that the facilities are in contrast to the living conditions at Saratoga Avenue, the building from which the occupiers were evicted and thereafter placed in Ekuthuleni. At Saratoga Avenue there was no sanitation, no running water and no electricity. There was no cleaning service and the place was unhygienic and pest ridden.

[27] Pienaar states that Ekuthuleni is not only the supplier of a roof over their head for destitute persons, but the second respondent attempts to address the physical, emotional, mental and spiritual needs of those in its 'managed care model'. The end result is that the second respondent's ultimate goal is, as set out by Pienaar, as follows:

'The ultimate goal of the enhanced shelter model is to assist persons to re-integrate with the community and to become self-sustaining members of society. The approach is one that provides opportunity and promotes aspiration. This approach is premised on the notion that individuals ought to take responsibility for their lives and to seek to live independent and meaningful lives.'

The shelter is subject to a three-phased programme being intake, intervention and sustainable exit. The last stage is stated to be a phase where the occupier, after receiving all the support offered by Ekuthuleni, exits it to be self-sustainable. Pienaar says:

'It is clear that the enhanced shelter model is therefore a multi-disciplinary response to a socio-economic challenge, which involves a process from being homeless to becoming self-sustaining.'

And further:

'The shelter is merely a stepping stone to housing options. Once an individual leaves the shelter and becomes self-sustaining, he or she secures other accommodation that is affordable and accessible. In so doing, s / he / makes way for another needy individual in the shelter and so the cycle of social empowerment takes place.'

Pienaar adds that the accommodation at the shelter is provided for a short period of time, generally six months, but which period can be extended up to twelve months on approval of a social worker. This extended period is in order to permit an individual to complete his or her development plan in order to make a sustainable exit.

[28] The model described as the managed care model, is the model which the City utilises for persons who are destitute and who seek overnight accommodation on an ad hoc basis. These persons arrive at a shelter late in the afternoon and disappear again in the mornings. They are in a league of their own and are referred to as homeless individuals. The applicants are in a different category of persons. They were evicted form premises where they had stayed for a considerable period of time. They are now to be housed pursuant to the order in *Blue Moonlight*, which is a category of persons wholly different from those only seeking overnight accommodation.

[29] It is common cause that the City has not finalised its policy on how to deal with this category of persons, but that it is in the process of doing so – that being the reason why prayer 9 was not persisted with for the time being.

[30] The programme or the policy which the City applies to persons such as the applicants, whether they are to be housed for a period of six, twelve months or longer as practice has shown, requires some consideration. The City imposed, inter alia, the rules which it imposes on destitute persons using its overnight facilities by requiring them to leave the facility by day and by separating family members by gender. The applicants contend that these rules violate their fundamental rights as contained in ss 10[12], 12[13] and 14[14] of the Constitution. The applicants allege that the effect of the

[12] 10. 'Human dignity
Everyone has inherent dignity and the right to have their dignity respected and protected.'

regime imposed by Ekuthuleni is to deprive the residents of peace, privacy, security and dignity which any human being is entitled to associate with a home - this as a result of the two rules which allow them to be locked out of their homes during the day and prohibiting them from living with their spouses, life partners or children. Although the applicants refer to their home, I am of the view that the same can be said of the place where they reside.

[31] The separation of spouses (or life partners) is, in my view, an infringement of a fundamental human right. In Dawood[15], O'Regan J at paras 33 to 37, said:

'[33] In terms of common law, marriage creates a physical, moral and spiritual community of life. This community of life includes reciprocal obligations of cohabitation, fidelity and sexual intercourse, though these obligations are for the most part not enforceable between the spouses. Importantly, the community of life establishes a reciprocal and enforceable duty of financial support between the spouses and a joint responsibility for the guardianship and custody of children born of the marriage. An obligation of support flows from marriage under African customary law as well. In terms of Muslim personal law, the husband bears an enforceable duty of support of the wife during the subsistence of the marriage.

[34] Section 10 of the Constitution provides as follows:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

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[13] 12. 'Freedom and security of the person
(1) Everyone has the right to freedom and security of the person, which includes the right -
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.
(2) Everyone has the right to bodily and psychological integrity, which includes the right -
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.'

[14] 14. 'Privacy
Everyone has the right to privacy, which includes the right not to have -
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed.'

[15] *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC)

This Court has on several occasions emphasised the importance of human dignity to our constitutional scheme. It is clear from the text of the Constitution itself that human dignity is a fundamental value of our Constitution. Section 1 of the Constitution provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) human dignity, the achievement of equality, and the advancement of human rights and freedoms;

. . . ."

Similarly, s 7(1) of the Constitution states:

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

And s 36(1):

"The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. . . ."

Finally, s 39(1) states:

"When interpreting the Bill of Rights, a court, tribunal or forum -

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

. . . ."

[35] The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to

equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.

[36] In this case, however, it cannot be said that there is a more specific right that protects individuals who wish to enter into and sustain permanent intimate relationships than the right to dignity in s 10. There is no specific provision protecting family life as there is in other constitutions and in many international human rights instruments. The applicants argued that legislation interfering with the right to enter into such relationships infringed the rights to freedom of movement and the rights of citizens to reside in South Africa. It may well be that such legislation will have an incidental and limiting effect on these rights, but the primary right implicated is, in my view, the right to dignity. As it is the primary right concerned, it is the right upon which we should focus.

[37] The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many, if not most, people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance. In my view, such legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of spouses to honour their obligations to one another would also limit that right. A central aspect of marriage is cohabitation, the right (and duty) to live together, and legislation that significantly impairs the ability of spouses to honour that obligation would also constitute a limitation of the right to dignity. Like all rights, however, the question of whether such a limitation is unconstitutional or not will depend upon whether it is reasonable and justifiable in an open and democratic society in terms of s 36(1) of the Constitution.'

[32] Although the *Dawood* matter concerned legislation there is, in my view, no difference between legislation or rules imposed by an authority on persons, which rules have the same consequence, ie an infringement of the right to dignity.

[33] South Africa is also a member state of the African Union (formerly the Organisation of African Unity), and as such, accepted to be bound by the African Charter of Human and Peoples' Rights (the Banjul Charter). The Banjul Charter provides in article 18:

'1. The family shall be the natural unit and basis of society. It shall be protected by the

State which shall take care of its physical health and moral.

2. The State shall have the duty to assist the family which is the custodian or morals and

traditional values recognized by the community.

3. The State shall ensure the elimination of every discrimination against women and

also ensure the protection of the rights of the woman and the child as stipulated in

international declarations and conventions.'

[34] In addition, the African Union subscribes to the Grand Bay (Mauritius) Declaration and Plan of Action, 1999, which states in clause 10:

'The Conference recognizes that the development and energization of the civil society, the strengthening of the family unit as the basis of human society, the removal of harmful traditional practices and consultation with community leaders should all be seen as building blocks in the process of creating an environment conducive to human rights in Africa and as tools for fostering solidarity among her peoples.'

[35] In *Bernstein and Others v Bester and Others NNO*[16] the Constitutional Court held[17]:

'. . . A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. . . .'

[16] 1996 (2) SA 751 (CC)
[17] At para 77

[36] I am also of the view that the assumption that family accommodation must be provided is implicit in some of the more recent decisions locally. An example is *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*[18], where Wallis JA held[19]:

'. . . without greater detail as to their circumstances and their needs if evicted — the needs of a family with three children being different from those of three young men sharing living quarters — he could not be satisfied that the order he was making was just and equitable. . . .'

and[20]:

'. . . What the City needs to know is who requires temporary emergency accommodation and the nature of their needs, for example, whether dormitory accommodation would suffice or whether a flat of some sort is required for a family with children, or whether an aged or disabled person has some special needs. . . .'

[37] The rules and the limited gender separation as referred to herein which the applicants object to, in my view, have humiliating consequences. It compromises and disrupts the family as a unit; it creates emotional distance in a relationship; the inability to live as a family represents a loss of support for them of one another; it creates an additional financial burden or the couple's limited financial resources; couples must implement ways to mitigate the lack of communication that the rule imposes on them; the most basic associative privileges connected to a marriage or permanent relationship are denied to them.

[38] The splitting up of families at the shelter cuts to the very heart of the right to dignity and the right to family life. In the circumstances the applicants are entitled to a declaration that the splitting up of families by gender at Ekuthuleni, is in violation of ss 10, 12 and 14 of the Constitution.

[39] Once an infringement of a fundamental right has been established (and this fact was not seriously contended for otherwise by counsel for the respondents), the provisions of s 36(1) of the Constitution comes into play as a limitation of the

[18] 2012 (6) SA 294 (SCA)
[19] At para 10
[20] At para 47

constitutional right may be justified. The submission on behalf of the respondents was that the limitation is reasonable having regard to the purpose of the short term emergency accommodation which is provided. But even if the provision of accommodation was only for a period of six months (which it has been shown it is not), a violation of a fundamental right, enshrined in the Constitution, should not and cannot be justified unless it meets the provisions of s 36(1) of the Constitution. This aspect of the matter does not need much elaboration. Section 36 of the Constitution provides for a justified

'. . . limitation of the right, considering the nature and importance of the right, and the extent of its limitation on the one hand, . . . in relation to the purpose, importance and effect of the provision causing the limitation, taking into account the availability of less restrictive means to achieve the purpose of the provision, on the other.'[21]

The provision referred to by O'Regan J regarding the justified limitation should be introduced by a law of general application as set out in s 36(1) of the Constitution. No such law has been shown or submitted by the respondents to exist. In *August v Electoral Commission and Others*[22] it was said at para 23:

'In the absence of a disqualifying legislative provision, it was not possible for respondents to seek to justify the threatened infringement of prisoners' rights in terms of s 36 of the Constitution as there was no law of general application upon which they could rely to do so.'

[40] In the absence of any legislative provision there can be no justified limitation of the right of spouses (and life partners) to co-habit. Any infringement of that right is an infringement of the right to dignity and unconstitutional and falls to be struck down.

[41] In addition, the respondents aver that the daily lock-out rule admits of exceptions and will no longer be applied on weekends. But the default position, ie that the residents will be locked out of Ekuthuleni, unless special permission is granted, should be considered. In my view, the daily lock-out rule also violates the residents' rights to

[21] *Dawood* at para 40
[22] 1999 (3) SA 1 (CC)

privacy and dignity. In *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)*[23], the Constitutional Court said:

'The right to privacy recognises the importance of protecting the sphere of our personal daily lives from the public. In doing so, it highlights inter-relationship between privacy, liberty and dignity as the key constitutional rights which construct our understanding of what it means to be a human being. All these are therefore inter-dependant and mutually reinforcing. We value privacy for this reason at least – that the constitutional conception of being a human asserts and seeks to foster the possibility of human beings choosing how to live their lives within the overall framework of the broader community. The protection of this autonomy, which flows from our recognition of individual human worth, presupposes personal space within which to live this life.'[24] (footnotes omitted)

[42] The lock-out also results in residents being exposed to dangers inherent in street life and inhibits their freedom in material respects and thus clearly infringes on their right to freedom, security and dignity.

[43] If the applicants should feel unwell or wish to attend to some private or personal matter, it must be done or suffered elsewhere than the place where they stay. If they feel like a rest because of a hard day's work which may end earlier than the lock-out time, they are not able to return to their place of safety where their entire life possessions are kept. In my view, the rules breach their right to dignity, privacy and security and fall foul of the applicants' constitutionally entrenched rights.

[44] Although the argument, submitted on behalf of the amicus, mainly concentrated on the right to adequacy of housing, this was so because the issue was alive until the concession was made by the first respondent and the undertaking given that the applicants would not be evicted from the shelter without it first obtaining a court order. Nevertheless, the argument submitted by the amicus was, especially in relation to the African Charter of Human and Peoples' Rights (the Banjul Charter) and the Grand Bay (Mauritius) Declaration and Plan of Action, 1999, most valuable and of assistance to the court.

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[23] 2007 (5) SA 250 (CC)
[24] At para 131

[45] The second respondent is a supplier of services to the City. The City is the entity that was required by the Constitutional Court to house the applicants. The City has not finalised its plan of action. It opposed the application. It was not obliged to limit the housing of the applicants to a managed care model. I am of the view that the second respondent, as the service provider, should not be the party to bear the costs of the application.

[46] The amicus requested that the City should pay its costs in relation to the admission application only. The amicus relied on J*eebhai and Others v Minister of Home Affairs and Another*[25]*,* where it was held[26]:

'The amicus contended that the respondents ought to pay their costs for having unreasonably opposed their application to be admitted as amicus curiae in this court. In this matter the submissions of the amicus were of considerable assistance to the court. There were no proper grounds for opposing its application and I agree that it is appropriate that the respondents pay such costs.'

[47] The admission of the amicus was opposed to the end, though the argument was not convincingly presented before this court.

[48] The applicants were successful in their application. The City only conceded the relief in prayer 1, when submitting its heads of argument and the remainder of the relief was obtained in this court. In the circumstances I grant the following order which does not impact on the provision of gender separated ablution facilities:

1. Rules 3 and 4 of the 'Ekuthuleni Overnight / Decant Shelter House Rules' are an unjustifiable infringement of the applicants' constitutional rights to dignity, freedom and security of person, as well as privacy enshrined in ss 10, 12 and 14 of the Constitution.

2. The respondents are interdicted and restrained from enforcing rules 3 and 4 of the 'Ekuthuleni Overnight / Decant shelter House Rules' as against the applicants for the duration of the applicants' stay at Ekuthuleni.

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[25] 2009 (5) SA 54 (SCA)
[26] At para 52

3. The respondents' refusal to permit the applicants to reside in communal rooms together with their spouses or permanent life partners is an infringement of the applicants' constitutional rights to dignity and privacy, enshrined in ss 10 and 14 of the Constitution.

4. The respondents are directed forthwith to permit those of the applicants who wish to do so, to reside together with their spouses or life partners in communal rooms at Ekuthuleni for the duration of the applicants' stay at Ekuthuleni.

5. The City is ordered to pay the costs of the application, such costs to include the costs of two counsel. The City is further ordered to pay the costs of the amicus curiae in relation to its application to be admitted as amicus curiae.

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Wepener J

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S. Wilson

M. Stubbs

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