CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 124/16

In the matter between:

NOMSA ELLEN DLADLA	First Applicant
TEN RESIDENTS OF THE EKUTHULENI SHELTER	Second to Eleventh Applicants
and	
CITY OF JOHANNESBURG	First Respondent
METROPOLITAN EVANGELICAL SERVICES	Second Respondent
and	
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
CENTRE FOR CHILD LAW	Second Amicus Curiae

Neutral citation: *Dladla v City of Johannesburg* [2017] ZACC 42

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Mojapelo AJ, Pretorius AJ and Zondo J

Judgments: Mhlantla J (majority) [1] to [54]
Cameron J (concurring): [55] to [101]
Jafta J (concurring): [102] to [130]
Madlanga J (concurring): [131] to [133]

Heard on: 16 February 2017

Decided on: 1 December 2017

Summary: Temporary housing accommodation — constitutionality of Shelter rules — requirement that residents leave during day — prohibition on opposite-sex partners living together — Shelter rules unlawfully limited sections 10, 12 and 14 of the Constitution

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:

   "(a) It is declared that the application of rules 3 and 4 of the Ekuthuleni Overnight/Decant Shelter House Rules constitutes an infringement of the applicants' rights to dignity, freedom and security of the person, and privacy in sections 10, 12 and 14 of the Constitution.

   (b) The City of Johannesburg and Metropolitan Evangelical Services 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 the Shelter.

   (c) It is declared that the City of Johannesburg and the Metropolitan Evangelical Services' refusal to allow the applicants to reside in communal rooms together with their partners of different sexes is an infringement of the applicants' constitutional rights to dignity and privacy, enshrined in sections 10 and 14 of the Constitution.

(d) The City of Johannesburg and the Metropolitan Evangelical Services are directed to permit those of the applicants who wish to do so, to reside together with their partners of different sexes in communal rooms at Ekuthuleni for the duration of the applicants' stay at Ekuthuleni."

4. The City of Johannesburg is ordered to pay the applicants' costs including the costs of two counsel in this Court, the Supreme Court of Appeal and in the High Court of South Africa, Gauteng Local Division, Johannesburg.

JUDGMENT

MHLANTLA J (Mogoeng CJ, Nkabinde ADCJ, Mojapelo AJ, Pretorius AJ and Zondo J concurring):

Introduction

[1] This application for leave to appeal is against an order of the Supreme Court of Appeal.[1] The applicants in this matter were the subject of this Court's judgment in *Blue Moonlight*[2] and were evicted from a property in which they lived. This Court ordered the first respondent, the City of Johannesburg (City), to provide temporary accommodation to the applicants. The applicants are currently residing at the Ekuthuleni Shelter (Shelter). They moved to the Shelter after the City had concluded a contract with the second respondent, Metropolitan Evangelical Services (MES).

[1] *City of Johannesburg v Dladla* [2016] ZASCA 66; 2016 (6) SA 377 (SCA) (Supreme Court of Appeal judgment).

[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*).

[2] Two *amici curiae* made submissions to this Court. The first is the Centre for Applied Legal Studies (CALS), a civil society organisation and law clinic involved in advocacy and strategic litigation. Its focus areas include the provision of and advancement of basic services, gender related issues, the protection of the rule of law, business and human rights, and the protection of a clean and healthy environment. The second is the Centre for Child Law (CCL), a registered law clinic. Its main objective is to promote the best interests of children in South Africa.

[3] This matter concerns a constitutional challenge to the validity of certain rules, imposed by the City and MES, upon the applicants as a condition for living in the Shelter. The rules in question will be referred to as the "lockout" and "family separation" rules respectively. The lockout rule required that the applicants be out of the Shelter between 08h00 and 17h30 every day and return by 20h00, or face the prospect of not being allowed to enter the Shelter. The family separation rule prohibited men and women from living together through the provision of single-sex dormitories.[3] It also separated children from their caregiver depending on their age.[4]

Background

[4] The applicants are 11 of the 33 people that lived at 7 Saratoga Avenue, Berea (Saratoga Avenue) until their eviction in *Blue Moonlight*. They had previously lived at Saratoga Avenue for periods of up to 20 years. This Court had ordered all 33 persons to vacate Saratoga Avenue by 15 April 2012, subject to the condition that

[3] For ease of reference, the term "partners" will be used throughout the main judgment. In their submissions, the applicants and respondents referred to the family separation rule as applying to "spouses and permanent life partners". Because the family separation rule separated men and women, the rule's effect was that only heterosexual partners were separated. However, this Court recognises that using "partners" as a shorthand for the heterosexual couples that were affected by the forced division of men and women in separate dormitories does not imply that same-sex couples are excluded from the category of "partners" in the general sense of the term.

[4] Boys and girls under the age of 16 were forced to live with a female caregiver. Boys older than 16 were forced to live in the male dormitory, presumably with a male caregiver if present. Girls older than 16 would remain in the female dormitory.

the City provide them with "temporary accommodation in a location as near as feasibly possible to [Saratoga Avenue]".[5]

[5] The City was then forced to determine how to go about providing temporary accommodation to the evictees in order to comply with the order of this Court. In doing so, it conducted an analysis of this Court's order to assess whether its provision of temporary accommodation to the applicants would constitute "queue jumping", in the sense that the City would be providing them with accommodation ahead of those who had applied for accommodation through the necessary processes. The City concluded that, since it would not be providing permanent housing to the applicants, its provision of temporary housing would not amount to "queue jumping". It also assessed the extent of the plight of the evictees. The City's finding, based on its assessment, was that a majority of people, when faced with an emergency, would require minimum intervention, while some would not be able to take care of themselves. The City accepted that it would have to find a more permanent solution for the more vulnerable individuals.

[6] The City decided not to give the applicants housing in a temporary residential area, as provided for in terms of the Emergency Housing Policy in the National Housing Code.[6] It concluded that the best solution entailed a facilitation of what it viewed to be an "empowered" transition that would discourage a "dependency relationship" with it. The City envisaged that this programme would ensure that the evictees would at some stage move to rental accommodation and "take responsibility for their own lives". As a result, the City developed what it termed an institutional accommodation, which was a "managed-care policy", or temporary accommodation provision.[7] According to the City, this facility would be temporary and was not

[5] *Blue Moonlight* above n 2 at para 104.

[6] Department of Human Settlements "Part 3: Incremental Interventions: Emergency Housing Programme" in The National Housing Code (2009) (The National Housing Code).

[7] The City intends to implement managed-care policies at other shelters for people evicted from their homes.

intended to be a step in the realisation of the applicants' right of access to adequate housing.

[7] The City canvassed various service providers in the sector providing managed-care facilities. Its chosen service provider was MES, a non-profit company incorporated in terms of section 10 of the Companies Act.[8] MES operates the Shelter by providing relief for persons who are experiencing or have experienced a crisis and are in need of a residence. The Shelter, which accommodates approximately 100 people, is a temporary place for destitute individuals looking for employment. Its aim is to integrate persons into society, assist them to find employment and provide the persons with a shelter for a temporary period until they are self-sustaining. In this regard, MES provides its residents with temporary accommodation for a period of about six months, which can be extended to 12 months on approval of a social worker. This extended period permits an individual to complete his or her development plan, in order to make a sustainable exit. In addition to accommodation, MES also provides its temporary residents, free of charge, with food, as well as computers with internet access and local newspapers to facilitate job hunting.

[8] The City negotiated with MES on the cost implications and managed-care protocols that would be involved in temporarily housing the applicants. The parties concluded a contract in terms of which MES would provide the kind of accommodation envisaged by the City at the Shelter. At the time, the Shelter was not in use. As a result, the business of the Shelter changed from a traditional overnight facility into a managed-care facility. The City also retained the Shelter's "Ekuthuleni Overnight/Decant Shelter House Rules" (Shelter rules).

[9] The City, however, did not provide the temporary accommodation before the deadline set for the applicants to vacate Saratoga Avenue. As a result, the deadline was extended to 2 May 2012, by means of an interim order issued by the High Court

[8] 71 of 2008.

of South Africa, Gauteng Local Division, Johannesburg (High Court). Thereafter, the evictees from Saratoga Avenue engaged the City about their needs for accommodation. The parties agreed that those persons who could afford a rental of R600 per month would move to a property known as MBV Phase 2 and the applicants, who did not have the means to pay rent, would move to the Shelter.

[10] When they arrived at the Shelter, the applicants were told that their residency was conditional on their compliance with the Shelter rules set by MES. Two of these rules are the subject matter of this dispute, the lockout and family separation rules. The lockout rule forbade residents of the Shelter from being at the Shelter during the day and from leaving after certain times at night. In this regard, the applicants had to leave the Shelter from 08h00 and were re-admitted at 17h30. The gates of the Shelter were locked again at 20h00. This meant that any occupant who came back after this time had to find alternative accommodation for the night, which often meant sleeping on the street. The lockout rule could be relaxed if a special arrangement had been made for a resident to arrive after 20h00. The lockout rule is embodied in rules 3 and 4 of the Shelter rules. The second impugned rule, the family separation rule was enforced through the Shelter's provision of separate dormitories for male and female residents. The effect of the separation rule was that heterosexual couples were not allowed to stay in the same dormitory as their partners and were thus separated from their families. This rule is not expressly listed in the Shelter rules, but was strictly enforced by the Shelter management.

[11] The City contends that these conditions form part of what it describes as its "managed-care policy", which is intended to assist people like the applicants, by "[facilitating] the transition of evictees from a state of homelessness to a position of independence" through "a systematic approach that identifies the cause of the homelessness, and seeks to place an evictee in a position where they are able to secure their own permanent accommodation."

[12] The applicants contended that the rules had an adverse effect on them. For instance, in relation to the impact of the family separation rule, the first applicant lived with her granddaughter. The social workers advised her that the Shelter was not a suitable place for minor children. Consequently, the child was taken into care by the Department of Social Services, as the first applicant was not in a position to take care of her on the streets during the day when the child was not at school or was ill. Heterosexual married couples were also separated, and one couple stated that the enforced separation "felt like a divorce". At night, women would bear the duty of taking care of the children, as girls and boys under the age of 16 had to stay with their mothers. Boys older than 16 stayed with their fathers. This perpetuated gender stereotypes.

[13] In relation to the lockout rule, there is undisputed evidence that some of the applicants, who worked night shifts, were not permitted to sleep at the Shelter during the day. The rule also meant that the applicants could not stay indoors during the day in order to recuperate from medical procedures, such as trips to the dentist. Those who were unemployed were rendered vulnerable to violence as they had to wait outside or spend time in parks during the day.

[14] Due to the oppressive nature of the Shelter rules, some of the residents moved out of the Shelter, although they had no alternative accommodation. In fact, some ended up living in an old building, and one applicant even moved to a shack under a bridge. As a result, the applicants brought an application in the High Court and sought an interdict against the City and MES to prevent the further enforcement of these rules.

Litigation history

High Court

[15] In response to the interdict application, the High Court granted an interim order in terms of which the impugned rules were relaxed until all of the applicants were

successfully accommodated elsewhere. This, in effect, meant that the applicants were permitted access to the Shelter during the day and partners could live together.

[16] The applicants, thereafter, launched a constitutional challenge against these rules. They sought an order declaring that the lockout and family separation rules were unjustifiable infringements on their constitutional rights to dignity, freedom and security of the person, privacy, and access to adequate housing, enshrined in sections 10,[9] 12,[10] 14[11] and 26[12] of the Constitution.[13] In the alternative, the applicants

[9] Section 10 of the Constitution states:

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

[10] Section 12 of the Constitution reads:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
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> (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—
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> (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."

[11] Section 14 of the Constitution states:

> "Everyone has the right to privacy, which includes the right not to have—
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> (a) their person or home searched;
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> (b) their property searched;
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> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[12] Section 26 of the Constitution states:

> "(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.
>
> (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."

requested the High Court declare that the accommodation provided at the Shelter did not constitute "Housing Assistance in Emergency Circumstances" within the meaning of the National Housing Code.[14]

[17] The High Court held that the lockout rule was a violation of the rights to dignity, freedom and security of the person, and privacy. It caused the residents to be exposed to the dangers inherent in street life and inhibited their freedom in material respects.[15]

[18] The High Court also held that the family separation rule had "humiliating consequences" for several reasons.[16] It compromised and disrupted the family as a unit and created an emotional distance in the family relationship; and the inability to live as a family represented a loss of support for one another. The Court held further that the rule created an additional financial burden, on the limited resources of couples, as they would have to implement ways to mitigate the lack of communication that the rule imposed on them when the most basic associative privileges connected to a permanent relationship were denied to them.[17]

[19] As a result, the High Court held that the separation of families at the Shelter "cut to the very heart" of the right to dignity and the right to family life.[18] As a result, the High Court concluded that the family separation rule at the Shelter constituted an infringement on the rights enshrined in sections 10, 12 and 14 of the Constitution.

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[13] Although the applicants sought a declaratory order stating that the Shelter rules violated their section 26 rights, the High Court did not decide whether there was a section 26 violation, confining its order to sections 10, 12 and 14.

[14] The National Housing Code above n 6 at 15.

[15] *Dladla v City of Johannesburg* [2014] ZAGPJHC 211 (High Court judgment) at para 40.

[16] Id at para 35.

[17] Id.

[18] Id at para 36.

[20] Once it had established that the impugned rules amounted to infringements on the applicants' fundamental rights, the High Court applied section 36 of the Constitution[19] to assess whether the limitation of these rights could be justified. In this regard, the High Court held that section 36(1) provides that constitutional rights may be limited only by a "law of general application". The High Court held that the Shelter rules were not imposed by a "law of general application", and therefore did not represent a justifiable limitation of the applicants' rights in terms of section 36.

[21] As a result, the High Court concluded that the lockout and family separation rules of the Shelter were unjustifiable infringements on the applicants' constitutional rights to dignity, freedom and security of the person, and privacy enshrined in sections 10, 12 and 14 of the Constitution. The Court accordingly interdicted and restrained the City and MES from enforcing the rules against the applicants for the duration of their stay at the Shelter. In the light of this conclusion, the High Court did not consider the alternative claim, whether the Shelter constituted "housing in emergency circumstances" as required by the National Housing Plan.

Supreme Court of Appeal

[22] The City appealed to the Supreme Court of Appeal against the decision of the High Court. The Supreme Court of Appeal criticised the applicants for taking issue with the rules of a *bona fide* institution such as MES, rather than applying for an order that the accommodation provided by the City, through MES as its agent, was not that

[19] Section 36(1) provides:

> "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, taking into account all relevant factors, including—
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> (a) the nature of the right;
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> (b) the importance of the purpose of the limitation;
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> (c) the nature and extent of the limitation;
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> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

which had been ordered by the Constitutional Court.[20] The Court held that the lockout rule was "not dissimilar from those at other institutional buildings", and that its purpose "to ensure the safety and protection of the occupiers" and "to discourage an attitude of dependence" was not unreasonable in all circumstances.[21] Concerning the family separation rule, the Court reasoned that MES could not accommodate all the potential occupiers and allow men and women to sleep in the same dormitory without offending many people's sense of decency, modesty and decorum.[22] Furthermore, partners did not have the right, "always and everywhere", to sleep together. There were instances in which this right had to yield, albeit temporarily, to broader practical demands, such as those related to the business of the Shelter.[23] The Court held that, given all the circumstances, the rules were not unreasonable.

[23] The Supreme Court of Appeal accepted that the impugned rules infringed the applicants' constitutional rights but held that the infringement was reasonable. It further accepted the City's argument that, because the Shelter was not a permanent home but temporary accommodation, the applicants could not claim to have the same rights as they would have in their homes.[24] In reaching this conclusion, the Supreme Court of Appeal did not consider the question whether the rules were introduced by a "law of general application" as set out in section 36(1) of the Constitution. As a result, the Supreme Court of Appeal upheld the appeal and set aside the order of the High Court.

In this Court

[24] The applicants now seek leave to appeal against the decision of the Supreme Court of Appeal.

[20] Supreme Court of Appeal judgment above n 1 at para 24.

[21] Id at para 23.

[22] Id.

[23] Id.

[24] Id at paras 19-20.

Applicants' submissions

[25] The applicants submit that the City has not complied with the order in *Blue Moonlight* because the measures adopted by the City were inconsistent with the right of access to adequate housing in section 26 of the Constitution. The applicants submit that the temporary housing provided by the City is inconsistent with the state's obligation to take reasonable measures to progressively realise and give effect to the right of access to adequate housing in section 26. They contend that the lockout and family separation rules were designed to force them back onto the streets as admitted by the City.

[26] The applicants submit that their rights to dignity, freedom and security of the person, and privacy were infringed by the lockout and family separation rules. The High Court and the Supreme Court of Appeal both recognised that the rules were degrading to the applicants and disrupted family life. The High Court also held that the rules violated the right to freedom and security of the person and the right to privacy. The applicants support the conclusion of the High Court that the infringement on their rights by these rules was not a justifiable limitation in terms of section 36 because the rules were not introduced pursuant to a "law of general application". The applicants therefore submit that the order of the Supreme Court of Appeal should be set aside, and that the order of the High Court, on the unconstitutionality of the lockout and family separation rules, should be reinstated.

City's submissions

[27] The City submits that the rights in question do not apply because of the nature of the housing provided. Because the order in *Blue Moonlight* directed it to provide "temporary" housing, the City submits that the applicants are not entitled to the full gamut of rights included in the Constitution. Rather, what constitutes "reasonable" housing under section 26 depends on the emergency and the temporary nature of the arrangement. The City contends that the applicants had diminished expectations that "necessarily attenuated" the rights in question, and that the High Court erred in basing

its findings on the premise that the Shelter was a "home", which is commonly regarded as permanent housing. The City submits that the Shelter was only temporary in nature as opposed to a home. Therefore, there has been no infringement on the applicants' rights because the Shelter constituted reasonable housing in these particular circumstances.

[28] In addition, the City does not dispute the allegation that the rules had a negative impact on the applicants but submits that the High Court failed to consider the degree to which the rights in question were in fact limited by the impugned rules, taking into account the manner in which the rules were implemented. It explained that the applicants could ask for the relaxation of the rules in deserving circumstances. It denies that the rules caused much prejudice. The City submits that giving full effect to the panoply of rights in question would also necessarily undermine the City's ability to provide permanent housing in terms of its housing programme, in accordance with its constitutional mandate. Thus, the City submits that the Shelter constituted reasonable housing under section 26 in this specific context and denies that the applicants' rights to dignity, freedom and security of the person, and privacy were violated by the lockout and family separation rules. The City therefore submits that the applicants have not established that a violation of their constitutional rights has taken place in the light of the emergency nature of the arrangement, and, as a result, the need for a section 36 enquiry does not arise.

First amicus' submissions

[29] CALS submits that the right to adequate housing is recognised in international human rights law both as a self-standing right and as a component of the right to an adequate standard of living. CALS submits that international law is also concerned with the impact of housing on women. In particular, women's access to adequate housing is critical to their enjoyment of other human rights, and a gendered perspective must be adopted in order to give effect to women's right to adequate housing. States must also adopt measures tailored to bring about circumstances in which women enjoy the right to adequate housing. The right to adequate housing is

also integral to women's overall wellbeing. Because women are primarily responsible for taking care of the home, they are particularly vulnerable to gender-based violence outside the home, and adequate housing is necessary for their social empowerment. CALS concludes that the lockout and family separation rules are coercive and demeaning, and that they disproportionately affect women, as women are burdened by any disruptions in family life caused by the rules. The rules, therefore, violate international human rights law in a number of ways.

Second amicus' submissions

[30] CCL submits that the Supreme Court of Appeal erred in its determination that, because *Blue Moonlight* called only for temporary housing, the applicants do not enjoy the full gamut of constitutional rights to which they are entitled. CCL argues that the duty imposed by the order was that the applicants should be given a home, which is akin to permanent housing. It bases this argument on four grounds. First, although the order was vague, it did require that housing be provided close to the applicants' former homes. Second, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE)[25] itself protects the home of the evictee, and therefore, any remedy provided under it must be akin to a home, albeit a temporary one. Third, section 26(3) of the Constitution and legislation adopted pursuant to it, including PIE, show that there is a general protection against the invasion and loss of a home in the wide sense of the term. The right not to be arbitrarily deprived of a home in terms of section 26(3) of the Constitution must therefore be given a generous interpretation. Finally, any accommodation provided short of a home fails to take into account the rights of the child enshrined in section 28 of the Constitution, which are paramount in any matter in which they are concerned. Therefore, the applicants are entitled to a home in the wide sense of the term, no matter how temporary the arrangement may be. Therefore, because the lockout and family separation rules deprive the applicants of certain basic characteristics of the home, they violate the

[25] 19 of 1998.

right of access to adequate housing, as well as the rights to dignity, freedom and security of the person, and privacy.

Issues

[31] The issues to be determined are:

(a) Whether leave to appeal should be granted;

(b) If so, whether the applicants in their capacity as temporary residents are protected by the rights in sections 10, 12, 14 and 26;

(c) If so, whether the lockout and family separation rules infringe the rights in sections 10, 12, 14 and 26; and

(d) If so, whether the infringement constitutes a justifiable limitation of the applicants' rights.

Leave to appeal

[32] This Court is empowered to decide matters of a constitutional nature and any other matter that raises an arguable point of law of general public importance, which ought to be considered by it.[26] Additionally, it must be in the interests of justice for leave to appeal to be granted.[27]

[33] This application concerns the constitutional validity of the lockout and family separation rules imposed on the occupiers at the Shelter. It therefore raises constitutional matters that engage this Court's jurisdiction.

[34] Moreover, the City utilised MES as an agent in order to fulfil the obligations imposed on it by this Court's order in *Blue Moonlight*. As a result, the Shelter rules have become susceptible to constitutional challenge, as if the City itself had made them. The rules are not being challenged as a measure taken by a private actor, but

[26] See section 167(3)(b) of the Constitution.

[27] *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 29-31.

rather the manner in which the City – a public duty-bearer – decided to fulfil its constitutional obligation pursuant to the *Blue Moonlight* order. This is significant also because the Shelter is the City's pilot project, as it intends to implement these rules in future managed-care models. It will therefore impact future parties in need of temporary accommodation. The effect of this is that the issue before this Court is one of wider public importance, and it is in the interests of justice to decide it.

[35] It is also in the interests of justice that this Court determines the question whether the City complied with the order that this Court issued in *Blue Moonlight*, as it remains central to this application. These factors lead to the conclusion that leave to appeal be granted.

The constitutionality of the impugned rules

[36] In order to answer the question of whether the impugned rules are constitutional, it is first necessary to determine whether the City has materially complied with the order of this Court in *Blue Moonlight* through its provision of temporary accommodation to the applicants at the Shelter.

What was the City obliged to do in terms of the order in Blue Moonlight?

[37] The order in *Blue Moonlight* granted the City's application for leave to appeal, but dismissed the appeal. The order also upheld the occupiers' cross-appeal to a limited extent and set aside the order of the Supreme Court of Appeal in that case. This Court replaced the order of the Supreme Court of Appeal with an order that required the occupiers to vacate the property by no later than 15 April 2012, and that the City was to provide the occupiers with "temporary accommodation in a location as near as possible to the area where the property is situated on or before 1 April 2012". This Court declared the City's housing policy, which made a distinction between its obligation to provide temporary emergency accommodation to persons evicted from

public property and private property, to be unconstitutional.[28] According to the order in *Blue Moonlight*, anyone subject to an eviction order, whether from private or public property, must be provided temporary accommodation by the City. As a result, the occupiers could not be evicted until the City had provided them with temporary accommodation.

[38] In its discussion of the City's housing policy in *Blue Moonlight*, this Court referred to sections set out in the City's 2010 Housing Report in relation to "temporary accommodation".[29] The Housing Report defined "temporary accommodation" as "very cheap housing provided for a maximum of one year".[30] Given that the order was intended to extend the provision of temporary accommodation in the event of an emergency to persons evicted by private property owners, it can be inferred that the order intended to provide accommodation comparable to that provided to persons evicted by the City. The order also did not expressly impose any limitation on the occupiers' rights when it ordered the City to provide temporary accommodation.

[39] The City contends that the order was intended to diminish the rights of the applicants because it provided for temporary accommodation only. But the order did no such thing. In my view, the order meant that the City had to provide temporary accommodation in accordance with the general legal standards applicable to the provision of temporary accommodation. The order was made notwithstanding any other rights the occupiers had. The order certainly did not limit the rights in question in the present case, namely, the rights to dignity, freedom and security of the person, and privacy.

[28] *Blue Moonlight* above n 2 at para 104.

[29] Id at paras 27-8 and 78.

[30] Id at para 78.

[40] Moreover, this Court's decision in *Blue Moonlight* recognised that the issue of the provision of temporary accommodation necessarily implicates section 26(2) of the Constitution.[31] This decision was motivated by a concern that the occupiers would be rendered homeless should they be evicted.[32] At the same time, the Court held that, generally speaking, the risk of homelessness is the same whether a person is evicted by a private property owner or the City. Therefore, the Court eliminated the distinction between persons evicted from public property and those evicted from private property. As a result, the Court required the City to take reasonable measures, within its available resources, to prevent homelessness on the part of the applicants by providing temporary accommodation.

[41] The City complied, by providing temporary accommodation in the form of the Shelter, as required by section 26(2). However, the Shelter rules do not themselves constitute a measure in terms of section 26(2). Despite the fact that the Shelter rules were imposed by the Shelter, and were intended to form a part of the City's managed-care policy, they cannot be deemed measures for purposes of section 26(2). As the applicants note, were the Shelter rules removed, the resultant accommodation provided by the Shelter would be satisfactory. Thus, the Shelter rules can be separated from the provision of accommodation at the Shelter itself, which, again, satisfies section 26(2). Instead, the Shelter rules should be analysed separately, insofar as they implicate any other rights in the Constitution. So even though the temporary accommodation provided by the Shelter implicates section 26(2), the Shelter rules themselves at most implicate, as argued here, the rights to dignity, freedom and security of the person and privacy.

[42] The occupiers succeeded in obtaining a right to temporary accommodation pursuant to the eviction order. The Court ordered that the temporary accommodation

[31] Id at para 87.

[32] Id at para 100.

needed to be as close as possible to the occupiers' residence at the time.[33] As a result, the order in no way limited any of the occupiers' fundamental constitutional rights. Therefore, because the Shelter rules implicate the applicants' rights under sections 10, 12 and 14, those sections apply.

[43] While I accept that temporary accommodation is provided to alleviate a housing crisis and provides a structure for a limited period, I remain unpersuaded by the City's contention that, because the accommodation provided pursuant to the order in *Blue Moonlight* need only have been temporary, the applicants are not entitled to the full protection of the other fundamental rights in the Constitution during this temporary period. The argument, reiterated several times by the City, that the Shelter does not constitute a "home", and therefore the applicants had diminished expectations with respect to dignity, freedom and security of the person, and privacy is without merit. Just because the Shelter does not constitute a home in the everyday, colloquial sense of the term does not mean that the applicants are not entitled to the protection of their fundamental constitutional rights.

[44] The City's argument is misconceived. The Constitution confers the rights guaranteed by sections 10, 12 and 14 on everyone, regardless of where they are at a given time. These rights attach to every person and are enjoyed everywhere in the country, except where they are limited in terms of section 36 of the Constitution. Even those who are incarcerated continue to enjoy these rights to the extent that the enjoyment is not justifiably limited. The real issue here is not whether the Shelter constitutes a home, but whether the impugned rules amount to a limitation of the rights in question.

[45] The City also averred that, because the applicants have been provided with temporary accommodation, they now have an unfair advantage over persons who have applied and have been waiting for permanent housing.

[33] Id at para 104.

[46] I do not agree. The fact that the applicants have been provided with temporary accommodation in the form of the Shelter will not enhance their chances for consideration for permanent housing. In other words, this does not mean that they have "jumped the queue". In terms of this Court's order in *Blue Moonlight*, the City was ordered to provide temporary accommodation in line with its Housing Policy. That accommodation is for a period of 12 months. The occupiers have been living at the Shelter for more than four years as a result of the ongoing judicial process. Furthermore, the City did not argue that the temporary period has expired. That is why the occupiers are still allowed to continue to live there. Moreover, the applicants will have to adhere to the City's procedures and rules and apply for permanent housing and follow the ordinary processes. The applicants will not now invariably be provided permanent housing merely because they have been provided with temporary accommodation.

Breach of the rights

[47] The temporary accommodation given by the City implicates the rights to dignity, freedom and security of the person, and privacy. The applicants are thus entitled to the protection of their constitutional rights in sections 10, 12 and 14. Again, the fact that *Blue Moonlight* called for temporary accommodation only does not mean the applicants are not entitled to the full protection of their constitutional rights. They flow from this Court's order. I will show below that the Shelter did not give effect to the applicants' rights to dignity, freedom and security of the person, and privacy.

[48] The lockout and family separation rules limit the applicants' right to dignity. The lockout rule limits the right to dignity because it is cruel, condescending and degrading. It forces the applicants out onto the streets during the day with no place whatsoever to call their own and to rest. As a result, people seek refuge on the street while they wait for the Shelter to re-open. The lockout rule also disproportionately affects people who work the night shift and sleep during the day. They have nowhere

to rest and get ready for the next shift. For them in particular the Shelter is no shelter at all. The lockout rule also treats people like children. It undercuts the ability of the applicants to make plans and to make use of their time as they see fit. Clearly, the implication is that the applicants cannot manage their own affairs and have to be shepherded to and fro.

[49] The right to dignity includes the right to family life.[34] This right in turn consists of the right to marry and the right to raise a family.[35] The family separation rule creates a vast chasm – between parents and children, between partners and between siblings – where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants.

[50] It is even more obvious that the lockout and family separation rules impair the right to privacy set out in section 14 of the Constitution. The fact that the applicants are forced out onto the street during the day means *ipso facto* they do not have privacy for the duration thereof. The right is given effect only if the applicants have a place they can call their own to which they can retreat at any time. The lockout rule destroys their ability to avail themselves of such solitude. One would think that people who have been evicted from their homes in which they had some privacy would be provided a substitute with a measure of the same. They were not.

[51] Finally, the impugned rules limit the right to freedom and security of the person. It goes without saying that they restrict the movements of the applicants in critical respects. As the applicants have complained, they could not go about their business because the lockout rule prevented them from accessing the Shelter during the day and barred them from entry after 20h00. Because parents could not visit their

[34] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 36.

[35] Id at para 28.

children and partners of different sexes could not stay with each other, the family separation rule materially affected the movements of the applicants within the Shelter as well. The lockout rule also endangered the applicants. In particular, the lockout rule exposed the applicants to the vagaries of street life both during the day and at night. Several of the applicants have been assaulted. According to the applicants' submissions, one applicant was even stabbed after he was denied entry at night. After a long work shift, or a painful medical procedure, the applicants would also have nowhere to rest and would be forced to suffer on the street after curfew. The City did not dispute these facts, which illustrate the impact of the impugned rules on the applicants.

Is the limitation of the applicants' rights by the impugned rules justified?

[52] Now that it has been established that the applicants' rights have been limited, the next question is whether the limitations of these rights can be justified under section 36(1) of the Constitution. For the limitations to be justified under section 36, they must first and foremost be authorised by a "law of general application". This is a threshold test which must be met before a justification analysis may begin. It cannot be gainsaid that here the impugned rules were not authorised by a "law of general application". The rules were imposed by a contract concluded between the City and MES. Because the contract is a private agreement and does not bind third parties, it is the very opposite of a "law of general application". Absent that law, the City may not invoke section 36 in an attempt to justify the limitations created by the rules in question.

[53] Consequently, the City has failed to prove that the limitations flowing from the application of the impugned rules on the applicants were reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom as required by section 36(1). It follows that the application of those rules to the applicants constitutes a violation of their rights guaranteed by sections 10, 12 and 14 of the Constitution. Therefore, the appeal must succeed.

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "(a) It is declared that the application of rules 3 and 4 of the Ekuthuleni Overnight/Decant Shelter House Rules constitutes an infringement of the applicants' rights to dignity, freedom and security of the person, and privacy in sections 10, 12 and 14 of the Constitution.
   (b) The City of Johannesburg and Metropolitan Evangelical Services 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 the Shelter.
   (c) It is declared that the City of Johannesburg and Metropolitan Evangelical Services' refusal to allow the applicants to reside in communal rooms together with their partners of opposite sexes is an infringement of the applicants' constitutional rights to dignity and privacy, enshrined in sections 10 and 14 of the Constitution.
   (d) The City of Johannesburg and Metropolitan Evangelical Services are directed to permit those of the applicants who wish to do so, to reside together with their partners of opposite sexes in communal rooms at Ekuthuleni for the duration of the applicants' stay at Ekuthuleni.
4. The City of Johannesburg is ordered to pay the applicants' costs including the costs of two counsel in this Court, the Supreme Court of Appeal and in the High Court of South Africa, Gauteng Local Division, Johannesburg.

CAMERON J (Froneman J and Khampepe J concurring and Madlanga J concurring except for [93] to [100]):

[55] I am indebted to my colleague Mhlantla J for her judgment, which illuminatingly sets out the facts and issues (first judgment). I agree with her conclusion: the rules of the Ekuthuleni Shelter that put the residents out on the street during daylight hours (lockout rule) and forbade partners of opposite sex to overnight together (family separation rule) are not constitutionally valid and must be struck down. But how do we get to the conclusion that those rules are invalid? Our reasons and our approach differ.

[56] We start with the question: how does the Bill of Rights govern the contentious rules of the Shelter? The first judgment answers this by saying, rightly, that the Shelter's rules infringed the residents' rights to dignity, freedom and security of the person, and privacy under sections 10, 12 and 14 of the Constitution.[36] But the first judgment and the judgment of Jafta J (third judgment) conclude that the Shelter's rules did not concern a measure the City took under section 26 of the Constitution to progressively realise their rights of access to housing.[37] The first judgment asserts that the Shelter's rules "can be separated from the provision of accommodation at the Shelter itself",[38] and that, "even though the temporary accommodation provided by the Shelter implicates section 26(2)",[39] the impugned rules do not.[40] The third judgment, by contrast, reasons that the temporary accommodation provided by the Shelter does not implicate section 26(2); instead, the City was merely carrying out the *Blue Moonlight*[41] court order, which the City was obliged to fulfil.[42] The City could

[36] See [47]-[51].

[37] See [41] and [120].

[38] See [41].

[39] Id.

[40] Id.

[41] *Blue Moonlight* above n 2.

[42] See [119].

not do so, the third judgment reasons, by superimposing the impugned rules on the *Blue Moonlight* order.[43] Nothing in that order spoke about lockout or family separation. If not authorised together with the eviction order when originally issued, add-on rules and conditions – like those in issue here – are thus invalid and do not implicate the residents' rights under section 26 at all.

[57] The distinction the first judgment makes between the provision of temporary accommodation and the rules the Shelter imposed in providing it is unpersuasive. The Shelter's rules were an integral part of the temporary accommodation it provided. Indeed, the rules were sourced in the *Blue Moonlight* order sanctioning the temporary accommodation. Temporary accommodation of necessity entails more than just providing a roof and four walls; it must include all that is reasonably appurtenant to making the temporary accommodation adequate. The provision of housing entails not only the delivery of a building or tent. The conditions the state attaches to the accommodation are part of its provision. Therefore, any rules the Shelter implemented to regulate the conduct of its inhabitants necessarily informed the adequacy of the housing it was providing. It cannot be that the provision of temporary accommodation implicates section 26(2) while rules designed to fulfil that provision do not.

[58] This too is the fundamental difficulty with the approach of the third judgment. It is that the *Blue Moonlight* order gave no details, no guidance on how the City was to provide the residents with temporary accommodation. The Court simply ordered the City to provide the residents with "temporary accommodation" as near as possible to their old homes. It did not say how the City should do this. What type of accommodation? With or without other people? In family units? Or separated by gender? And how many people per room? What meals? What ablutions? What lockout hours? None of that was before the *Blue Moonlight* Court. And obviously so. It was the City that was obliged, in fulfilling the order, to fill out the details. And, in

[43] See [123].

doing so, it had to act reasonably. And this requirement derived from the reasonableness standard in section 26. For, while this Court's order in *Blue Moonlight* mandated the provision of temporary emergency housing – rather than permanent housing – it nonetheless engaged the residents' right under section 26 to access adequate housing. Fulfilling that order equally engaged that right.

[59] The temporary housing at issue here, even though afforded in response to a court order, remained a measure to achieve the progressive realisation of the right to adequate housing. All of the parties recognised this. Their arguments – that of the residents, the City and the *amici* – proceeded on the implicit and explicit assumption that section 26 governed whether the *Blue Moonlight* order had been fulfilled. This Court's previous decisions on temporary housing – *Grootboom*,[44] *Joe Slovo*[45] and *Blue Moonlight* – have all repeatedly made clear that section 26 applies. And the logic no less governs government's actual implementation of a court order granted under section 26: the reasonableness criterion that governs the right itself applies here, too.

[60] The second question is: were the Shelter's rules reasonable? The first judgment turns to a limitations assessment under section 36(1) of the Bill of Rights.[46] It finds a simple reason why the City has failed to justify the infringements the accommodation imposes: no "law of general application" can be found.[47] For the limitations to be justifiable under section 36, the first judgment finds—

> "they must first and foremost be authorised by a 'law of general application'. This is a threshold test which must be met before a justification analysis may begin. It cannot be gainsaid that here the impugned rules were not authorised by a 'law of

[44] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).

[45] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* [2009] ZACC 16; 2010 (3) SA 454 (CC); 2009 (9) BCLR 847 (CC) (*Joe Slovo*).

[46] Section 36(1) of the Constitution above n 19.

[47] See [52].

> general application'. . . . Absent that law, the City may not invoke section 36 in an attempt to justify the limitations."[48]

[61] This approach is similar to that of the High Court (Wepener J), which decided that it is not possible to conduct a reasonableness enquiry without first locating a "law of general application".[49] By contrast with the approach of the first judgment, however, the High Court explicitly recognised that the City's efforts in response to the *Blue Moonlight* order were measures to fulfil social and economic rights.[50]

[62] On appeal, the Supreme Court of Appeal reversed the High Court's judgment. It concluded that the measures were in fact reasonable.[51] It cited rights-limitation as the basis for embarking on a reasonableness enquiry,[52] but made no mention of any "law of general application". The approaches of the High Court and the Supreme Court of Appeal therefore implicitly differ on whether it is possible to enquire into the reasonableness of a measure intended to fulfil socio-economic rights without first establishing the existence of a "law of general application" enabling that measure.

[63] The approach to "law of general application" the High Court and the first judgment adopt raises more problems than it may seem to solve. It deflects attention from the first question that arises when measures taken in progressive realisation of social and economic rights are assessed for reasonableness. That is not whether they are justified in terms of a "law of general application", but whether, as section 26(2) of the Bill of Rights itself requires, they are *reasonable*. This has always been the central enquiry in determining the constitutional soundness of socio-economic rights

[48] Id.

[49] High Court judgment above n 15 at paras 37-8.

[50] Id at para 13.

[51] Supreme Court of Appeal judgment above n 1 at para 23.

[52] Id at para 18.

measures. The great cases this Court has decided in this field – *Grootboom*,[53] *TAC*[54] and *Mazibuko*[55] – focussed almost exclusively on the reasonableness of the measures at issue, and not on whether any "law of general application" authorised them.

Was the temporary housing here a section 26 "measure"?

[64] The right at issue here is grounded in section 26. Section 26(1) is concerned with the provision of adequate housing that can be either temporary or permanent, while section 26(2) demands that measures taken by a local authority in progressively realising this right must be reasonable. The third element in the housing rights provision, section 26(3), ensures that no one will be evicted from their home without a court order made after considering all the relevant circumstances. The three parts of section 26 must be read and understood together. The cases say so.[56] And it makes good sense.

[65] While *Blue Moonlight* authorised merely a standalone temporary housing programme, this does not change the fact that section 26 of the Constitution is implicated – nor that section 26 governs whether the City, in fulfilling the *Blue Moonlight* order, did so properly and faithfully. Indeed, this Court's judgment in

[53] *Grootboom* above n 44 at para 33 ("[T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable"). For further discussion on the reasonableness analysis, see also paras 38, 41, 43-4, 46 and 63.

[54] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*TAC*) at para 68 (holding that a programme for the realisation of socio-economic rights that excluded a significant segment of society could not be said to be reasonable). See also paras 80-1 (concluding that a policy of waiting for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites was not reasonable under section 27(2) of the Constitution) and paras 93-5 (reasoning that the Court has a duty to determine whether the measures taken in respect of the prevention of mother-child transmission of HIV were reasonable).

[55] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at para 161 ("When challenged as to its policies relating social and economic rights, the government agency must explain why the policy is reasonable"). See also para 162 ("Not only must government show that the policy it has selected is reasonable, it must show that the policy is being reconsidered consistent with the obligation to 'progressively realise' social and economic rights in mind") and para 67 ("[T]he positive obligations imposed upon government by the social and economic rights in our Constitution will be enforced by courts . . . . If government's adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness").

[56] See, for example, *Grootboom* above n 44 at para 34 (stating that "[s]ubsections (1) and (2) are related and must be read together", and that these two subsections imply a "negative obligation", explicitly provided in subsection (3), on the state "to desist from preventing or impairing the right of access to adequate housing").

Blue Moonlight approaches the question whether the City's then temporary emergency accommodation policy was constitutionally valid entirely as a matter of whether it was "reasonable" or a breach of section 26.[57] *Blue Moonlight* proceeds on the premise that a claim to temporary accommodation is a right within section 26, falling under government's obligation to take reasonable measures to provide access to adequate housing.[58] And it finds that the City's housing policy conflicted with section 26 in that it failed to extend temporary accommodation to those evicted by private landowners.[59] The core of the Court's reasoning in extending the section 26 right to temporary accommodation proceeds from sections 9(1) and 26(2) of the Bill of Rights.[60]

[66] I disagree with the conclusion of the third judgment that the residents' occupation of the Shelter did not flow from a measure the City took to progressively realise their right of access to adequate housing. The third judgment claims that the "impugned rules are all regressive measures",[61] but there is no basis for the conceptual distinction between progressive measures that are constitutional and regressive measures that are unconstitutional. To say that no decision of this Court holds that the imposition of unconstitutional rules, in the process of complying with an eviction order requiring temporary housing, amounts to a breach of section 26(2),[62] is obviously correct, but it seems to me to beg the question. This is whether the rules are constitutional or unconstitutional in the first place. And that question can be answered only by invoking the right at issue, which is the right of access to housing, section 26, and the requirement of reasonableness that section 26(2) embodies, and under which *Blue Moonlight* issued its order.

[57] *Blue Moonlight* above n 2 at paras 86-97.

[58] Id at para 88.

[59] Id at para 97.

[60] Id at para 87.

[61] See [120].

[62] See [113].

[67] The *Blue Moonlight* Court was not oblique about the fact that the section 26 right embraces government measures providing temporary housing. It spelt it out:

> "In the area of the right of access to adequate housing, of which the provision of temporary or emergency accommodation is a part, the question is essentially one of *reasonableness*."[63] (Emphasis in original.)

[68] This is both logically and textually sound. Providing temporary housing, as this Court recognised in *Blue Moonlight*, constitutes a measure in fulfilment of section 26. The first and third judgments swivel all this round to face the other way. But the consequences are perilous. If fulfilling a temporary emergency housing order is not governed by section 26, what right applies? How can evicted occupiers argue for their rights under section 26 in future? And what must a government agency, that wants to impose reasonable conditions on the temporary housing it provides, do to ensure that those conditions conform with the order? Must it hurry back to the court that issued the original order each time? That cannot be. The correct position is surely that, when government provides temporary housing in fulfilment of a court order, section 26(2) and its reasonableness criterion govern the way in which it does so. For how else could one determine whether the measures to fulfil the court order are reasonable?

[69] What is more, this Court's approach in *Blue Moonlight* was consistent with its approach in every prior case concerning temporary housing. Every case has dealt with the constitutional validity of these measures under section 26.

[70] In *Grootboom*, this Court had to consider temporary housing at a time when no express policy existed to facilitate it.[64] The Court located the right to temporary accommodation squarely at the heart of section 26:

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[63] *Blue Moonlight* above n 2 at para 88.

[64] *Grootboom* above n 44 at para 52.

> "The national government bears the overall responsibility for ensuring that the state complies with the obligations imposed upon it by section 26. The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focussed on medium and long-term objectives. It is essential that a reasonable part of the national housing budget be devoted to this."[65]

[71] The same appears from all the judgments this Court delivered in *Joe Slovo*.[66] There, the land from which the occupiers were sought to be evicted was earmarked for government housing development.[67] In the interim, government sought to house the occupiers in temporary accommodation.[68] Not all of the occupiers would be able to return to Joe Slovo – but all would ultimately be provided with permanent housing.[69]

[72] The judgments in *Joe Slovo* give insight into how temporary accommodation is integral to section 26. In the context of relocation to temporary accommodation, Ngcobo J explained:

> "The Constitution, in particular section 26(3), recognises that at times it may be necessary for the government to relocate landless people and people who are living in deplorable conditions in order to provide them with access to adequate housing. This may be necessary either because the land they occupy must be upgraded or developed in order to provide decent houses for them in that area, as the present case illustrates, or because they are occupying the land without the permission of the landowner and the landowner requires the land. However, these relocations must take place in accordance with the Constitution and the law, in particular section 26(3)."[70]

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[65] Id at para 66.

[66] There was no clear majority in *Joe Slovo* above n 45. The order is set out by the unanimous Court. There were five judgments: Yacoob J (Langa CJ and Van der Westhuizen J concurring) wrote the principal judgment; Moseneke DCJ (Sachs J concurring); Ngcobo J (Moseneke DCJ and Sachs J concurring); O'Regan J; and Sachs J (Moseneke DCJ and Mokgoro J concurring).

[67] Id at paras 25 and 126.

[68] Id at paras 27 and 46.

[69] Id at paras 33, 46 and 260.

[70] Id at para 230.

Ngcobo J expressly stated that temporary housing measures are measures under section 26. He said that "government, consistent with its obligation to promote access to adequate housing, has committed itself to alleviating the consequences of relocation".[71] He further specifically describes the arrangement of temporary accommodation as "the government . . . fulfilling its constitutional obligation to facilitate the right of access to adequate housing".[72] To the same effect was Sachs J.[73] This makes unmistakably clear that the temporary housing measures were part of government's section 26 obligations.

[73] This makes sense. For it would endanger a coherent understanding of government's duties in fulfilling its social and economic rights obligations – as well as vulnerable peoples' rights to delivery – if section 26 were not implicated at all. It is against this background that I do not agree with the third judgment's suggestion that the execution of the *Blue Moonlight* order was not governed by section 26(2).

Were the Shelter's rules, post-Blue Moonlight, reasonable?

[74] The rich text of the Bill of Rights asks those bound by it, including courts, to understand it as a whole, by reading its rights and limitations together and understanding the language it uses consistently and coherently.[74] This Court has laid down that, out of proper concern for intelligibility, the same word where it appears a number of times in a statute must be understood to have the same meaning.[75]

[71] Id at para 257.

[72] Id at para 260.

[73] Id at paras 335 and 360-1.

[74] See *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 21. See also *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 54.

[75] *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) at paras 69-70 (citing *Minister of Interior v Machadodorp Investments (Pty) Ltd* 1957 (2) SA 395 (A) at 404D-E, as endorsed in *More v Minister of Co-operation and Development* [1985] ZASCA 89; 1986 (1) SA 102 (A) at 115C-D).

Of course, the Bill of Rights is no mere statute. On the contrary, it is a charter that governs the exercise of power so as to fulfil the fundamental values of our constitutional order. But, in understanding what it requires of those bound by it, a proper concern for its intelligibility all the more requires a broad consonance of meaning.

[75] This means that the word "reasonable" in section 36(1) must mean the same, or at least entail the same interpretive process,[76] as where the Bill of Rights uses it elsewhere to prescribe what measures the state is obliged to take to achieve social and economic justice.[77] Section 36(1) is subject to the internal standard of reasonableness built into section 26(2). We should confront the difficult contextual questions this case raises within that reasonableness enquiry.

[76] To determine whether a measure is "reasonable", it is necessary to thoroughly scrutinise any rights-limitations it may inflict. This must be done by a careful assessment coordinate with, and closely akin to, that required by section 36(1). This means taking context into account. Counsel for the residents rightly suggested in reply that this enquiry must be both purpose- and circumstance-based. The nature of the right and the obligation must in each instance also be assessed.

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[76] The word "reasonable", by itself, generally does not require or bear interpretation, only application. The question usually is not what "reasonable" itself means, as a linguistic abstraction, but what the reasonable thing to do is as a matter of practical requirement.

[77] Section 24(b) (environment) requires that the environment be protected "through reasonable legislative and other measures"; section 25(5) (property) requires the state to take reasonable legislative and other measures to foster conditions to enable citizens to gain access to land; section 26(2) (housing) requires the state to take reasonable legislative and other measures to achieve progressive realisation of the right; section 27(2) (health care, food, water, and social security) requires the state to take reasonable legislative and other measures to achieve the progressive realisation of each of these rights; and section 29(1)(b) (education) affords the right to further education, which the state, through reasonable measures, must make progressively available and accessible.

Apart from these five instances and section 36(1), the word "reasonable" appears five other times in the Bill of Rights: section 32(2) (national legislation giving effect to the right of access to information may provide for reasonable measures to alleviate the administrative and financial burden on the state); section 33(1) (right to administrative action that is lawful, reasonable, and procedurally fair); section 35(1)(d) (right of everyone arrested for allegedly committing an offence to be brought before a court as soon as reasonably possible); and section 37(6)(c) and (d) (emergency detainees' rights to be visited "at any reasonable time" by a medical practitioner and a legal representative).

[77] Hence, depending on the right infringed, the reasonableness criterion may vary in intensity. Some limitations on rights will be approached with more scepticism than others, and some infringements will be scrutinised more intensely. For example, the scrutiny in determining the reasonableness of a measure that affects the right to life will differ if that measure is designed to progressively realise the right of access to healthcare – in contrast to where the disputed measure is justified merely by a lack of resources. Demonstrated resource scarcity may mean that the measure could more easily be shown to be reasonable.[78] But the scrutiny will nevertheless be intense because of the right at issue.

[78] Again, a rights-limitation imposed by a measure to provide emergency housing may require different treatment to one providing access to non-emergency, adequate housing. Consider a disaster by fire or flood or earthquake. Would lockout and family separation rules in its aftermath be reasonable? It may well be that ad hoc arrangements do not infringe dignity because those subjected to them do not perceive or feel them to infringe their dignity. But even if they do infringe dignity, they might nevertheless be reasonable.

[79] But the rules here were not reasonable. My reasons accord with those my colleague sets out in explaining her conclusion that the rules infringe on the residents' rights. The lockout rule seems only tenuously connected to any housing-related purpose. The residents' complaint seems warranted that the rule really aims to get them out of the Shelter to forestall any supposedly self-indulgent lazing around and instead impel them to active job-seeking. Indeed, the City more or less acknowledged this in its papers.

[80] Counsel pointed out in reply that the rules seemed to treat the residents as they do *because they are poor*. To put it this way – that the rules were based on the

[78] See, for example, *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

residents' socio-economic status – is another way of challenging the infringement they entailed. Both rules appear to treat those subject to them as worthy of less consideration. They seem to be telling the residents something about themselves as people, demeaningly.

[81] Two arguments the City made deserve further consideration.

[82] The first is that many tens of thousands – in fact hundreds of thousands – of people in the city of Johannesburg are worse off than the residents. Although the rules subjected the residents to daytime lockout and night-time separation, they had square nourishing meals, shelter from the elements, warmth and protection, and effective ablutions. This in a city where many live in abject conditions, hungry, shelterless and cold. This fact, the City seemed to urge, should make us judge the limitations the rules impose more leniently.

[83] The City's second argument is that the two rules save money – which the City urgently needs for those even worse off than these residents.

[84] These two points are related. The second, budgetary point seems a little easier to deal with than the comparative welfare point. That the two rules save money, however marginally, seems to me a justified inference. Striking them down will require more expenditure on those subject to them with the result that there will be less in the City's budget for others worse off than those before us now.

[85] Yet, as in *Blue Moonlight*,[79] the City's resources argument here was thin. The most detail the City gave was that abolishing the lockout rule would raise monthly costs per resident from R990 to R1 300. (This cost analysis was in fact provided by the Shelter, not the City.) As against this, the residents correctly pointed out that the facilities the City said ameliorated the lockout rule, namely the daytime drop-in centre

[79] *Blue Moonlight* above n 2 at paras 68-75.

and skills centre, themselves cost money because, unlike the Shelter, they were open all day using costly resources.

[86] So, the City's argument that housing is a zero-sum game – where if you require better treatment of one group, another group necessarily suffers – is not borne out by the facts here. The material in the record is unpersuasive. The City's notional assertion that every rand spent on the residents counts against money for others who need shelter is undoubtedly correct – but it cannot prevail in the general terms in which the City propounded it here.

[87] The comparative welfare argument is more difficult. It, too, has punch. Why should we countenance the residents' complaints about what the City is doing for them when others, who do not have what they have, are much worse off and would want it?

[88] The question is hard. It can only be answered by moving back from the abstract. These litigants are before us now. They make a claim to concern, respect and dignified treatment that cannot be waved away by the fact that others, who are worse off than they, may also have claims. The reasonableness of public treatment of the vulnerable cannot depend only on the fact that what they are getting is better than that of others who are worse off. The question is not whether others are worse off, but whether these measures the City is taking here, now, with this vulnerable group, affords them sufficient care, respect and dignity. That question must be answered each time in concrete terms, within the framework the Bill of Rights sets, including available resources.

[89] A court should not have to determine in the abstract who are the worst-off. A court is obliged to adjudge the claims of those who are before it on their own merits. If the comparative welfare of others, or their lack of it, could without more justify deprivation of benefits, this could imply a race to the bottom, where the hierarchy of

the worse-off determines who is entitled to dignity. This could lead to infinite regressions of impoverishment and misery.

[90] Vulnerability and dependence explain why prisoners in South Africa received anti-retroviral treatment long before members of the public did.[80] Their confined status gave them a special claim to concern and treatment.[81] The fact that others, not imprisoned, were fatally worse off, did not justify denying the prisoners treatment.

[91] While the residents here are not in prison, they were evicted from their homes and, thus, too, have a special claim to concern. Their eviction was constitutionally permissible only because, under *Blue Moonlight*, the City incurred an obligation to provide them with suitable alternative accommodation.[82] It would make a nonsense of that obligation to say the City fulfils its duty to them so long as it provides accommodation that is marginally better than the worst-off have.

[92] This is tough. There is a painful clash of principles here. But we do better to acknowledge it than to obscure it. Hence, I would prefer to defer final determination of what a "law of general application" in section 36 means to another case where we are obliged to confront it. However, I should say now that I do not agree with the first judgment's view that "law of general application" is a threshold consideration that can preclude limitations analysis. It is possible – must be possible – to enquire into the reasonableness of a measure intended to fulfil section 26 without first hunting down a "law of general application" enabling that measure.

[80] *Van Biljon v Minister of Correctional Services* 1997 (4) SA 441 (C) at para 52 (Brand J) (holding, on the basis of the right to "adequate . . . medical treatment" in section 35(2)(e) of the Constitution, that "[w]hat is provided for people outside can . . . be no absolute standard for what is adequate for prisoners"). The order was granted on 17 April 1997. Free anti-retroviral treatment became available in the public sector only seven years later. See Lopez Gonzalez "South Africa celebrates 10 years of free HIV treatment" (4 April 2014), available at https://www.health-e.org.za/2014/04/04/south-africa-celebrates-ten-years-free-hiv-treatment/.

[81] See *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 100.

[82] *Blue Moonlight* above n 2 at para 104.

[93] Nonetheless, recognising that we can assess the reasonableness of the Shelter's rules without a "law of general application", it does seem to me that the order in *Blue Moonlight* was indeed a "law of general application", in which the Shelter's rules were sourced – and that they unlawfully limited the residents' rights to dignity, freedom and security of the person, and privacy.

[94] The complexities in construing "law of general application" are considerable. They were not fully argued before us. The residents merely invoked the High Court's reasoning, which they described as "undoubtedly correct".[83] That reasoning (truncated, perhaps, because the point was not properly argued there either)[84] was that a section 36 limitations assessment cannot get off the ground at all "[i]n the absence of any legislative provision".[85] As the residents tersely put it, the section does not arise in this case because there is no statute.

[95] This argument cannot stand. It runs counter to the Constitution's own provisions. These expressly state that section 36 may justify a rights-infringement embodied not in statute but in judge-made law. The Bill of Rights explicitly empowers the courts to "develop rules of the common law to limit" a right, provided this is in accordance with section 36.[86] So, the term "law" in section 36 must include at least the common law.

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[83] The respondent said no limitation question arose at all because no right was infringed. The *amici* did not consider the point.

[84] High Court judgment above n 15 at para 37 says that the respondents did not submit that the requirement was met.

[85] Id at para 38.

[86] Section 8(3)(b) provides—

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
>
> . . .
>
> (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

[96] The argument also sits uneasily with our system of government. It is true that section 36 derives from an analogous provision in the German Basic Law.[87] That provision is underpinned by the notion that the "legislature is the only body with the necessary legitimacy to limit the use of the fundamental freedoms".[88] But there is a reason for this narrow approach. It is because "there is no system of common law in Germany".[89]

[97] It has rightly been said that common-law norms have a "legislative quality" – this even though "deliberations by judges are private and the ordinary person who is a stranger to litigation will have few if any opportunities to have input in the result" – because of "the combination of the open justice process, the historical role of courts in identifying and developing the common law, and the public reasons given in a judgment explaining a particular common law position".[90]

[98] Section 36 states that a rights-infringement may be justified not "by" or "under", but "in terms of" a "law of general application". "In terms of" is much broader than "by" or "under". It is advisedly capacious. It allows that the policy at issue here, though not itself law, may be *sourced* in law.[91] Similarly, the analogous German provision says that the rights-infringement must be "by *or pursuant to* a law".[92] The government action that is the immediate cause of the rights-infringement need not itself be a law, provided it is legally authorised.[93]

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[87] Article 19(1) of the German Basic Law (translation at http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0112) provides:

> "Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case."

[88] De Waal "A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights" (1995) 11 *SAJHR* 1 at 5.

[89] Id at 13.

[90] Young "Does it Matter if Restrictions on the Right to Social Welfare in Hong Kong are Prescribed by Law or Policy?" (2014) 44 *Hong Kong Law Journal* 25 at 29.

[91] See De Ville "The Right to Administrative Justice: An Examination of Section 24 of the Interim Constitution" (1995) 11 *SAJHR* 264 at 275 (arguing that the rights-infringing decision must itself be a law "would clearly be absurd").

[92] Article 19(1) of the German Basic Law above n 87. See Woolman and Botha "Limitations" in Woolman et al (eds) *Constitutional Law of South Africa* 2 ed (Juta & Co Ltd, Cape Town 2008) at 34-47 fn 4. The authors

[99] This, of course, does not suggest that any policy, practice, standard or daily decision made by a government agency or local authority could justify a rights-infringement. Policies meant for purely internal use, for example, could not.[94] But that is for a different reason. It is because people are entitled to know the extent of their rights. To this end, norms intended to limit rights must be both adequately accessible and precisely formulated.[95]

[100] In the present case, the Shelter's rules were sourced in a "law of general application" – the order in *Blue Moonlight* – and were both accessible and precise. They were also not reasonable, for the reasons the first judgment gives.

[101] For these reasons, I concur in the order in the first judgment.

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correctly point out that "law of general application" is the equivalent to the phrase "prescribed by law" found in the Canadian Charter of Rights and Freedoms, the European Convention on Human Rights, and the New Zealand Bill of Rights.

Woolman and Botha at 34-66 to 34-67 note:

> "[T]here is a signal difference between the Canadian jurisprudence that has developed around 'prescribed by law' in section 1 of the [Canadian Charter of Rights and Freedoms], and the Bill of Rights jurisprudence that has developed around 'law of general application' in Final Constitution section 36. South African courts have expressly recognized that all forms of law – legislation, subordinate legislation, regulation, common law and customary law – can be characterized as law of general application. It goes without saying that much of this has not – as some Canadian jurists would require for section 1 analysis of the Charter – passed through the democratic law-making machinery of the state. In so far as a law in South Africa possesses the four formal hallmarks of the rule of law . . . – parity of treatment, non-arbitrariness, precision and accessibility – it is law of general application."

[93] De Ville above n 91 at 275 says the German provision more accurately captures the meaning of the requirement.

[94] See *Canadian Federation of Students v Greater Vancouver Transportation Authority* 2009 SCC 31; [2009] 2 SCR 295 (SCC) at para 63.

[95] See *The Sunday Times v United Kingdom*, 26 April 1979, § 49, Series A no 30. See also *Canadian Federation of Students* id at para 65.

JAFTA J (Mogoeng CJ concurring except for [116] to [118] and Mojapelo AJ concurring):

[102] I have had the benefit of reading the judgments prepared by my colleagues Mhlantla J (first judgment) and Cameron J (second judgment). I agree with the first judgment that the application of the impugned rules of the Shelter on the applicants constitutes an unjustifiable violation of their rights which are guaranteed by sections 10, 12 and 14 of the Constitution. However, I do not agree with the second judgment that those rules amount to a measure contemplated in section 26(2) of the Constitution and that their application to the applicants violated the provisions of this section.

[103] I do not think that section 26(2) finds application here. This is because the occupation of the Shelter by the applicants does not flow from a measure taken by the City within its available resources to make the applicants' right of access to adequate housing progressively realisable. Instead, the City afforded them accommodation at the Shelter in compliance with the Court's order in *Blue Moonlight*.[96]

Blue Moonlight and background

[104] In *Blue Moonlight* this Court granted an order in these terms:

> "(e) Paragraphs 5.1 to 5.4 of the order of the Supreme Court of Appeal are set aside and replaced with the following:
>
> (i) The first respondent in the South Gauteng High Court, Johannesburg, and all persons occupying through them (collectively, the Occupiers) are evicted from the immovable property situated at Saratoga Avenue, Johannesburg, and described as Portion 1 of Erf 1308, Berea Township, Registration Division IR, Gauteng (the property).

[96] *Blue Moonlight* above n 2.

(ii) The Occupiers are ordered to vacate the property by no later than 15 April 2012, failing which the eviction order may be carried out.

(iii) The housing policy of the second respondent in the South Gauteng High Court, Johannesburg, the City of Johannesburg Metropolitan Municipality, is declared unconstitutional to the extent that it excludes the Occupiers and other persons evicted by private property owners from consideration for temporary accommodation in emergency situations.

(iv) 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."[97]

[105] It is apparent from the order that the City was directed to give the applicants temporary accommodation on or before 1 April 2012 and that the applicants were to be evicted from Saratoga Avenue on 15 April 2012. But the City failed to comply. On 12 April 2012, the applicants instituted an urgent application in the High Court, seeking to compel the City to obey the order before they could be evicted on 15 April 2012. The High Court postponed the eviction to 2 May 2012 and directed that the City provide the applicants with accommodation by not later than 30 April 2012.

[106] Acting in terms of the order, the City offered occupiers of Saratoga Avenue who could afford R600 per month rental payment, relocation to a building known as MBV Phase 2 in the city centre. As the applicants could not afford the rent, they were informed that they would be accommodated at the Shelter which was designed for, and provided, overnight accommodation to homeless people. The applicants were also told about the rules and conditions under which they would stay at the Shelter.

[97] Id at para 104.

They objected to these rules and conditions. As the date of their eviction from Saratoga Avenue was approaching, they were constrained to relocate to the Shelter. They vacated Saratoga Avenue and moved into the Shelter on 2 May 2012.

[107] Despite their objections, upon arrival at the Shelter they were subjected to the impugned rules. The MES refused to engage with them and their legal representatives. They averred that the Shelter merely told them that they would stay there for six months, which date would have expired on 31 October 2012. According to the applicants, they had a document that stated that they would be accommodated at the Shelter for up to 12 months.

[108] Fearing that they could be evicted on 31 October 2012, the applicants launched an urgent application in the High Court against the City and MES. This was after the City had refused to assure them that they would not be evicted. The application was opposed by both parties who sought to justify the impugned rules for various reasons, including the need to keep peace and order at the Shelter.

[109] The High Court held that the rules in question constituted an unjustifiable infringement of the applicants' rights entrenched in sections 10, 12 and 14 of the Constitution. On appeal, the Supreme Court of Appeal overturned this conclusion and set aside the order of the High Court.

[110] The applicants sought to reverse the order of the Supreme Court of Appeal in this Court. It is against this background that the question of whether section 26(2) of the Constitution applies must be assessed.

[111] The applicants claimed that the impugned rules violated rights in sections 10, 12 and 14 of the Constitution. The fact that the applicants also asserted that those rules were inconsistent with section 26(2) of the Constitution does not, by itself, make the section applicable. What determines the applicability of section 26(2) is the nature of the real dispute between the parties. And that dispute was not the

state's failure to take a measure that would have progressively made access to adequate housing by the applicant realisable.

[112] When the City offered the applicants temporary accommodation at the Shelter, it was not discharging an obligation under section 26(2). On the contrary, it was carrying out the order of this Court in *Blue Moonlight* as reinforced by the High Court. It is evident from the terms of that order that the City had no right to impose the impugned rules on the applicants in complying with the order. That order did not empower the City to violate the applicants' fundamental rights.

[113] None of the decisions of this Court, cited in the second judgment, deal with a situation in which there was an improper compliance with an eviction order. I am not aware of any decision that holds that the imposition of unconstitutional rules, in the process of complying with an eviction order requiring the state to provide temporary accommodation, amounts to a breach of the obligation in section 26(2) of the Constitution. It is difficult to imagine an eviction case where a court concludes that it is just and equitable to issue an eviction order and grants it, but later it is held that section 26(2) is implicated when that order is wrongly carried out.

Circumstances under which section 26(2) applies

[114] It seems to me that if section 26(2) were to apply, it must be invoked *before* the eviction order is granted. It must be one of the "relevant circumstances" the court considers before granting an eviction order. Once an order for eviction is granted, part of which includes an order that the state must provide alternative or temporary accommodation, all that needs to happen is to enforce that order. The litigation must come to an end. Whatever is provided must accord with the terms of the court's order.

[115] The enquiry into whether the rules of the Shelter constituted a reasonable measure as contemplated in section 26(2) was not part of the case in *Blue Moonlight*. The measure that was raised in *Blue Moonlight* was the City's housing programme which afforded temporary accommodation to people evicted by the City itself from

buildings that were considered to be unsuitable for human habitation. Therefore, the enforcement of the order granted there cannot depend on whether the rules adopted by the City, after the order was issued, were reasonable. If that evaluation could lead to the conclusion that the rules were reasonable, could it be said that the rules determine how the City should comply with a court order? Litigants do not decide how they should carry out court orders. Nor do they have a right to impose conditions on how an obligation imposed by a court order should be discharged.

[116] Differently put, section 26(2) indeed applies to eviction proceedings – but at a different stage. The view I take here accords with the decision of this Court in *Joe Slovo*. In that matter Yacoob J said:

> "The applicants are being evicted and relocated in order to facilitate housing development. In the circumstances their eviction constitutes a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution.
>
> . . .
>
> Eviction is a reasonable measure to facilitate the housing-development programme. In addition, all the factors discussed in relation to the question whether it is just and equitable to grant the eviction order also justify a conclusion that the eviction is, in the circumstances, reasonable."[98]

[117] In the same matter Ngcobo J stated:

> "I agree with Yacoob J that, in these circumstances, the eviction and relocation of the residents is a reasonable measure to facilitate the housing-development programme. Neither the Constitution nor PIE precludes the relocation sought by the government."[99]

[98] *Joe Slovo* above n 45 at paras 115-6.

[99] Id at para 229.

[118] It is apparent from *Joe Slovo* that whether an eviction measure, taken by the state, can be said to constitute a reasonable measure in terms of section 26(2), is dependent in part on the question whether it will be just and equitable to grant the eviction order. In other words, whether what was done to achieve an eviction was reasonable, must be determined before the granting of the eviction order. And the purpose of this enquiry would be to decide whether the eviction would be just and equitable. In this regard Ngcobo J observed:

> "The question to be answered then is whether on the facts and circumstances of this case it is just and equitable for the residents to be relocated to Delft. A relevant factor in deciding whether it is just and equitable to relocate the residents is the purpose of the relocation. And the purpose of the relocation must be viewed in the light of the right of access to adequate housing, and, in particular, the constitutional duty of the government to facilitate the progressive realisation of the right of access to adequate housing imposed by section 26(2) of the Constitution."[100]

[119] That is not the case here. The City here was obliged merely to implement the *Blue Moonlight* order – but now it seeks to invoke new rules in doing so, under the guise of authority derived from section 26(2). Once a court reaches the conclusion that the eviction should be granted and issues the order, no new measure may be adopted by the state under the guise of section 26(2), pertaining to the eviction order already granted by the court.

Do present rules constitute a section 26(2) measure?

[120] Apart from the incorrect stage at which section 26(2) was sought to be invoked here, the impugned rules can hardly be said to qualify as a measure whose purpose is to ensure the progressive realisation of the right of access to adequate housing. Section 26(2) contemplates measures that are taken in the furtherance of progressively making the right to adequate housing realisable within the state's available resources. On the contrary, the impugned rules are all regressive measures. For a measure to fall

[100] Id at para 224.

within the ambit of the section, it must seek to achieve progressive access to adequate housing. And if implemented, it should be capable of attaining that objective. This is because the section empowers and obliges the state to take measures whose objective is to achieve that singular purpose. The impugned rules do not meet this basic requirement.

Temporary accommodation

[121] While it is true that temporary accommodation may constitute a measure envisaged in section 26(2), it does not follow without more that every temporary accommodation is provided in terms of this section. If that were the position, it would be fertile ground for queue-jumping by unscrupulous and illegal occupiers of land. The purpose of temporary accommodation in cases like the present is to avoid homelessness, arising from the execution of an eviction order. It does not amount to a progressive realisation of access to adequate housing. And because the accommodation is provided for a temporary period, it does not mean that once provided, the state must continue to provide it for as long as the occupiers would be rendered homeless.

[122] The duration of the temporary accommodation would depend on circumstances relevant to a particular case. These include the financial resources of the occupiers, on the one hand, and those of the state, on the other hand. Here the duration of the temporary accommodation was determined with reference to the City's own housing programme, which provided for temporary accommodation for a period of 12 months. Preferably, when the order for temporary accommodation is made, the duration for providing that accommodation must be specified.

Compliance with order

[123] In complying with the *Blue Moonlight* order, the City committed a monumental irregularity that should not be condoned. It was ordered to provide temporary accommodation to the applicants without any conditions. It decided, of its own

accord, to impose conditions under which the applicants were to access that accommodation. This is impermissible.

[124] What is more, the conditions introduced by the City unjustifiably limited a number of the applicants' fundamental rights. In doing so the City breached section 7(2) of the Constitution which obliged it, as an organ of state to "respect, protect, promote and fulfil the rights in the Bill of Rights".[101] This conduct by the City violated the dignity of vulnerable people whose financial circumstances did not enable them to rent accommodation as they could not afford the R600 monthly rental charged by the City. The residents of Saratoga Avenue who could pay this rent were not subjected to the same conditions that violated their dignity.

[125] The indignity suffered by the applicants at the hands of the City was egregious. Their sin was that they could not afford R600 for rent. Those who could were not subjected to the same treatment. The highhandedness with which their situation was handled by both the City and MES was remarkable. These two bodies adopted the attitude that said, if you come to stay at my house you must obey my rules. This was at odds with why the applicants ended up at the Shelter, which was chosen by the City as a temporary accommodation ordered by the Court. It was as if the applicants came there at the pleasure and generosity of the City. On the contrary, the City was not doing them a favour. It was discharging its obligation under a court order.

[126] In these circumstances the conduct of the City seriously undermined not only the court order but also the Constitution. That conduct denied the applicants the enjoyment of rights guaranteed to them by the supreme law, in circumstances where the applicants had already obtained judicial relief. That relief was rendered somewhat hollow. With the kind of stance taken by the City here, the journey to an egalitarian society envisaged in the Constitution would take a lot longer to complete,

[101] Section 7(2) of the Constitution provides:

> "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

if ever it will be completed. This is because the state on which the primary mandate to drive that transformation falls, fails to carry out its constitutional obligation.

[127] What makes matters worse is the fact that the applicants are not only a group of poor people but are part of those who were denied dignity under the apartheid order. In *Makwanyane* O'Regan J said about the right to dignity enshrined in section 10 of the Constitution:

> "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans. Thus recognition and protection of human dignity is the touchstone of the new political order and is fundamental to the new Constitution."[102]

[128] As the first judgment illustrates, the impugned rules also violated the applicants' privacy and the rights guaranteed by section 12 of the Constitution. The City's failure to respect, protect and promote these rights does not accord with its duty, as part of the state, to be exemplary in its conduct. In *Makwanyane* this duty was expressed in these terms by Langa J:

> "Implicit in the provisions and tone of the Constitution are values of a more mature society, which relies on moral persuasion rather than force; on example rather than coercion. In this new context, then, the role of the State becomes clear. For good or for worse, the State is a role model for our society. A culture of respect for human life and dignity, based on the values reflected in the Constitution, has to be engendered, and the State must take the lead."[103]

[102] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 329.

[103] Id at para 222.

[129] Here the City ignored the applicants' objection to the rules and sought to justify them on a number of reasons. With regard to the daytime lockout rule, the City asserted that the rule "incentivised" the applicants to go to work during the day or seek employment. It is more concerning that when resolution of the dispute eluded the parties and the applicants decided to approach the courts, their efforts were initially undermined by the City's objection to them consulting with their lawyers at the Shelter and the Shelter denying them permission to use its facilities for such consultation. All of this did not accord with respecting the applicants' rights, let alone promoting them.

[130] It is for these reasons that I support the order proposed in the first judgment.

MADLANGA J:

[131] I have read the three judgments by my colleagues, Mhlantla J (first judgment), Cameron J (second judgment) and Jafta J (third judgment). But for one issue, I agree with the reasoning in the second judgment.

[132] The second judgment first holds that the Shelter's rules constitute a "measure" under section 26(2) of the Constitution. It also holds that – as a consequence – the "reasonableness" criterion elucidated in this Court's seminal jurisprudence[104] finds application in this case. It then concludes that the Shelter's rules do not meet that reasonableness criterion. That is sufficient to justify a holding that the Shelter's rules are constitutionally invalid.

[133] But the second judgment does not end here. Whilst it states that in the present context the meaning of "law of general application" is best left for determination on another day, it proceeds to hold that "the order in *Blue Moonlight* was indeed a 'law of

[104] *Grootboom* above n 44; *TAC* above n 54; and *Mazibuko* above n 55.

general application', in which the Shelter's rules were sourced".[105] This is not necessary at all. As correctly pointed out by the second judgment, the "complexities in construing 'law of general application' are considerable" and the issue was not fully canvassed by the parties.[106] In the circumstances, I am loath to be party to this debate, especially as it appears to be *obiter*.

[105] See [93].

[106] See [94].

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