

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

CASE NO: 2012/39502

In the matter between:

ELLEN NOMSA DLADLA & 32 OTHERS

Applicants

and

CITY OF JOHANNESBURG

First Respondent

METROPOLITAN EVANGELICAL SERVICES

Second Respondent

AMICUS CURIAE SUBMISSIONS:

CENTRE FOR APPLIED LEGAL STUDIES

Contents

INTRODUCTION.....	2
THE ADMISSION OF CALS AS AMICUS CURIAE	3
THE ROLE OF INTERNATIONAL LAW IN THE APPLICATION OF CONSTITUTIONAL RIGHTS.....	6
THE RECOGNITION OF WOMEN'S RIGHT TO HOUSING IN INTERNATIONAL HUMAN RIGHTS LAW.....	8
WHY A GENDER PERSPECTIVE ON HOUSING RIGHTS IS IMPORTANT	24
THE IMPACT OF THE SHELTER RULES ON WOMEN IN THE CONTEXT OF INTERNATIONAL LAW	28
CONCLUSION	34

INTRODUCTION

- 1 These submissions are filed on behalf of the Centre for Applied Legal Studies (CALs), which has made application to be admitted as an amicus curiae in this matter. CALs' primary interest in the case is the impact of the conditions imposed at the Ekuthuleni shelter on women, in particular the daytime lockout rule and the gendered separation of families.
- 2 CALs seeks admission as an amicus curiae in this matter. The first respondent opposes the admission of CALs. The parties were directed to argue the admission application together with the merits at the hearing of this matter.
- 3 If admitted, CALs will submit that a woman's right to adequate housing is protected under international law, and that the necessity of a gendered perspective on the right to adequate housing has been widely recognised in international human rights law. A gendered lens must be brought to bear in the Court's scrutiny of the rules at the Ekuthuleni shelter, and the impact of these rules on the rights of women must be given special consideration.
- 4 CALs will submit further that the gender-neutral rules imposed at the Ekuthuleni shelter disproportionately impact on women, and infringe women's constitutional rights to adequate housing, equality, dignity, privacy and security.

- 5 These submissions are structured as follows:
- 5.1 First, we address the admission of CALS and the City's opposition to such admission;
 - 5.2 Second, we explain the relevance of international law for the interpretation of constitutional rights and legislation;
 - 5.3 Third, we address the recognition of women's right to adequate housing in international law by describing the most important statements on women and housing rights, particularly in international treaties and by international treaty monitoring bodies.
 - 5.4 Fourth, we explain why the gender perspective on the right to housing, as recognised in international law, is necessary, and describe the implications of this approach for this case; and
 - 5.5 Fifth, we discuss the impact of the daytime lockout rule and gendered separation of families on women.

THE ADMISSION OF CALS AS AMICUS CURIAE

- 6 The first respondent opposes the admission of CALS on the basis that:
- 6.1 CALS has no interest in the litigation;¹

¹ First Respondent's AA to CALS' application for admission as amicus curiae, para 7: Bundle L, pp. 1412-1413.

6.2 the topics under which it seeks to make submissions are similar to those made by SERI;²

6.3 without having applied to do so, it now has introduced new evidence;³ and that

6.4 it delayed excessively in bring its application.⁴

7 There is no merit to any of the grounds of opposition:

7.1 First, CALS has a demonstrable interest in this litigation due to the possibility that some of its clients may be affected by the enforcement of the rules under challenge.⁵

7.2 Secondly, while the ‘topics’ may be broadly similar to those covered by SERI, CALS’ submissions as set out below are fundamentally different from SERI’s and have a different premise – they are premised on international law. In addition, CALS’ submissions have a specific and nuanced approach, focusing on the impact the rules have on women. CALS has ensured that it does not repeat the submissions of the applicants.

7.3 Third, the statistical evidence that CALS annexed to its application for admission is merely for purposes of supporting its admission

² Id at paras 4.1, 8-12, pp. 1410-1415.

³ Id at para 4.2 and 12.2, pp. 1411 and 1414-1415.

⁴ Id at para 4.3 and 15, pp. 1411-1412 and 1416-1417.

⁵ CALS’ replying affidavit, para 16: Bundle M, p. 1503.

as an amicus curiae by demonstrating the expertise and perspective that CALS can bring to bear on the matter. While this court does have the power to admit evidence adduced by an amicus curiae,⁶ CALS does not seek to rely directly on this factual material in relation the relief in the main application.⁷ Accordingly, the complaint that CALS seeks inappropriately to adduce evidence in the main matter is unfounded.

7.4 Finally, CALS respectfully submits that the delay in bringing its application is not excessive and is, in any event, satisfactorily explained by CALS.⁸ In addition, the delay has caused no prejudice to the parties and has not resulted in any delay in the hearing of the main matter.

8 In the circumstances, a proper case is made out for the admission of CALS as an amicus curiae. The matter raises issues of great public importance in respect of which CALS seeks to make submissions that are different from those of the principal parties and which it is respectfully submitted will assist the court.

9 The Supreme Court of Appeal has held that, although ordinarily no costs are awarded for or against an amicus curiae in relation to the main

⁶ *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others* 2013 (2) SA 620 (CC).

⁷ CALS' replying affidavit, paras 5.3 and 10, pp. 1500-1501.

⁸ *Id* at paras 11 and 12, p. 1502.

matter, where a party unreasonably opposes the admission of an amicus curiae, the party may be ordered to pay the costs of the amicus curiae in relation to the admission application.⁹

10 We turn now to set out the submissions of CALS on the merits of the main application.

THE ROLE OF INTERNATIONAL LAW IN THE APPLICATION OF CONSTITUTIONAL RIGHTS

11 The relevance of international law for the interpretation of South Africa's constitutional and statutory obligations is governed by two provisions of the Constitution of the Republic of South Africa, 1996 ("the Constitution"):

11.1 In terms of section 39(1)(b) of the Constitution, a court interpreting the Bill of Rights "*must consider international law*".

11.2 Section 233 of the Constitution provides that "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international*

⁹ In *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA), the SCA held at para 52:

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

law over any alternative interpretation that is inconsistent with international law.”

12 While a court may give greater weight to binding international law instruments (such as treaties that have been ratified and incorporated by the Republic), the Constitutional Court has also had regard to non-binding international instruments (such as United Nations resolutions, treaty monitoring committee recommendations) in interpreting a right in the Bill of Rights and legislation.¹⁰ Sources of non-binding or ‘soft’ international law are important in that they reflect collective and authoritative (albeit not binding) interpretations of State commitments and legal obligations. They may also reflect the development of new norms of customary international law.

13 In what follows, we describe the developments in international law on women’s rights to housing by analysing international treaties as well as other non-binding sources of international law. These developments should inform the Court’s interpretation of the right to housing under section 26 of the Constitution, as well as of the State’s commitments under the applicable legislation.

¹⁰ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC), para 35; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), paras 26-30. See further, on the status of international agreements law under South Africa’s Constitution, *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC), paras 88-103.

THE RECOGNITION OF WOMEN'S RIGHT TO HOUSING IN INTERNATIONAL HUMAN RIGHTS LAW

14 The right to adequate housing is recognized in international human rights law as both a self-standing right and as a component of the right to an adequate standard of living.¹¹ Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) is the essential codification of the housing right in international

¹¹ Article 25 of the 1948 Universal Declaration of Human Rights is one of the first international statements of the right. It provides: *“Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old-age or other lack of livelihood in circumstances beyond his control.*

Since then, the right to adequate housing has been incorporated into a number of international and regional human rights instruments. These include the 1951 Convention Relating to the Status of Refugees (art. 21); the International Labour Organization's 1962 Convention No. 117 concerning Basic Aims and Standards of Social Policy (art. 5 (2)); the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e)(iii)); the 1966 International Covenant on Civil and Political Rights (art. 17); the 1966 International Covenant on Economic, Social and Cultural Rights (art. 11); the 1979 Convention on the Elimination of All Forms of Discrimination against Women (arts. 14 (2) and 15 (2)); the 1989 Convention on the Rights of the Child (arts. 16 (1) and 27 (3)); the International Labour Organization's 1989 Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (arts. 14, 16 and 17); the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43 (1)(d)); and the 2006 Convention on the Rights of Persons with Disabilities (arts. 9 and 28).

Provisions relevant to the right to adequate housing are also found in the following regional instruments: the African Charter on Human and Peoples' Rights (arts. 2 and 18, paras 2 and 3); the European Convention for the Protection of Human Rights and Fundamental Freedoms (arts. 5, 8 and 14); the Revised European Social Charter (art. 31); the American Declaration of the Rights and Duties of Man (arts. 1, 2 and 23); the American Convention on Human Rights (arts. 1, 17, 21 and 24) and its Additional Protocol (art. 3).

law. It provides that States parties “*recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing*”. It further commits States parties to “*take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent*”.¹²

15 Article 11(1) must be read with Article 2.1 which provides:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

16 The UN Committee on Economic, Social and Cultural Rights (“the Committee”) has adopted General Comments to provide authoritative guidance on the provisions of the ICESCR.¹³ In General Comments 4, 7 and 16, the Committee has addressed the content and importance of the right to adequate housing. In these statements, the Committee has emphasised the importance of the right to adequate housing for the enjoyment of other human rights; endorsed a generous interpretation of the right premised on the right to human dignity; and recognised that

¹² South Africa signed the ICESCR on 3 Oct 1994, but has yet to ratify the Convention – this is despite the fact that in October 2012, Cabinet approved South Africa’s ratification of the ICESCR.

¹³ The General Comments are based upon the Committee’s review of reports from State parties, as well as resolutions, documentation and reports from various UN bodies.

women have particular housing needs and vulnerabilities, which cannot simply be addressed by gender-neutral laws and policies.

16.1 In General Comment 4, the Committee recognised that the right to adequate housing “*is derived from the right to an adequate standard of living*” and that the right “*is of central importance for the enjoyment of all economic, social and cultural rights*”.¹⁴ It further emphasised that –

“The right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.”¹⁵

16.2 As noted in General Comment 4, the broader interpretation of the right is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised, including the right to human dignity. Secondly, the reference in article 11(1) must be read as referring not only to housing but to adequate housing, which implies “*adequate privacy, adequate space, adequate security, adequate lighting and ventilation,*

¹⁴ UN Committee on Economic, Social and Cultural Rights, General Comment 4 (1991): The right to adequate housing (Art. 11(1) of the Covenant), para 1. Adopted at the Committee’s Sixth Session on 13 December 1991. UN Document E/1992/23.

¹⁵ General Comment 4, para 7, emphasis added.

adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost".¹⁶

16.3 The Committee identified the following key aspects of the right, which must be taken into account in determining whether particular forms of shelter can be considered to constitute of "adequate housing": (a) *legal security of tenure*, including legal protection from forced eviction; (b) *availability of services, materials, infrastructure and facilities* such as water and sanitation; (c) *affordability*, at such level that other basic needs are not threatened or compromised; (d) *habitability*, providing inhabitants with adequate space, physical safety, and protection from the cold, heat, rain and other threats; (e) *accessibility* to those entitled to it, including for disadvantaged groups; (f) *location*, which allows access to employment options, health-care services, schools etc.; and (g) *cultural adequacy*, enabling the cultural identity and diversity of housing.¹⁷

16.4 General Comment 4 specifically emphasised that enjoyment of the right must be not be subject to any form of discrimination, in particular gender discrimination.¹⁸

¹⁶ General Comment 4, para 7, with reference to statements by the Commission on Human Settlements and the Global Strategy for Shelter for the Year 2000.

¹⁷ General Comment 4, para 8.

¹⁸ General Comment 4, para 6.

16.5 This principle was elaborated upon in General Comments 16,¹⁹ where the Committee noted that women are often denied equal enjoyment of their economic, social and cultural rights, including the right to housing.²⁰ The Committee emphasised the importance of a substantive notion of gender equality in the realization of socio-economic rights, which is concerned not simply with the like treatment of men and women, but with ensuring that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience. The Committee noted that substantive equality is not necessarily achieved by gender-neutral laws and policies, but requires laws, policies and practices that take account of existing economic, social and cultural inequalities experienced by women.²¹

16.6 In General Comment 7,²² the Committee focused on forced evictions as a violation of the right to adequate housing. It noted that women and children, among other groups, suffer disproportionately from the practice of forced eviction, and that

¹⁹ UN Committee on Economic, Social and Cultural Rights, General Comment 16 (2005): The equal right of men and women to the enjoyment of economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights). Adopted at the Committee's Thirty-Fourth Session, 25 April – 13 May 2005. UN Document E/C.12/2005/4.

²⁰ General Comment 16, paras 3 and 14.

²¹ General Comment 16, paras 7 and 8.

²² UN Committee on Economic, Social and Cultural Rights, General Comment 7 (1997): The equal right to adequate housing (Art. 11.1 of the Covenant): forced evictions. Adopted at the Committee's Sixteenth Session, 20 May 1997. UN Document E/C.12/1998/22, annex IV.

upon eviction women in all groups are especially vulnerable, including as a result of “*their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless*”.²³

17 A number of international and regional instruments have expressly drawn attention to the housing rights of women. These include:

17.1 The 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),²⁴ which recognises the housing needs of rural women in particular, as well as the link between discrimination against women and their lack of access to adequate housing. Article 14 calls on States Parties to take all appropriate measures to eliminate discrimination against women in rural areas, and to ensure to such women the right “*to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications*”; and

17.2 Although the African Charter on Human and Peoples’ Rights²⁵ does not include an explicit right to housing, the African Commission on Human and Peoples’ Rights recognised that it

²³ General Comment 7, para 10.

²⁴ Adopted by General Assembly resolution 34/180 of 18 December 1979, and entered into force on 3 September 1981.

²⁵ African [Banjul] Charter on Human and Peoples’ Rights (1981), adopted 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force 21 October 1986.

does confer a right to housing in the landmark decision in *SERAC v Nigeria*.²⁶ Significantly, the Commission held that the right to family life in the African Charter was one of the cluster of rights whose combined effect is to guarantee the right to shelter and housing:

“[T]he corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.”²⁷

17.3 The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, which entered into force in 2005, specifically protects the rights of women to adequate housing, and states that women are entitled to “*equal access to housing and to acceptable living conditions in a healthy environment*” (art. 16).²⁸ The Protocol further guarantees every

²⁶ *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* Communication No. 155/96 (“SERAC”).

²⁷ SERAC at para 60.

²⁸ African Union, ‘Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa,’ adopted by the 2nd Ordinary Session of the Assembly of the Union (Maputo, 11 July 2003), entered into force 25 Nov. 2005. South Africa ratified the Protocol on 17 December 2004.

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

woman respect for her life and the integrity and security of her person, and requires the State parties to adopt and implement appropriate measures to ensure the protection of every women's right to respect for her dignity and protection from all forms of violence.²⁹

18 In addition to these express stipulations, the provisions on equality and non-discrimination contained in various international instruments provide implicit recognition that women should enjoy, on substantively equal terms with men, *inter alia* the rights to: housing; property; protection against unlawful interference in one's privacy, family and home; security of person; equality before, during and upon dissolution of marriage; and equal protection before the law.³⁰

See also the *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights* at para 6, which provide that States parties submitting reports on what they have done to give effect to their socio-economic rights obligations under the African Charter must:

"Provide information on legislative and practical steps taken to ensure enjoyment of the rights on a non-discriminatory basis by members of vulnerable or marginalised groups as defined in the Principles and Guidelines. Reports should particularly indicate what steps have been taken to ensure gender equality." (emphasis added)

²⁹ Articles 3 and 4.

³⁰ Relevant provisions are found in: the Universal Declaration of Human Rights (arts. 2, 16, 17 and 25); the International Convention on the Elimination of All Forms of Racial Discrimination (arts. 5 (d) (v) and (vi), 5 (e) (iii)); the International Covenant on Civil and Political Rights (arts. 2, para. 1, 3, 9, 16, 17, 23, para. 4, and 26); the International Covenant on Economic, Social and Cultural Rights (arts. 2, para. 2, 3, 11, para. 1); the Convention on the Elimination of All Forms of Discrimination against Women (arts. 1, 2 (f), 3 and 5 (a)); and the Convention on the Rights of the Child (arts. 1, 16, para. 1, and 27).

19 Further, as noted by the first UN Special Rapporteur on women and adequate housing, the lives of the majority of the world's women are intrinsically linked to those of their families and their children. The impact of inadequate housing and living conditions and homelessness on children therefore is equally important for their mothers.³¹ The provisions of articles 16.1 and 27 of the Convention on the Rights of the Child are thus also relevant:

“No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation (art. 16.1);

States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development . . . States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing. . . (art. 27).”

20 Various treaty bodies established to monitor States parties' compliance with international human rights instruments have examined the situation of women in relation to housing. These bodies have repeatedly recognised the importance of realising women's right to adequate housing for their empowerment and well-being, and have emphasised

³¹ Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination, Miloon Kothari, in accordance with Commission resolution 2002/49, adopted by the United Nations Commission on Human Rights at its Fifty-ninth session, March 2003. UN Document E/CN.4/2003/55. Para 23.

the necessity for State parties to adopt a gender-sensitive approach to housing laws and policies.

20.1 As noted above, the General Comments of the Committee on Economic, Social and Cultural Rights (CESCR) recognise the importance of adequate housing for women's enjoyment of other rights; the need for a gendered perspective in housing laws and policies to address discrimination against women; and the particular vulnerability of women in the context of forced eviction.

20.2 The United Nations' Commission on the Elimination of All Forms of Discrimination against Women (CEDAW) has issued a number of General Recommendations that have underscored States parties' obligations to ensure adequate living conditions for women, including housing, and linked this right to the enjoyment of other fundamental rights, including equality and health.³²

20.3 In 2002, the United Nations' Commission on Human Rights entrusted the Special Rapporteur on the Right to Adequate Housing with the task of conducting a global study on women and adequate housing.³³ The Special Rapporteur presented two

³² See for example, UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 21 on Marriage and Family Relations' 13th session (1994), UN document A/49/38; UN Commission on the Elimination of All Forms of Discrimination against Women, 'General Recommendation No. 24 on Women and Health,' 20th session (1999), UN document A/54/38/Rev.1, chap. I, para 28.

³³ UN Commission on Human Rights, Resolution 2002/49: "Women's equal ownership of access to and control over land and the equal rights to own property and to adequate housing".

reports to the Commission, in 2003 and 2008.³⁴ The Special Rapporteur identified various factors inhibiting women's access to adequate housing, and found that there is a "*clear link between violence against women and the human right to adequate housing*".³⁵

20.4 In 2004, the United Nations' Commission on Human Rights issued a resolution on forced evictions (no. 2004/28), which reiterated that women in particular are affected by forced evictions, "*given the extent of statutory and other forms of discrimination which often apply in relation to the property rights of women, including homeownership and rights of access to property of accommodation, and given the particular vulnerability of women to acts of gender-based violence and sexual abuse when they are rendered homeless*".³⁶

20.5 In 2005, the United Nations' Commission on Human Rights adopted a resolution on women's equal rights to adequate

³⁴ Miloon Kothari, *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination*, adopted by the United Nations Commission on Human Rights at its Fifty-ninth session, March 2003. UN Document E/CN.4/2003/55; Miloon Kothari, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the United Nations Human Rights Council at its Seventh session, February 2008. UN Document A/HRC/7/16.

³⁵ UN Special Rapporteur (M Kothari) First Report, 2003 at para 40.

³⁶ UN Commission on Human Rights Resolution: 2004/28, "Prohibition on forced evictions", adopted at the Commission's 52nd meeting on 16 April 2004; UN document: E/2004/23 – E/CN.4/2004/127.

housing,³⁷ in which it recognised that “*the lack of adequate housing can make women more vulnerable to various forms of violence*”. The Commission requested the Special Rapporteur on adequate housing to cooperate with the Special Rapporteur on violence against women in the elaboration of model provisions to protect women’s rights in housing and domestic violence legislation.³⁸ The Commission further reaffirmed “*women’s right to an adequate standard of living, including adequate housing*” and urged Governments to comply fully with their international and regional obligations and commitments concerning inter alia the equality of women to an adequate standard of living, including adequate housing.³⁹ It further affirmed that “*discrimination in law and practice against women with respect to . . . housing constitutes a violation of women’s human right to protection against discrimination and may affect the realization of other human rights.*”⁴⁰

20.6 In 2011, the United Nations’ Human Rights Council appointed a second Special Rapporteur to gauge what progress had been made in the advancement of women’s right to housing globally

³⁷ UN Commission on Human Rights Resolution: 2005/25, “Women’s equal ownership, access to and control over land and the equal rights to own property and to adequate housing”, adopted at the Commission’s 51st meeting on 15 April 2005; UN document: E/CN.4/2005/L.10/Add.10.

³⁸ Id at para 18.

³⁹ Id at para 2.

⁴⁰ Id at para 3.

since the first consultations were held.⁴¹ The Special Rapporteur noted that “*women throughout the world continue to face entrenched de jure and de facto barriers to the realization and enjoyment of this right*”, and that “*Legislative and policy measures must be put in place at national and regional levels explicitly prioritizing women’s right to adequate housing*”. In order to assist States and other relevant actors in the development of gender-sensitive housing law, policy, and programming, the Special Rapporteur provided a gender perspective on the core elements of the right to adequate housing enumerated in CESCR General Comment 4.⁴² The Recommendations of the Special Rapporteur include the following:

“63. The Special Rapporteur reiterates that States should design, adopt and implement gender-sensitive and human rights-based law, policy and programming which:

(a) Reflects international human rights standards related to women’s right to adequate housing, and a gender-sensitive understanding of the elements of the right to adequate housing;

. . .

70. States should ensure that housing includes water points and sanitation facilities available for and accessible to women, ensuring women their rights to water and sanitation, as well as to health. States should also ensure that housing is adequately located in order to provide women with access to employment options, health-care services, schools, childcare

⁴¹ Raquel Rolnick, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the Human Rights Council at its 19th Session in December 2011. UN document A/HRC/19/53.

⁴² *Id.* at paras 30 to 52.

centres and other social facilities, such that they are non-discriminatory, adequate, available and fully accessible to women and girls.”

20.7 In Europe, the Commissioner for Human Rights observed in a 2008 Issue Paper on Housing Rights that:⁴³

“The violation of the right to adequate housing may have different meanings for women and men. . . Women usually bear the primary responsibility for sustaining and maintaining homes, and it is vital that this critical role is recognized and their rights advanced. Any understanding of adequate housing in relation to women must take into account the context and housing and living conditions of the community and the family in which they live. The impact of inadequate living conditions and homelessness on children therefore becomes equally important for their mothers. The lives of many women are intrinsically linked to those of their families and their children. Homelessness for women carries great dangers. Accordingly, national Governments and the international community need to ensure that women are accorded substantive rather than illusory housing rights. . . . Moreover, laws and policies must be articulated and implemented in ways that recognize the specific constraints and vulnerabilities of women in relation to the right to adequate housing. The attainment of legal security of tenure is of critical importance to a large number of women. . . . Access to decent housing is a precondition for the exercise of other fundamental rights and for full participation in society.”⁴⁴ (emphasis added)

20.8 In 2009, the Commissioner for Human Rights of the Council of Europe issued a recommendation on the implementation of the right to housing, advocating the adoption and implementation of

⁴³ Issue Papers are commissioned and published by Europe’s Commissioner for Human Rights for the purpose of contributing to debate or further reflection on a current and important human rights matter.

⁴⁴ Council of Europe Commissioner for Human Rights, “Housing rights: The duty to ensure housing for all” (Strasbourg, 2008). Document CommDH/IssuePaper(2008)1, section 2.2.

national housing strategies by all Council of Europe member States.⁴⁵

20.8.1 The Commissioner endorsed the ICESCR's interpretation of the right, stating that the right to housing may be defined as "*the right to live somewhere in security, peace and dignity*", and noted that it "*is of central importance to the enjoyment not only of other social, economic and cultural rights such as rights to water, food, health, education and work, but also to the effective enjoyment of civil and political rights such as rights to privacy and family life*" (section 2.1).

20.8.2 Section 4.3.6 of the recommendation deals explicitly with women and women victims of violence, calling upon States "*to protect women victims of violence through specific legal and policy initiatives including the provision of specialized emergency shelters and other alternative housing.*" Section 5 also urges States to adopt national housing strategies that "*apply a gender perspective, identify disadvantaged and vulnerable groups and include positive measures for ensuring their effective enjoyment*

⁴⁵ Council of Europe Commissioner for Human Rights, "Recommendation of the Commissioner for Human Rights on the implementation of the right to housing" (Strasbourg, 30 June 2009), Document CommDH(2009)5.

of the right to housing,” and also to “adopt anti-violence provisions in housing legislation”.

21 Although not legally binding, these statements are indicative of international recognition that protecting women’s access to adequate housing is fundamental to their enjoyment of other human rights, including the right to family life; that a gender perspective on the right to housing is necessary to ensure women’s effective enjoyment of the right to housing; and that the protection of women’s right to adequate housing deserves focused and proactive measures. The same considerations have also informed numerous international declarations and recommendations, which contain specific references to issues related to women and adequate housing.⁴⁶

⁴⁶ For example, the Beijing Platform for Action, adopted at the Fourth World Conference on Women in 1995, commits Governments to remove all obstacles for women in obtaining affordable housing and access to land (para 58 (m)).

The Istanbul Declaration and the Habitat Agenda, adopted at the second United Nations Conference on Human Settlements in 1996, commits Governments to providing legal security of tenure and equal access to land to all people, including women and those living in poverty (para. 40 (b)). It also called upon States to support community projects, policies and programmes that aim to remove all barriers to women’s access to affordable housing and property ownership, economic resources, infrastructure and social services and ensure the full participation of women in all decision-making processes (para. 78 (e)).

The Declaration on Cities and Other Human Settlements in the New Millennium, adopted at the special session of the General Assembly in 2001, reaffirms the goal of gender equality in human settlements development. Some of the further actions listed in this Declaration include: the promotion of gender equality as an effective way to combat poverty (para 44); the promotion of changes in attitudes, structures, policies, laws and practices that form obstacles to gender equality (para 32); the promotion of greater security of tenure for the poor and vulnerable and of continued legislative, administrative and social reforms to give women “full

WHY A GENDER PERSPECTIVE ON HOUSING RIGHTS IS IMPORTANT

22 The emphasis in international human rights law on women's right to adequate housing is premised on the recognition that, for women especially, their right to adequate housing is intimately connected to their security, health, livelihood and overall well-being. This appreciation is based on two main reasons:

22.1 It is in part due to the fact that women usually bear the primary responsibility for sustaining and maintaining homes. Women tend to spend more time at home, and are often disproportionately burdened with child-care and household chores which depend directly on the availability of the facilities and infrastructure associated with adequate housing – including access to water, sanitation, heating, lighting, electricity, washing facilities and food storage.⁴⁷ The recognition that women continue to bear these responsibilities disproportionately should not be interpreted as

and equal access to economic resources" and the *"right to security of tenure"* (paras 45 and 49).

The United Nations Millennium Declaration (2000) lists, as one of the Millennium Development Goals, the promotion of gender equality and the empowerment of women. At their 2010 summit, States committed themselves to ensuring gender equality through a broad range of actions, including *"promoting and protecting women's equal access to adequate housing, property and land, including rights to inheritance, and enabling them to secure access to credit through appropriate constitutional, legislative and administrative measures."*

⁴⁷ Raquel Rolnick, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, adopted by the Human Rights Council at its 19th Session in December 2011. UN document A/HRC/19/53, para 38.

reinforcing the old, discriminatory adage that “a women’s place is in the home”, or confining women to certain gender roles. Rather, it is about acknowledging that gender as a social construct fundamentally impacts on the ways in which women experience their housing situations and that in order for women to enjoy adequate housing on the basis of equality their needs must be understood.⁴⁸

22.2 It is also due to the particular vulnerability of women to gender-based violence and sexual abuse when they are outside and rendered homeless.⁴⁹ This consideration is clearly relevant in South Africa, which has a high rate of violence against women. In its application for admission as an *amicus*, CALS attached a report from the Centre for the Study of Violence and Reconciliation (CSV) and crime statistics,⁵⁰ both of which evidenced the high rates of gender-based violence in South Africa. They also indicated that a relatively high proportion of

⁴⁸ The Special Rapporteur, Raquel Rolnick, makes a similar point at para 4 of her report (*ibid*).

⁴⁹ *Id* at fn. 37; the UN Commission on Human Rights resolution 2004/28 on forced evictions; Miloon Kothari, *Study by the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination*, adopted by the United Nations Commission on Human Rights at its Fifty-ninth session, March 2003. UN Document E/CN.4/2003/55, para 40.

⁵⁰ See CALS’ affidavit: Bundle L, p. 1289, paras 34 to 36; and annexures “BM1” and “BM2”: Bundle L, pp. 1294-1299; 1300-1393.

sexual offences occurred outside, in an open space like a field or park, and in the late afternoon/early evening period.⁵¹

23 The concern of human rights treaty bodies to promote and protect women's housing rights is also premised on the recognition that adequate housing is fundamental to the empowerment of women and the realisation of social equality. Ensuring that women have access to adequate housing is recognised as essential to securing autonomy and equality for women. As women continue to live in inadequate housing, or depend on male partners for access to adequate housing, they remain vulnerable to homelessness, forced evictions, gender-based violence and HIV/AIDS, which in turn results in the violation of other rights such as dignity, equality and health. Lack of access to adequate housing also limits women's ability to care for children, and so impacts on their right to family.⁵² In short, as the European Commissioner for Human Rights stated, "*Access to decent housing is a precondition for the exercise of other fundamental rights and for full participation in society*".⁵³

⁵¹ The 2012 Statistics of South Africa's Crime Survey showed that 34% of sexual offences occurred in an outside open space (see annexure BM2). The CSVR reported that of its study of approximately 800 reported rapes (most of which occurred in the Johannesburg Magisterial District between 1996 and 2000), some 25% of rapes took place outside, on open ground and other sites included public toilets and alleys. The study also showed a discernable increase in rape during the evening, from 4 to 6 pm (see annexure BM1).

⁵² See L Chenwi and K McLean 'A Woman's Home is her Castle?' – Poor Women and Housing Inadequacy in South Africa' (2009) 25 SALJ 517 at 535.

⁵³ Council of Europe Commissioner for Human Rights, "Housing rights: The duty to ensure housing for all" (supra), section 2.2.

24 In order for women to enjoy adequate housing and related rights, their needs must be understood and made visible in housing laws, policies and programmes. Gender-neutral laws and policies that fail to take into account women’s special circumstances (such as their vulnerability to sexual and gender-based violence) can perpetuate discrimination against women in the housing sphere, and fail to advance substantive equality.⁵⁴

25 We point out that, in South Africa, the need for a gender perspective to inform laws and policies has also been recognised as a legal imperative. The *Women Empowerment and Gender Equality Bill [B50-213]*, published in Gazette No. 37005 of 6 November 2013, introduces the requirement of “gender mainstreaming” in laws and policies.⁵⁵ ‘Gender

See also Raquel Rolnick, *Report of the Special Rapporteur* (supra) at para 3:

“[A]dequate housing goes far beyond addressing basic material needs. Because of the close connection that exists between the right to adequate housing and the right to equality, adequate housing for women goes to the heart of social inequality and discrimination. When a woman is unable to access adequate housing and land mainly because she is a woman, she is not only affected in terms of her immediate material needs, she is also relegated to a subordinate and dependent position within society because of her gender. Ensuring that women have access to and control over, vital resources such as housing and land is essential to challenging and changing gender power structures and patterns of gender inequality which continue to oppress, exclude and relegate women to the margins.”

⁵⁴ See further United Nations’ Office of High Commissioner for Human Rights, *Women and the Right to Adequate Housing* (New York and Geneva, 2012), UN doc: HR/PUB/11/02, pp. 42-44.

⁵⁵ Clause 8 of the Bill provides:

“Gender mainstreaming

8. (1) *Designated public bodies and designated private bodies must develop and implement plans and measures which seek to ensure gender mainstreaming.*
- (2) *The measures may include—*

mainstreaming' is defined in the Bill as "*the process of identifying gender gaps and making women's, men's, girls' and boys' concerns and experiences integral to the design, implementation, monitoring and evaluation of policies and programmes in all sectors of life to ensure that they benefit equally*".

THE IMPACT OF THE SHELTER RULES ON WOMEN IN THE CONTEXT OF INTERNATIONAL LAW

26 The international law approach to women's right to adequate housing must inform this Court's interpretation of the right under section 26 of the Constitution, and of legislation enacted to give effect to this right. This flows from the interpretative injunctions under sections 39 and 233 of the

-
- (a) *the integration of gender considerations by all managers into all policies, structures, systems and processes relating to the designated public bodies and designated private bodies;*
 - (b) *steps to ensure that decisions and activities of the designated public body or designated private body are preceded by a gender equality analysis;*
 - (c) *remedial measures to—*
 - (i) *prevent or alleviate actual and potential prejudice on the basis of gender; and*
 - (ii) *reduce disparities between women and men;*
 - (d) *steps aimed at ensuring compliance with obligations contained in applicable legislation and the international agreements; and*
 - (e) *assessing the implications of its planned measures, in relation to gender mainstreaming.*
- (3) *The policies, plans, programmes and strategies must, in the case of the designated public bodies, be approved by the Gender Focal Point contemplated in section 15, and in the case of designated private bodies, by the accounting officer also contemplated in that section.*
 - (4) *The Minister may require a designated public body or a designated private body to submit its plan and measures contemplated in subsection (1) within one year of being designated to the Minister, for consideration, evaluation and guidance.*
 - (5) *The Minister may, at any time after the submission of the plan or measures contemplated in subsection (2), require a designated public body or a designated private body to submit to the Minister a report on its implementation of subsection (1), for consideration, review and guidance.*
 - (6) *The Minister may develop guidelines to assist designated public bodies and designated private bodies to comply with subsection (1)."*

Constitution. The Court should accordingly adopt the gender perspective endorsed in international human rights law in assessing whether the shelter rules infringe on the occupants' constitutional right to adequate housing, and associated rights.

27 This requires the Court to give special consideration to the impact of the shelter rules on the rights of women, having regard to their particular housing needs. It must have regard to the social reality that:

27.1 Many women have special housing needs due to their responsibilities as primary care-givers, and they depend more heavily on access to household infrastructure and services as a result; and

27.2 Women have a particular dependency on housing as a place of safety and security, for themselves, their families and their children.

28 Further, the Court ought to have regard to the principled considerations that underpin the development of a gender perspective on the right to housing in international law, namely that:

28.1 The right to adequate housing is premised on the inherent right to human dignity. It is accordingly not simply a right to have a roof over one's head, but is *"the right to live somewhere in security, peace and dignity"*;

28.2 The enjoyment of the right to adequate housing is of central importance to women's enjoyment of other human rights, including the rights to equality, dignity, family and privacy;

29 The shelter rules have a serious detrimental impact on women and their children. The impact is evidenced in the cases of the women applicants described in this application.

30 The day time lock-out rule (which requires the occupants to remain out of the shelter every day from 08h00 to 17h30, with the lockout time extended to 09h00 on weekends) deprives women of a place of safety and security for themselves and their children when they are not employed; and it deprives women of access to basic infrastructure and services that they need to maintain a healthy and enabling environment for themselves and their families – in particular, water and sanitation, heat and lighting and cooking facilities. As a result, women occupants are denied the right to adequate housing, properly understood as “*the right to live somewhere in security, peace and dignity*”. Women's ability to fulfill their responsibilities as primary care-givers – and thus to enjoy the rights to family life, human dignity and equality – is also seriously compromised by the lock-out rule.

31 The impact of the lock-out rule on women's child-care is evidenced in the case of the first applicant, Ellen Nomsa Dladla and her 8 year-old

granddaughter, Ayanda, who shared a room at the shelter.⁵⁶ As Dladla explains in her replying affidavit, she was compelled to place her granddaughter in a children's home because the shelter conditions did not enable her to provide a safe environment for the child.⁵⁷ She feared for her safety and that of her granddaughter when roaming the streets of Johannesburg.⁵⁸

32 Dladla further expresses how splitting up families and being locked out of the shelter during the day “demeans” and disempowers the occupants, who are made to feel like children as a result.⁵⁹ This experience of ‘infantilisation’ by women at the shelter is supported by the expert evidence of psychologist, Professor Steven,⁶⁰ which explains that:

“The imposition of daytime lockouts tends to infantilise homeless people, undermine their dignity and impair their sense of agency. The imposition of rules separating them from their friends or relatives, or excluding them from shelter during the day, tends to produce a sense of powerlessness.”⁶¹

⁵⁶ FA, para 67: Bundle A, p. 37.

⁵⁷ RA, para 1: Bundle E, p. 373.

⁵⁸ FA, para 73: Bundle A, p. 38.

⁵⁹ RA, paras 5 and 57: Bundle E, pp. 374 and 393.

⁶⁰ Annexure A to replying affidavit: Bundle I, p. 1087-1127.

⁶¹ Id at para 18, p. 1093.

33 As a result of the day-time lock out rule, another woman staying at the shelter, Magdaline Malindsa, is forced “*to walk around the streets or sit in the nearby park*” when she does not have piecemeal work.⁶² She is deprived of a secure and non-threatening environment for many days of the month, as she has little work.⁶³

34 The impact of the day-time lock-out rule on the occupants’ well-being, health and security is described in the report of Ms Makhanya (a social worker who assessed certain of the occupants).⁶⁴ She explains *inter alia* that the occupants “*feel they have lost control of their lives and their housing situation*”; “*have become very anxious for their safety in the streets. The common worries include being hit by a car, robbed or abducted*”. Makhanya further explained that “*The rule denies employed clients the opportunity to rest when they are off. They related that this affects their performance at work because they are always tired*” and that the rule “*immobilizes them with all of them spending their time at a local park*”.⁶⁵

35 The experience of Samukelisiwe Mkwebu, who stays at the shelter with her 15 month-old daughter, also highlights the impossible constraints that the lock-out rule places on women with young children. While the shelter initially made an exception for Samukelisiwe to remain at the

⁶² FA, paras 114-115; Bundle A, p. 47.

⁶³ See Makhanya’s report, Bundle O at p. 1841.

⁶⁴ Annexure I to supplementary replying affidavit: Bundle O: pp. 1839-1847.

⁶⁵ Id, paras 1.1.2; 1.2; 1.3; 1.5, p. 1845.

shelter from 08h00 to 13h00 in order to care for her baby,⁶⁶ since November 2012, she has only been permitted into the front yard of the shelter to feed her child.⁶⁷ The fact that an exception (although only a partial one) was made to the lock-out rule for Samukelisiwe indicates that the second respondent recognised how prejudicial the lock-out rule is for women with young children.

36 The separation of families and cohabiting couples at the shelter also has a detrimental impact on women. In particular, it deprives women of privacy and family life, as they are denied intimacy and the support of their partners and husbands. The rule also increases the burden that women carry in maintaining families and children, as it is the women who are made to bear the sole responsibility for child-care in the sleeping quarters. In this respect, the rule entrenches patterns of gender discrimination in the family.

37 The impact of this rule on family life is evidenced in the case of Jackinah Kganyago and Samson Maitisa, who are married under customary law, but who are not permitted to share a room at the shelter.⁶⁸ Since being relocated to the shelter, Jackinah and Samson have also been separated from their children, aged 10 and 17 years, as they have sent their children to live in Limpopo.⁶⁹

⁶⁶ FA, paras 100-103: Bundle A, pp. 44-45.

⁶⁷ RA, para 59: Bundle E, p. 394.

⁶⁸ FA, para 91: Bundle A, p. 43.

⁶⁹ FA, paras 91, 93: Bundle A, p. 43.

- 38 The separation of their family and their separation as a couple is described as being “painful and humiliating” for Jackinah and Samson.⁷⁰ Ms Makhanya, a social worker who assessed certain of the occupants, described the impact of the separation of the couple as “*compromising and disrupting the family unit*”; having “*created an emotional distance in their relationship*”; “*presented a loss of support for them in one another*”; and having “*created an additional financial burden on the couple’s limited financial resources because they need to travel to Limpopo to have normal intimate relations*”.⁷¹
- 39 The result of these experiences is that the women occupants at the shelter are deprived of the right to adequate housing at the shelter. It is plainly not a place where they are able to live in security, peace and dignity. Their rights to family life, dignity, privacy and security are also seriously compromised by the shelter rules, and their right to equality is infringed by virtue of the fact that the shelter rules impact disproportionately on them as women.

CONCLUSION

- 40 For the above reasons, CALS seeks admission as an amicus curiae and supports the relief sought by the applicants.

⁷⁰ Id.

⁷¹ Annexure I to supplementary replying affidavit: Bundle O: p. 1845.

41 As is the ordinary rule in relation to costs for amici curiae, CALS does not seek its costs in the main matter and submits that no costs should be awarded against it in the main matter. However, in the event that the first respondent persists unreasonably in opposing the admission of CALS as an amicus curiae, CALS seeks the costs in relation only to the application for its admission.⁷²

Jason Brickhill

Janice Bleazard

Counsel for the Centre for
Applied Legal Studies

Chambers, Sandton

16 May 2014

⁷² *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) at para 52.