

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN, JOHANNESBURG)**

CC Case No.: 212/17
SCA Case No.: 423/17
WCHC Case No.: 5283/16

In the matter between:

RIAAN MOGAMAT AMARDIEN

First Applicant

ELEVEN OTHERS

Second to Twelfth Applicants

and

THE REGISTRAR OF DEEDS

First Respondent

SHAUN WINGERIN N.O.

Second Respondent

GRAEME MICHAEL SCKOLNE N.O.

Third Respondent

NICOLA MARTINE COHEN N.O.

Fourth Respondent

**THE CAPE TOWN COMMUNITY HOUSING
COMPANY (PTY) LTD**

Fifth Respondent

and

THE DEPARTMENT OF HUMAN SETTLEMENTS

First *Amicus Curiae*

WOMEN'S LEGAL CENTRE TRUST

Second *Amicus Curiae*

SECOND *AMICUS CURIAE*'S WRITTEN SUBMISSIONS

I INTRODUCTION

1. The Women's Legal Centre ("**The Centre**") is an African feminist legal centre that advances women's rights and equality through strategic litigation, advocacy and education and training. We aim to develop feminist jurisprudence that recognises and advances women's rights. The Centre drives a feminist agenda that appreciates the impact that discrimination has on women within their different classes, race, ethnicity, sexual orientation, gender identity and disability.
2. The Centre works on issues of land, housing and tenure security over its focus areas as we apply an intersectional approach to the work that we do. We therefore recognise that women experience issues of discrimination differently, but that they face multiple forms of discrimination.
3. In our work we often experience violence against women intersecting with housing and tenure security. Women's rights to tenure security and access to land and housing also intersect in various ways with issues of custom, in both law and practice. One therefore cannot have a conversation about a woman's rights to and access to land, housing and tenure security in isolation from where

she is positioned within her home, community and society as a whole.

4. Women in South Africa use land, occupy land and own land within different contexts. In our country, with such varying levels of discrimination, the impact of their use, occupation and ownership can be vastly differently
5. The Centre currently represents women-headed households in a separate eviction matter brought by the CTCHC in the Western Cape High Court. Although these matters are factually different from the current matter before the Court, the manner of cancellation by the CTCHC has an impact on the rights of these occupiers, and in particular women.
6. Our submissions are thus informed by the Centre's representation of these women in these matters, our daily engagement with women, various state institutions and departments on the issue of land, housing and property.

II CURRENT MATTER BEFORE THE COURT

7. Though the issues in the present matter have been narrowed to dealing with two specific points of law, the facts giving rise to the issues are by no means simple. The present case sees an intersection between the law of contract, the regulation of credit agreements, and most importantly the realisation of the right to housing as envisaged by section 26 of the Constitution.
8. It is imperative that the Court remain cognisant of the fact that the notices which are the subject of this determination are the bases for the Applicants', and others in their positions, right to reside in their homes. To view the matter devoid of, or separated from, the constitutional right to housing is a failure to appreciate the nature and impact of the present circumstances before the Court.
9. Housing jurisprudence is therefore a fundamental component of interpreting section 129 notices on the current set of facts. It is ill-advised to strip away the rights components as if the section does not bear direct implications for those rights. Section 129 must be placed within the framework of the right to housing, equality and dignity jurisprudence.
10. This intersectional set of facts requires a nuanced, purposive, and socio-contextual approach to be applied when interpreting the

implementation of s 129 notices in these circumstances – an approach the Court a quo failed to adopt in its strict interpretation.

11. The focus of these submissions, therefore, is to offer the Court the best interpretation to adopt when interpreting and applying the law to this specific set of facts. We submit that the best interpretation is one that is gendered in its approach, and protective of vulnerable persons in these, and similarly placed, situations.
12. In order to illustrate this point, these submissions are divided as follows:
 - 12.1 The need for a gendered lens in these proceedings;
 - 12.2 The position, and purpose of the Cape Town Community Housing Company;
 - 12.3 Interpretation of section 129 of the National Credit Act in line with section 26 of the Constitution; and
 - 12.4 International and regional law obligations

III THE NEED FOR A GENDERED LENS

13. This appeal is about the provision of housing in Mitchell's Plain. This is a known disadvantaged area in Cape Town. According to STATS SA statistics from 2011, of the then-calculated population of 310 385, women make up 51.4%; and of the 67 993 households, 37.8% are female-headed.¹
14. Women do not only make up the majority of persons reported to be living in Mitchell's Plain, they also head just over a third of the households in the area.
15. Of the 12 applicants, nine are women who had entered into an instalment-sale agreement with the CTCHC to purchase and own a home.²
16. This matter has a gendered aspect to it, and requires a gendered lens through which to view and interpret the facts. One cannot wish away the fact that the contracts were concluded with women and have direct implications for women.
17. It cannot be denied that within low-income communities there are women who struggle to have access to housing by virtue of their

¹ STATS SA http://www.statssa.gov.za/?page_id=4286&id=329 (accessed on 30 July 2018)

² FA pp 7-11; Record Vol. 1 pp 13-17.

lived realities, and the different forms of intersectional³ discrimination they experience on a daily basis.

18. Women are not a homogenous group who need and use land for the same purpose and reason. Women are from diverse backgrounds, races, ages and come from varying economic and educational circumstances. Any legislative or policy provisions must take into account the intersecting manner in which women engage with and use land.
19. Practical considerations must inform legislative and policy development in order to effect substantive change in the lives of women.

Women's rights to land, housing and property rights in personal relationships

20. Women have different relationships throughout their lives and through many of these relationships issues of land, housing and property rights intersect. The Centre's work in this area has been

³ Intersectionality is understood as the 'interaction between gender, race, and other categories of difference in individual lives, social practices, institutional arrangements, and cultural ideologies, and the outcomes of these interactions in terms of power' - K Davis, "intersectionality as a Buzzword: A Sociology of science perspective on What makes a Feminist Theory Successful, Feminist Theory 9, no9 (2008)

specifically focused on these rights as they intersect with marriage, inheritance and cohabitation.

21. South Africa's legal framework aims to promote women's rights to equality and dignity, and to provide legal protection for women in formal marriages (civil marriages, civil unions, and customary marriages). However at present there is a vacuum in terms of the protection of women in unregistered religious marriages, and in domestic partnerships. It is within this vacuum that women's constitutional rights are being violated in that they struggle to access their right to land, housing and property at the dissolution of their marriage or cohabitation (whether by death or divorce).
22. In these instances where the relationships breaks down either because of death, divorce or mutual separation women are left with little to no legal recourse in respect of the house they may live in, the land which they occupy or farm on, or the property which was jointly accumulated during the subsistence of the relationship.
23. Statistics South Africa has recently released the marriage statistics in our country and recorded only 3 978 registered customary

marriages in South Africa in 2016,⁴ which clearly indicates that there is a crisis in protecting women's property rights even under our current legislative framework.

24. Based on our experience, couples have not stopped getting married in terms of custom – they have stopped registering their marriages. This leaves women at a particular disadvantage as they cannot claim their matrimonial property without going to Court to obtain recognition of their marriage.

Evictions and Women's Access to Land, Housing and Tenure Security

25. Women in South Africa are not experiencing discrimination and evictions for the first time. The legacy of the 1913 Land Act has a rich history of how women were subjected to physical, social and economic plundering. It is from this legacy that we need to build a foundation to ensure that women are no longer left behind. Women continue to bear the brunt of discrimination based on past injustice and continued patriarchy.

⁴ In 2016 Stats SA recorded 3 978 customary marriages registered with the Department of Home Affairs, which is an increase of 14.7% based on 3 467 in 2015, but which is still nowhere close to 20 301 registered marriages in 2004.

26. In January 2017, the World Economic Forum reported that women own less than 20 percent of the world's land.⁵ South Africa has similar struggles in respect of women's ownership of, and control over land.
27. Women's access to land and housing remains peripheral at best even though the state has enacted a number of key strategic laws and policies to provide for equal treatment of women.
28. Legislation, policy, and the presence of customs and cultures steeped in patriarchy have supported ongoing discrimination against women in respect of access to land, housing and tenure security and ownership. Women in both rural as well as urban centres struggle with tenure security and often find themselves bonded to paternalistic policies which bind their tenure rights to that of the head of their households ("men").
29. Similarly, and increasingly, we are witnessing women in urban environments being vulnerable to evictions. The urban environment has for many years attracted women to cities in order to get work and improve their and their families' living conditions. Access to land

⁵ Monique Villa 'Women own less than 20% of the world's land. It's time to give them equal property rights' at <https://www.weforum.org/agenda/2017/01/women-own-less-than-20-of-the-worlds-land-its-time-to-give-them-equal-property-rights/> (11 January 2017).

and housing in urban centres have increasingly become problematic in cities such as Cape Town where apartheid spatial planning and development continue to keep women from enjoying access to housing, which is in close proximity to their places of employment.

30. In the inner city where many of our most vulnerable clients work the value and prices of property has increased exponentially to the point where ordinary women can no longer afford to purchase or rent property in close vicinity to places where they work. Thousands of women make use of public transport on a daily basis in order to reach places of employment in areas which are still considered white neighbourhoods. Housing subsidies and access to state linked finance schemes make access to housing a reality for the vast majority of working class women
31. It is clear that vulnerable, poor and working class women historically find it extremely difficult to access housing. Finance linked subsidies are the only means of accessing finances for a house, and policies and practices in respect of qualification and retention of housing need to take these factors into consideration.

IV POSITION AND PURPOSE OF CTCHC

32. The description of the CTCHC provided on the homepage of its website states that *'it is an affordable housing institution funded and wholly owned by the National Housing Finance Corporation.'*⁶ The affordable housing it has assumed the obligation of delivering is situated mainly *'where the poor and disadvantaged groupings live.'*
33. The National Housing Finance Corporation (**NHFC**) was established by the National Department of Human Settlements, as it then was, to improve on the socio-economic challenges of South Africa; and does so through financing affordable housing schemes. It focuses on financing those models that provide housing to GAP beneficiaries: those who do not qualify for free housing, though they are able to make some limited contribution towards their housing costs, but cannot access bank-funded housing finance.
34. The CTCHC's position is therefore strategically placed between the community members to whom it makes access to housing possible, and the State on which it is dependent on funds to ensure it is able to provide access to housing.
35. In its provision of housing for poorer members of the South African community, it states that it supports and implements the Western

⁶ <http://www.ctchc.co.za> (accessed on 20 July 2018).

Cape's Sustainable Human Settlement Strategy on integrated housing and dignity.⁷

36. In terms of the manual the CTCHC alleged to have provided to the Applicants at the workshop held with them, and as provided at page 386 of the record, the CTCHC explains that it applies for the institutional housing subsidy, and allocates it to those who qualify for the funding. The Applicants qualified by virtue of being GAP applicants – they earn between R3500 and R20 000 a month, do not qualify for free housing, but also cannot afford bank financing.
37. Before being allocated a house, the Applicants were required to embark on a savings programme and save a specified amount between R50.00 to R350.00 (increasing in R100.00 increments) for a certain number of months to prove that they were able to save consistently, and make payments into the account timeously. They did so to be placed in the housing queue for the allocation of a house by CTCHC. The programme geared them towards the practice of budgeting their limited finances; however, if they missed a payment then they would lose their place in the housing allocation queue. This illustrates the following:

⁷'Mandate, Vision and Mission', Cape Town Community Housing Company webpage <http://www.ctchc.co.za/?controller=pages&view=load&id=company#mandate> (accessed on 20 July 2018).

- 37.1 CTCHC recognised that budgeting would be a difficult task for the applicants due to their low income bands;
- 37.2 It foresaw that this exercise would be difficult for the applicants; and
- 37.3 In warning of the consequences of non-payment, CTCHC also foresaw the possibility that there would be applicants who would default on paying these amounts, and thus losing their place in the queue. It recognised that the applicants were in such difficult circumstances that it was possible to default on an amount as low as R50.00.
38. The above demonstrates that the CTCHC, working with State allocated subsidies, and financed by a governmental institution, assumed the obligation to provide access to housing for those persons who would otherwise struggle to become home-owners in South Africa and who are unable to access finance from a financial institution.⁸

⁸ Clause 2.2 of the instalment-sale agreement, Record vol. 1 p 48.

39. By its own admission, the fifth respondents described itself as a vehicle for the delivery of houses in compliance with the City's constitutional obligations.⁹

40. Its purpose is thus to provide adequate housing, as envisaged by the Constitution and to assist the State in progressively realising the right to housing in terms of Section 26 of the Bill of Rights which provides that:

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

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

(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.

41. Through its provision of financial resources to the CTCHC, it could be argued that the State is taking reasonable measures to achieve the progressive realisation of the right to have access to adequate housing. However, this reasonableness inquiry cannot stop with the State's provision of resources – it must extend to the vehicle to which the money is being allocated, and the manner in which it is

⁹ Written submissions of Fifth Respondent, para 5.

making access available to the recipients of the housing it endeavours to provide.

42. In *Katshwa and Others v Cape Town Community Housing Company*,¹⁰ Steyn J held that the CTCHC was not the State; however this finding does not mean that they are excluded from being held to the same standard of the State. By virtue of their unique position, in that:

42.1 They are funded by the State, through the NHFC;

42.2 They receive institutional housing subsidies to allocate to qualifying housing beneficiaries that, once allocated, cannot be obtained by the beneficiary in future;

42.3 They have undertaken to provide housing in line with the State's obligations as stated in section 26 of the Constitution;
and

42.4 Through their housing schemes, CTCHC allow GAP beneficiaries to realise their right to housing;

It is necessary for the Court to lift the veil between the CTCHC and the State in order to ensure that this unique vehicle is held to the same standard as the State as it has assumed a constitutional

¹⁰ *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd* [2013] ZAWCHC.

obligation to provide access to adequate housing. To do anything less would allow them to abdicate their assumed responsibilities, whilst benefiting from their barring access to housing for those who struggle to have this right realised.

43. CTCHC, and its actions, must be held to a standard that advances the section 26 right to access adequate housing; not one which allows it to act as a barrier to this right.

V INTERPRETING SECTION 129 OF THE NCA IN LINE WITH SECTION 26 OF THE CONSTITUTION

44. As stated by the applicants in their written submissions, it is necessary for the Court to adopt a purposive and contextual interpretation in this matter.¹¹ We will provide the Court with the necessary factors to consider, to add colour and texture to the purposive approach to be adopted when interpreting the present facts and law. More specifically, we submit that this approach will require a gendered lens, and an awareness of the existing legal protections afforded in the context of state-subsidised housing (which are lacking in this current set of facts).

¹¹ Written submissions of Applicants (dated 22 June 2018), paras 36-39.2.

The gendered lens

45. Quoting Anna Pellat, Amanda Spies supports her thoughts on the relevance of a feminist voice in litigation; that:

In order to make law conscious of, and responsive to, gender oppression in all of its manifestations, it is necessary to challenge signifying rules and conventions that denigrate and erase the difference that women represent and, at the same time, to find ways of re-working the discourse in order to represent who women are and what they experience in palpably real and full terms.¹²

46. When accessing housing, women are a recognised vulnerable group. This Court has accepted and recognised the vulnerable position of women in South African society, and the difficulties they face in realising their rights in terms of access to housing.

46.1 Sachs J, in *PE Municipality v Various Occupiers*¹³ in his discussion of what is meant by ‘considering all the relevant circumstances’ in terms of the Prevention of Illegal Evictions and Prevention of Unlawful Occupation Act,¹⁴ stated that the ‘*particular vulnerability*’ of those occupiers referred to in

¹² Amanda Spies ‘Considering the impact of amicus curiae participation on feminist litigation strategy’ *SAJHR* (2015) 136 at 139

¹³ *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC)

¹⁴ Act 19 of 1998.

section 4 of the Act could constitute a relevant circumstance.

Women constitute one such vulnerable occupier.¹⁵

46.2 As he then was, Moseneke DCJ recognised at para 147 of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*¹⁶ that women were of South Africa's most vulnerable groups, which also included the unemployed and children.

46.3 In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*¹⁷ Van der Westhuizen J recognised that the City's assessment as to whether emergency accommodation should be made available excluded the individual situations of the persons at risk of eviction. Van der Westhuizen J noted that '*affected individuals may include children, elderly people, people with disability or women-headed households, for whom the need*

¹⁵ *PE Municipality v Various Occupiers* at 30.

¹⁶ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454.

¹⁷ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) at 92.

*for housing in particularly great or for whom homelessness would result in particularly disastrous consequences.*¹⁸

47. The CTCHC is often the only mechanism through which women can obtain an asset, have a home, and thus access housing. In further understanding the vulnerable position women are in, it is necessary for the Court to recognise women embark on different forms of work; they have access to different sources of income; and that their relationships are not always legally recognised.

48. Due to this intersectional and vulnerable position, it is necessary for the CTCHC to exercise caution before embarking on a cancellation procedure in circumstances where they are aware that the financial resources of the beneficiaries of the houses are unique, limited and constrained.

Relevant factors to consider before cancelling state-subsidised housing

49. Subsidy beneficiaries fall within a certain income bracket and represent those persons who do not qualify for a mortgage bond

¹⁸ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* at 92.

and are unable to afford the average rental property. They represent, *inter alia*, female headed households, widows, backyard dwellers, single parents, the elderly, persons with disabilities, and the poor.

50. Many of these beneficiaries have also been waiting for years on the government's housing list for an allocation. Government housing schemes are thus designed to assist low to middle income earners to access adequate housing in terms of section 26 of the Constitution.
51. It is unfortunate, in these circumstances, that the termination of the instalment sale agreements effectively prevents them from ever qualifying for a housing subsidy again and will in all likelihood render them homeless. This practice adopted by the CTCHC constitutes an unfair and unreasonable infringement of these beneficiaries' right of access to adequate housing, provided for in section 26 (1) of the Constitution.
52. The Constitutional Court held in *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), that the right to housing imports at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate

housing. This rests not only on public bodies but also on private parties. Later decisions of the Constitutional Court have shown how the progressive realisation of the right of access to housing may impinge on private parties. Thus in the normal course debt recovery is subjected to judicial consideration of the right before creditors may levy execution on a debtor's home.¹⁹

53. It is apparent that the purchasers in this instance are not afforded the above protection as the instalment sale agreement allows for the CTCHC to cancel the agreement without judicial supervision and without affording the purchaser the opportunity for debt scrutiny by a competent Court. In at least two of the eviction applications pending before the Western Cape High Court the agreements were cancelled for trivial arrears that represent less than 2 months of non-payment. In this respect it appears to be an arbitrary process adopted by the CTCHC as the debt can be recovered by other means. If this agreement was subject to judicial supervision it would afford the purchaser's a right to settle their arrears without losing their homes.

¹⁹ See : *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC); and *Jaftha v Schoeman and Others*; *Van Rooyen v Stolz and Others* 2005 (2) SA 140 (CC); See also: *Mphango v Aengus Lifestyle Properties* 2012 (3) SA 531

54. Presently, debtors under mortgage bonds are afforded more protection than beneficiaries of state subsidies, and by virtue of the safeguards provided for in Rule 46 of the Uniform Rules of Court (as amended). The difference between a mortgagee and a purchaser in terms of an installment sale agreement is briefly summarized as follows:

In respect of a mortgagee:-

56.1. The title deed will immediately be transferred to the purchaser (mortgagee);

56.2. A mortgage bond in favour of the bank will be registered on the property

56.3. The bank holds the original title deed, with the bond as security until the mortgage bond has been covered or repaid in full or legally cancelled;

56.4. The mortgagee has full rights and responsibilities of ownership and use of the property;

56.5. They are afforded foreclosure with legal process;

In respect of beneficiaries of state subsidies in respect of this instalment sale agreement:-

56.6 The title deed remains in the name of the credit provider until such time as the purchaser has redeemed his/her debt in full;

56.7 The title deed merely stipulates that the purchaser bought the property and is repaying the credit provider. The purchaser will therefore eventually become the lawful and rightful owner of the property, provided the terms of the agreement are adhered to;

56.8 If the purchaser cannot meet the commitment as stipulated by the agreement the seller can cancel the agreement;

56.9 There is no provision in the agreement for cancellation with judicial process nor provision for cancellation with the knowledge, approval, or intervention of the City of Cape Town and the Department of Human Settlements;

56.10 In the event of cancellation of the agreement the monies already paid and all full subsidy benefit is forfeited to CTCHC and the purchaser's name remains on the database of the Department of Human Settlements as a beneficiary of a state subsidy;

56.11 The beneficiaries are not provided an opportunity to settle the outstanding arrears.

57. In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140, the Constitutional Court was seized with the question whether a law which permits the sale in execution of peoples' homes because they have not paid their debt, thereby removing their security of tenure, violates the right to have access to adequate housing, protected in section 26 of the Constitution.
58. It is apparent that the effect of the *Jaftha* judgment is that execution may only follow upon judgment in a Court of law. Where execution against the homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, then further judicial oversight of the execution process is a necessity.
59. Following *Jaftha*, the Constitutional Court was called upon to determine whether a High Court Registrar in the course of ordering default judgment under Rule 31 (5) (b) of the Uniform Rules of Court, may grant an order declaring mortgaged property, that is a person's home, specifically executable. The Court in *Gundwana v Steko Development* 2011 (3) SA 608 found that to the extent that the High Court Rules and practice allow a Registrar to grant orders

declaring immovable property that is a person's home executable, they are constitutionally invalid.

60. We submit that the same protection is not in place in terms of the instalment sale agreements that were entered into with the CTCHC. Its impact effectively means that there are two forms of justice: one for the rich that can afford a mortgage bond and who enjoy the protections thereof; and another for poor and marginalised women who after one default in payment of as little as R50.00 can have their right to housing snatched away. Its effect and impact is devastating on the lives of poor and working class women.

VI INTERNATIONAL AND REGIONAL LAW OBLIGATIONS

61. Gender inequality in respect of issues of land and housing are critical as it lies at the heart of poverty, exclusion and insecurity of women worldwide. Protecting and strengthening women's access and rights to land and natural resources helps to ensure that

women are able to provide for their material needs, as well as the needs of their families and communities.²⁰

62. South Africa is a signatory to a number of international and regional human rights mechanisms. These international and regional instruments have set out some positive developments and have encouraged a substantive equality approach to the provision of and access of women's rights to land, housing and property. It provides us with some guidance on South Africa's obligation in respect of women and the right to land, housing and property.
63. Section 39(1)(b) of the Constitution provides that '*[w]hen interpreting the Bill of Rights, a court, tribunal or forum– [...] must consider international law.*'
64. The necessary international law principles and obligations applicable to this set of facts, and section 26 of the Constitution, are:
- 64.1. The Universal Declaration of Human Rights;
- 64.2. Convention on the Elimination of all forms of Discrimination against Women;

²⁰ *The State of Food and Agriculture: 2010 – 2011* (UN Food and Agriculture Organisation, Open Society Foundation Securing Women's Land and Property Rights: *A Critical Step to address HIV, Violence and Food Security.*

- 64.3. The International Covenant on Economic, Social and Cultural Rights;
- 64.4. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa;
- 64.5. The Sustainable Development Goals; and
- 64.6. The Guiding Principles on Business and Human Rights.

The Universal Declaration of Human Rights

- 65. Adopted in 1948, the Universal Declaration of Human Rights ('**UDHR**') sets out fundamental human rights that are universally applicable, and universally protected. As South Africa is a party to the United Nations Charter, the obligations provided in the UDHR are binding on states by virtue of their UN member status.
- 66. South Africa is therefore bound by the obligations expressed in the UDHR. Pertinent in these proceedings are the obligations found in Article 25(1) of the UDHR, which provides that:

Everyone has the right to a standard of living adequate for the health and well-being of [herself] and of [her] family, including food, clothing, housing and medical care and necessary social services [...]

67. South Africa, as a member of the international community to which the above applies, has assumed the responsibility to '*promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance*'.²¹
68. CTCHC, as a vehicle for the provision of state-subsidised housing, is in a position to respect this right, and secure it through effective recognition and observance.

Convention on the Elimination of all forms of Discrimination against Women

69. South Africa has signed and ratified the Convention on the Elimination of all forms of Discrimination against Women ('CEDAW'), which has made some strong General Recommendations and General Comments to guide member states about women in relation to land.
70. The CEDAW Committee has called upon South Africa to '*[e]liminate all forms of discrimination with respect to ownership, co-sharing and inheritance of land*' and '*take the necessary measures*

²¹ United Declaration of Human Rights, Preamble.

*to increase and strengthen the participation of women in designing and implementing local development plans, and to pay special attention to the needs of rural women, by ensuring that they participate in decision making processes and have improved access to fertile land.'*²²

71. In general, the Committee has called upon member states to adopt special measures to accelerate the advancement of women's land ownership and expand access by women to land, as well as access to credit. The Committee recognises that women's economic social and cultural rights are all inter-linked and inter-dependent. The Committee has made clear linkages between women's access to land and food security calling on states to ensure women's access to resources and nutritious food by eliminating discriminatory practices.

The International Covenant on Economic, Social and Cultural Rights

72. South Africa has in recent years ratified the Covenant on Economic Social and Cultural Rights ('**ICESCR**'). Like the CEDAW Committee

²² CEDAW Committee Recommendation to South Africa 2011

the CESCR Committee has made a number of important comments in that it has for instance confirmed that “...*women have a right to own, use or otherwise control housing, land and property on an equal basis with men, and to access necessary resources to do so...*”²³

73. Article 11(1) of the ICESCR provides that states party to the Covenant recognise the right of everyone to an adequate standard of living, which includes housing and the continuous improvement of living conditions.
74. We submit that the obligation to provide continuous improvement of living conditions cannot be reconciled with the approach of the CTCHC on the facts. To attempt to cancel the instalment-sale agreements with the applicants, and to demand the immediate payment of unstipulated monies outstanding, without first having due regard to the distinctly difficult financial situations of the applicants, does not fulfill the spirit and purpose of Article 11.
75. In the circumstances, it is therefore necessary for CTCHC to adopt an approach that is in line with its international law obligations. Read with the section 26 right, this will in turn ensure the better

²³ CESCR General Comment No 16: Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005) UN Doc E/C.12/2005/3 para 28

realisation of its constitutional obligations, and the concomitant enjoyment thereof by the applicants and those similarly placed.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa

76. Better known as the **Maputo Protocol**, it places a specific obligation on the state to ensure that women have the right to equal access to housing and acceptable living conditions. South Africa is a signatory to, and has ratified the Protocol.

77. Article 2 recognises the necessity of a gendered perspective in the adoption of appropriate legislative, institutional and other measures. It provides that state parties shall '*integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life.*'

78. It makes specific provision for the right to property in Article 14 where it states that:

The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws

79. Article 16 of the Protocol addresses women's right to adequate housing, and mandates member states to ensure that women have access to housing and acceptable living conditions in healthy environments. It states that '*[w]omen shall have the right to equal access to housing and to acceptable living conditions in a healthy environment. To ensure this right, State Parties shall grant to women, whatever their marital status, access to adequate housing.*'
80. On the current facts, for those women who are in marriages not legally recognised by the State, or who cannot afford access to housing through bank financing or the State's free housing scheme, the CTCHC is their only recourse for the realisation of this right. It is a means through which women are granted access to housing through the progressive realisation of their rights.
81. It cannot be said without challenge that the CTCHC provides access to housing in the circumstances, and in line with the above obligations. If it did so, it would be more sensitive to the lived realities of those with whom it contracts.

The Sustainable Development Goals

82. The Sustainable Development Goals ('**SDGs**') are universal goals aimed at addressing environmental, political and economic challenges facing the global community.
83. There are 17 interconnected goals, two of which are relevant to the proceedings before Court:
- 83.1. Gender equality – ending all forms of gender discrimination is crucial to the process of sustainable development. Vital to the achievement of the goal is affording women equal rights to economic resources such as land and property; and
- 83.2. Sustainable cities and communities – due to the growth in the number of people living in urban areas, the goals recognise that in order to address and alleviate poverty requires making cities safe and sustainable. This can be achieved by ensuring access to safe and affordable housing.
84. The goals are a commitment to ensuring that everyone enjoys substantive rights realisation.

The Guiding Principles on Business and Human Rights

85. The Guiding Principles on Business and Human Rights (**'the Principles'**), endorsed by the Human Rights Council, were developed on the issue of human rights, and transnational corporations and other business enterprises. The Principles should be implemented in a manner that pays particular attention to the rights, needs, and challenges faced by individuals and groups at heightened risk of becoming marginalised or vulnerable, and with due regard to the different risks faced by women and men. The Principles apply to all States and business enterprises, and are grounded in recognising the role of business enterprises as specialised organs of society performing specialised functions, and that they are required to comply with applicable laws and respect human rights.

86. Article 4 of the Principles provides that states should take additional steps to protect against human rights abuses by business enterprises owned and controlled by the state, or that receive substantial support and services from state agencies. This can be done by requiring human rights due diligence.

87. In its commentary on Article 4, the HRC states that:

Where a business enterprise is controlled by the State or where its acts can be attributed otherwise to the State, an abuse of human rights by the business

enterprise may entail a violation of the State's own international law obligations. Moreover, the closer a business enterprise is to the State, or more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights.²⁴

88. The Human Rights Council is a body established by the United Nations (of which South Africa is a member state). It issued these Principles to assist States in respecting their international law obligations. Though they are not binding, they do supplement the understanding and respect of international law obligations.
89. Internationally it has been accepted that women's access to land is intrinsically linked to their other economic, social and cultural rights, and any legislative amendment or policy introduction needs to take this intersectionality into account. There is also an acceptance special measures need to be put in place in order to address discrimination.

VII CONCLUSION

²⁴ United Nations Human Rights Office of the High Commissioner, 'Guiding Principles on Business and Human Rights', p 7.

90. We submit that the matter cannot be determined without due consideration of the uniquely vulnerable position of women, and their lived realities when accessing state-subsidised housing.

SEEHAAM SAMAAI

NASREEN SOLOMONS

Attorney for the second *amicus curiae*

Women's Legal Centre, Cape Town

31 July 2018

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
(HELD AT BRAAMFONTEIN, JOHANNESBURG)**

CC Case No.: 212/17
SCA Case No.: 423/17
WCHC Case No.: 5283/16

In the application of:

| | |
|-------------------------------|--------------------|
| RIAAN MOGAMAT AMARDIEN | First Applicant |
| TASSANDRA ANNE APRIL | Second Applicant |
| ASHEEQAH DAMON | Third Applicant |
| ROEWAYDA JOCHEMS | Fourth Applicant |
| LOUISE PRIMOE | Fifth Applicant |
| MARGARETH ROMAN | Sixth Applicant |
| CASSIEM SAPAT N.O. | Seventh Applicant |
| CYNTHIA ARENDSE | Eighth Applicant |
| CRAIG CLOETE | Ninth Applicant |
| FAIZA GASANT | Tenth Applicant |
| WARREN KOEN | Eleventh Applicant |
| KASFICAH SMITH | Twelfth Applicant |

and

| | |
|--|-------------------|
| THE REGISTRAR OF DEEDS | First Respondent |
| SHAUN WINGERIN N.O. | Second Respondent |
| GRAEME MICHAEL SCKOLNE N.O. | Third Respondent |
| NICOLA MARTINE COHEN N.O. | Fourth Respondent |
| THE CAPE TOWN COMMUNITY HOUSING COMPANY (PTY) LTD | Fifth Respondent |

and

| | |
|--|----------------------|
| DEPARTMENT OF HUMAN SETTLEMENTS | First Amicus Curiae |
| WOMEN'S LEGAL CENTRE TRUST | Second Amicus Curiae |

SECOND AMICUS CURIAE'S TABLE OF AUTHORITIES

Legislation

1. The Constitution of the Republic of South Africa
2. The National Credit Act 34 of 2005
3. Prevention of Illegal Evictions and Prevention of Unlawful Occupation Act 19 of 1998

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1. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC).
2. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC).
3. *Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC);
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5. *Katshwa and Others v Cape Town Community Housing Company (Pty) Ltd* 2014 (2) SA 128 (WCC).
6. *Mphango v Aengus Lifestyle Properties* 2012 (3) SA 531 (CC).
7. *PE Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
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International law and regional law instruments

1. Convention on the Elimination of all forms of Discrimination against Women
2. Covenant on Economic Social and Cultural Rights
3. Guiding Principles on Business and Human Rights
4. Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa
5. Sustainable Development Goals
6. Universal Declaration of Human Rights
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1. CESCR General Comment No 16: Article 3: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (2005) UN Doc E/C.12/2005/3.

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