

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No: 5633/2020

In the matter between:

CITY OF CAPE TOWN

Applicant

and

SOUTH AFRICAN HUMAN RIGHTS COMMISSION

First Respondent

**CHIEF EXECUTIVE OFFICER OF THE SOUTH
AFRICAN HUMAN RIGHTS COMMISSION**

Second Respondent

TAURIQ JENKINS

Third Respondent

ANNIE KIRKE

Fourth Respondent

ANNELIZE VAN WYK

Fifth Respondent

LYSANDRA FLOWERS

Sixth Respondent

LORENZO DAVIDS

Seventh Respondent

CATHERINE WILLIAMS

Eighth Respondent

GILLES VAN CUTSEM

Ninth Respondent

JARED SACKS

Tenth Respondent

ZELDA HOLTZMAN

Eleventh Respondent

and

Centre for Applied Legal Studies

First *Amicus Curiae*

Women's Legal Centre

Second *Amicus Curiae*

SUBMISSIONS OF SECOND *AMICUS CURIAE*

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A. INTRODUCTION & BACKGROUND

1. On 15 May 2020 this Court granted an order admitting the Women’s Legal Centre Trust (*‘WLC Trust’*) as an *amicus curiae* (*‘amicus’*) in these proceedings, and allowing its legal representatives to deliver written submissions and make oral submissions at the hearing of this matter.
2. The main matter is an application brought by the City of Cape Town (*‘the City’*) for a range of interdicts against the South African Human Rights Commission (*‘the Commission’*) and ten individual respondents (*‘the main application’*), the most significant of which seeks to interdict the individual respondents, save for Rev. Chris Nissen, from acting as monitors, gaining access to, and being within 1 km radius of the Strandfontein temporary shelter (*‘the Shelter’*).
3. The WLC Trust’s application to be admitted as an *amicus* was launched after the WLC Trust sought the consent of the City for such admission, and was refused.¹ The City’s refusal to give such consent initially stated that the director of the Women’s Legal Centre, Ms Seehaam Samaai, was the legal representative of the individual respondents.² This allegation is denied, and Ms Samaai has deposed to an affidavit explaining her interaction and relationship with the third respondent and other individual respondents on 1 May 2020.³
4. The other basis for the City’s refusal to give consent for the WLC Trust to be admitted as *amicus* is a general refusal, stating that none of the submissions of the

¹ pp 878 – 879 WLC Trust *Amicus* Application “CM4”.

² p 880 WLC Trust *Amicus* Application “CM5”.

³ p903 , para 10; p 901, paras 5 - 7; p 903, paras 10, 12-13; p904, para 14 WLC Trust *Amicus* Application

WLC Trust are novel, and they are unrelated to the facts of this matter; and that the Commission already addresses the need for oversight and monitoring at the shelter.⁴

B. ROLE OF AN AMICUS

5. The Constitutional Court has stated that the role of an *amicus* is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights.⁵ In *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others*⁶ the Constitutional Court described this role of the *amicus* as being to 'promote and protect the public interest' in two key ways, namely 'ensuring that court considers a wide range of options and is well informed'; and secondly, 'creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues'.⁷
6. The mechanism by which an *amicus* performs the duty of promoting and protecting constitutional rights is by making factual and/or legal submissions that place the court in a better position to adjudicate on the issues than would be the case were the admission denied.
7. The "submissions" referred to are not limited to legal argument. In *Children's Institute*, the Constitutional Court made clear that "rule 16A does not prohibit the introduction of evidence by an *amicus* in a High Court." It noted that a High Court retains a discretion – "guided by the interests of justice" – to determine "whether,

⁴ p882, WLC Trust *Amicus* Application "CM6".

⁵ *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* 2013 (2) SA 620 (CC) para 26.

⁶ *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* 2013 (2) SA 620 (CC) para 26.

⁷ *Children's Institute v Presiding Officer, Children's Court, Krugersdorp and Others* para 26.

*and to what extent, to allow an amicus to adduce evidence in support of its submissions”.*⁸

8. In *South African Broadcasting Corporation v Avusa Ltd and Another*⁹, Willis J noted that “*the possibility that an aspirant amicus may or may not raise new or different matter is a factor to be considered, but the absence of novelty is not necessarily, and in itself, destructive of the application.*” Nevertheless, we explain below that the submissions of the WLC Trust are indeed different from those of the other parties.
9. Rule 16A(8) contemplates any court hearing an application for admission as an amicus to “*refuse or grant the application upon such terms and conditions as it may determine.*” The rule as a whole therefore vests the High Court with a wide-ranging discretion to admit an amicus in the interests of justice.
10. Recognising that the resolution of constitutional issues usually has an impact that extends beyond the litigants in any particular case, our courts both welcome and encourage the participation of *amici* who are able to bring a public interest perspective. As the Constitutional Court stated in *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)*¹⁰ “[m]ost, if not all constitutional matters present issues, the resolution of which will invariably have an impact beyond the parties directly litigating before the Court. Constitutional litigation by its very nature requires the determination of issues squarely in the public interest, and in so far as amici introduce additional, new and relevant

⁸ Para 39.

⁹ *South African Broadcasting Corporation v Avusa Ltd and Another* 2010 (1) SA 280 (GSJ) at para 44.

¹⁰ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2010 (4) SA 327 (CC) at para 80.

perspectives, leading to more nuanced judicial decisions, their participation in litigation is to be welcomed and encouraged.'

11. In addition, our courts have recognised that *amici* may be particularly well-placed to make submissions on background information that has not been introduced by any of the parties. In bringing such information to the court's attention, the *amicus* may assist in ensuring that the social consequences of any particular decision are well-understood.¹¹ In addressing this issue in *Children's Institute*, the Constitutional Court referred with approval to the decision of this court in *S v Engelbrecht (Centre for Applied Legal Studies Intervening as Amicus Curiae)* where the court explained that *'intervention may ensure that the Court considers a wide range of options when coming to a decision and that it is better informed. Murray suggests that the intervener or amicus does one or both of two things: it offers a legal argument not raised by either of the parties and/or it presents factual material along the lines of placing the issues before the Court in their social context and suggesting their likely consequences.'*
12. In *Hoffman v SAA*¹² the Constitutional Court stated as follows:

An amicus curiae assists the court by furnishing information or argument regarding questions of law or fact. An amicus is not a party to litigation, but believes that the court's decision may affect its interest. The amicus differs from an intervening party, who has a direct interest in the outcome of the litigation and is therefore permitted to participate as a party to the matter. An amicus joins proceedings, as its name suggests, as a friend of the court. It is unlike a party to litigation who is forced into the litigation and thus compelled to incur costs. It joins in the proceedings to assist the court because of its expertise on or interest in the matter before the court. It chooses the side it wishes to join, unless requested by the court to urge a particular position.

¹¹ *Children's Institute* para 22.

¹² *Hoffman v South African Airways* 2001 (1) SA 1 (CC) at [63].

13. In the latter event admission is entirely in the discretion of the Court. In the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the amicus will give the Court assistance it would not otherwise enjoy.¹³
14. In *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp and Others*¹⁴:

“Properly interpreted, Rule 16A is permissive and allows for an amicus to adduce evidence. Both a textual and purposive interpretation of the Rule support this conclusion. In any event, even if Rule 16A does not provide for evidence to be adduced by an amicus, section 173 of the Constitution gives courts the inherent power to regulate their own process and this includes the ability to allow amici to adduce evidence if the interests of justice so demand.”

C. WLC TRUST’S INTEREST

15. It is submitted that the admission of the WLC Trust as an *amicus* is in keeping with the above case law and Rule 16A. Due to the nature of the work that the WLC Trust conducts¹⁵, it has an institutional and constitutional interest in the issues that arise in this matter. The monitoring of the City’s compliance with its obligations towards vulnerable women is an issue that falls squarely within the scope of its work and mandate.
16. The WLC Trust is particularly well-placed to make submissions on background information that has not been introduced by any of the parties. It introduces

¹³ *In Re: Certain Amicus Curiae Applications; Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 715E-G at para [3].

¹⁴ At para 17.

¹⁵ pp830 – 832, , para 11 – 17, WLC Trust *Amicus* Application.

additional, relevant information and perspectives, thus ensuring that the social consequences of the decision to be made by this Court are well-understood.

17. The submissions that the WLC Trust seeks to make are relevant to the proceedings; will assist the Court in deciding the main application in the manner that promotes and protects the public interest; and are sufficiently different from those of the other parties to justify admission as an *amicus*.

18. Regarding the relevant public interest issues and the social context for the determination of this matter, the following is relevant:

- 18.1 The WLC Trust represents the only voice of the homeless in these proceedings - an 18 year old woman who was raped at the Shelter by another resident.¹⁶ The rape incident shows that the City failed to take the necessary safety and security precautions at the site.

- 18.2 Despite the rape incident, the City continues to maintain, even in this application, that its safety and security measures are adequate, and that they have adapted as the changing circumstances have required.¹⁷ In support of the contention that it has appropriate oversight, and that the site is “*well-managed and provides appropriate, integrated services to residents*”¹⁸, a report is annexed from the SANDF¹⁹ which makes no mention of the rape incident. This is a glaring omission.

¹⁶ p833, para 21; pp838 - 841, para 35 – 44, WLC Trust *Amicus* Application .

¹⁷ pp18 – 19, paras 42 – 45, Founding Affidavit (FA).

¹⁸ pp30 – 31, para 113, FA

¹⁹ “**RGB4**”, pp 65 – 66, paras 3 - 4. .

- 18.3 In addition to the above, the City has failed to produce any plan it may have regarding the safety and security of vulnerable women at the shelter, despite repeated requests by the WLC.²⁰
- 18.4 The City has also refused to grant access to the WLC for the purpose of facilitating access to justice for the vulnerable women residing at the Shelter for the residents.²¹ In this regard, no provision had been made or mechanisms put in place for the reporting of criminal matters to the SAPS to ensure that the specialised services that SAPS offer to attend specifically to crimes against women were activated. This, despite that fact that firstly, courts remained operational for urgent and essential matters during the national lockdown in terms of Directions issued by the Minister of Justice and Correctional Services in terms of the Disaster Management Act 57 of 2002 (*'the DMA'*); and secondly, most people were still able to access the above basic rights, the women residing at the Shelter were effectively deprived of the right to consult with legal practitioners.
19. In the light of the scant information forthcoming from the City on these issues, and its refusal to grant access to the Shelter to, amongst other institutions, the WLC, the oversight by the Commission is a necessity.
20. It is especially essential that the monitoring of organs of state that are tasked with establishing temporary shelters and sites in terms of the Lockdown Regulations is conducted in a robust fashion; and that monitoring is conducted by independent

²⁰ pp842, para 45, WLC Trust application. .

²¹ pp845 – 847, paras 49 – 54, WLC Trust *Amicus* Application.

bodies to ensure the protection of the most vulnerable women who find themselves placed in these shelters and sites.

D. THE INTERDICT SOUGHT IS IMPRACTICAL & HAS UNCONSTITUTIONAL & UNLAWFUL CONSEQUENCES

21. The City decided to accommodate approximately 1600 homeless people at the Shelter.²² Logically, limiting the number of SAHRC monitors who may have access to and monitor the site to one individual is impractical and unworkable.²³
22. In seeking to impose the number and identity of the Commission's monitors who can have access to the Shelter, the relief sought by the City has the effect of usurping and limiting the powers granted to the Commission by the Constitution of South Africa Act 108 of 1996 (*the Constitution*). This is impermissible.

21.1 The Commission is established in terms of section 181 of the Constitution. It is one of the institutions that are established in terms of chapter 9 of the Constitution for the express purpose of strengthening the constitutional democracy in the Republic.

21.2 In terms of section 181(2) the Commission is subject only to the Constitution and the law, must be impartial and exercise its powers and perform its functions without fear, favour or prejudice. In terms of section

²² p30, para 112, FA

²³ It is accepted that, in terms of the interim order granted by Desai J on 15 May 2020, more members of the Commission are granted access to the Shelter. However, the relief sought in para 2.1.2 of the notice of motion by the City expressly limits the number of monitors who may have access to the site to one individual, namely Rev Nissen.

181(3), other organs of state, through legislative and other measures, must assist and protect the Commission to ensure its independence, impartiality, dignity and effectiveness.

21.3 In terms of section 181(4), no person or organ of state may interfere with the functioning of the Commission.

21.4 In terms of section 184(1)(c) of the Constitution, the Commission has specific power to monitor and assess the observance of human rights in the Republic. In terms of section 184 (2) it is granted powers, as regulated by national legislation, which are necessary to perform its functions, including the power to investigate and to report on the observance of human rights.

21.5 The granting of these powers is a recognition of the values enshrined in our Constitution, namely human dignity, the achievement of equality and the advancement of human rights and freedoms. The achievement of these values for some of the most vulnerable in our society, namely the homeless woman cannot be understated.

23. Thus the Commission's power to monitor and assess observance of human rights is a specific power granted to it by the Constitution. Therefore the relief sought by the City has constitutional implications which extend beyond this case.

24. Furthermore, the effect of limiting access and monitoring by the Commission also has the effect that the City avoids or evades accountability as an organ of state. This is an untenable situation.

23.1 The City has established the Shelter in terms of the Regulations issued in terms of Section 27(2) of the DMA promulgated by Government Notice No. 43148 of 25 March 2020 (*‘the Lockdown Regulations’*). In terms of Regulation D thereof, the City elected to accommodate all homeless people in Cape Town on a single site, being the Shelter. The provisions of Regulation 11D of the Lockdown Regulations are of key importance. It provides as follows:

“Resources by the State during lockdown

- (1) *For the period of the declaration of a lockdown, a person refusing to be evacuated from any place subject to lockdown, may be evacuated by an enforcement officer to a temporary shelter, if such action is necessary for the preservation of life.*
- (2) *The State shall identify –*
 - (a) *temporary shelters that meet the necessary hygiene standards for homeless people; and*
 - (b) *temporary sites for quarantine and self-isolation that meet the necessary hygiene standards for people who cannot isolate or quarantine in their homes.*
- (3) *The provision of the State's resources listed herein shall be for the duration of the lockdown, and the use thereof will be subject to conditions determined by the Cabinet member responsible for such resources.”*

23.2 The site has been specifically established for some of the most vulnerable in society, some of whom may include victims of gender-based violence.²⁴ However, Regulation 11D does not have accompanying guidelines in respect of the security and safety measures by which the City may be held

²⁴ May affidavit, p 845, para 49.

accountable when establishing and erecting temporary shelters and other sites. It is therefore a matter of utmost necessity that the City should be held accountable through effective monitoring by the Commission, which is the constitutional mechanism for facilitating and ensuring such accountability.

23.3 Accountability by a municipality is a requirement of the Constitution.

23.3.1 In terms of section 41(1)(c), all spheres of government and all organs of state within each sphere must provide effective, transparent, accountable and coherent government for the Republic as a whole.

23.3.2 In terms of section 152(1)(a), the objects of local government are to provide democratic and accountable government for local communities.

23.3.3 In terms of section 195(1)(f), public administration must be governed by the democratic values and principles enshrined in the Constitution, including that public administration must be accountable.

25. The adherence to, and application of the above constitutional provisions is indispensable during the pandemic known as COVID-19.

26. Furthermore, the effect of the relief sought by the City is that there is insufficient oversight over the City's compliance with its obligations towards the vulnerable

women who are resident at the Shelter. It is the duty of an organ of state to address the conditions that enable and continue to underlie gender-based violence (*'GBV'*), and to prevent its repetition.²⁵ This duty arises from the constitutional obligation upon the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. The State has a constitutional duty to address systemic inequality against women and protect women from violence in all its forms.²⁶

27. Section 7(2) of the Constitution imposes a duty on the state to “*respect, protect, promote and fulfil*” the rights in the Bill of Rights.²⁷ Sexual violence implicates the following rights in the Bill of Rights:

26.1 Section 9(1) and 9(2): *Everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all rights and freedoms*

26.2 Section 10: *Everyone has inherent dignity and the right to have their dignity respected and protected.*

26.3 Section 11: *Everyone has the right to life.*

²⁵ *Bridgman NO v Witzenberg Municipality and Others* 2017 (3) SA 435 (WCC) paras 1 – 4; *Witzenberg Municipality v Bridgman NO and Others* (685/2018) [2019] ZASCA 186 (3 December 2019)

²⁶ The state’s duty under section 7 of the Constitution includes both the negative obligation to protect these rights, but also the positive obligation to take steps to respect, promote and fulfil the rights. See *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), para 11 where the Court held that Court held that the state has a duty “directly to protect the right of everyone to be free from private or domestic violence”; *Christian Education SA v Minister of Education* 2000 (4) SA 757 (CC), para 47; *Carmichele v Minister of Safety and Security* 2001(4) SA 938 (CC), paras 44 to 45; *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA), para 20.

²⁷ The Constitution of the Republic of South Africa 108 of 1996.

- 26.4 Section 12(1)(c); *Everyone has the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources and not to be treated or punished in a cruel, inhuman or degrading way.*
- 26.5 Section 12(2)(b): *Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body.*
28. The state's duty under section 7 includes both the negative obligation to protect these rights, but also the positive obligation to take steps to respect, promote and fulfil the rights.²⁸
- 27.1 In doing so, the state may initiate appropriate legislation and ensure effective enforcement;
- 27.2 The state's duty extends beyond its own action, and it must also take steps to protect these rights against damaging acts that may be perpetrated by private parties.²⁹
29. There are several specific aspects of the state's duty that are now well-entrenched in our constitutional jurisprudence:

²⁸ *S v Baloyi (Minister of Justice and Another Intervening) 2000 (2) SA 425 (CC)* at para 11; *Christian Education SA v Minister of Education 2000 (4) SA 757 (CC)* at para 47; *Carmichele v Minister of Safety and Security 2001(4) SA 938 (CC)* at paras 44 to 45; *Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA)* at para 20.

²⁹ *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae) 2004 (6) SA 40 (SCA)* at para 27.

- 28.1 The state is obliged “*directly to protect the right of everyone to be free from private or domestic violence*”;³⁰
- 28.2 The state is obliged to “*take appropriate steps to reduce violence in public and private life*”;³¹
- 28.3 The state is obliged in certain circumstances “*to provide appropriate protection to everyone through laws and structures designed to afford such protection*” which may imply “*a positive obligation on the authorities to take preventative operational measures to protect an individual whose life is at risk from the criminal acts of another individual*”.³²
30. The City’s conduct in complying with the Lockdown Regulations, and specifically the establishment of the Shelter, has an impact on the rights of homeless, and specifically the vulnerable women amongst them. Thus the question of whether there is adequate monitoring and oversight by the Commission at the Shelter has a direct impact on rights of vulnerable women.
31. In addition to the above, the determination of the relief sought by the City in this matter must be made taking into account the following issues, which are discussed below:
- a. The special vulnerability of the homeless in society;
 - b. The scourge of sexual violence in South Africa;

³⁰ *Baloyi* 2000 at para 11.

³¹ *Christian Education* at para 47.

³² *Carmichele* at paras 44 to 45, citing with approval, *Osman v United Kingdom* 29 EHHR 245 at 305, para 115.

- c. Gender-based violence during Covid-19; and
- d. The City's non-compliance with Inter-Agency Standing Committee Guidelines.

E. VULNERABILITY OF HOMELESS PEOPLE IN SOUTH AFRICA

- 32. Research and the WLC Trust's experience have shown that by the time women are forced into homelessness, they have experienced various forms of intersecting discrimination, and find themselves homeless for a myriad of reasons and circumstances.³³
- 33. According to the United Nations High Commissioner for Human Rights ("*UNHCR*"), women who find themselves living on the streets are a particularly vulnerable group of homeless persons, and may be described as internally displaced persons – people who have been forced to flee home but remaining within the borders of the Republic.
- 34. Given their increased vulnerabilities, homeless women residing in temporary shelters and sites of the nature envisaged by the Lockdown Regulations are in specific need of protection through external monitoring. They need appropriate security and safety measures, and also need the oversight powers of the Commission to vindicate their rights.

³³ May FA, p 832, para 18.

F. SEXUAL VIOLENCE AGAINST WOMEN IN SOUTH AFRICA

35. Any consideration of the adequacy of the City's response to COVID-19, and specifically the establishment of the Shelter, must take into account the very high levels of sexual violence against women in South Africa.
36. The very high levels of sexual violence in South Africa are well-documented and recognised by our courts. In *Carmichele v Minister of Safety and Security*³⁴ the Constitutional Court recognised that sexual violence and the threat of sexual violence go to the core of women's subordination in society, and is the single greatest threat to the self-determination of South African women.
37. The threat of sexual violence to women is as pernicious as sexual violence itself.³⁵ It goes to the very core of the subordination of women in society; and entrenches patriarchy as it imperils the freedom and self-determination of women.
38. Sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society.³⁶
39. The preamble of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 recognises the prevalence of sexual offences in South Africa and the vulnerability of women and children in particular to these offences.

³⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 62.

³⁵ *F v Minister of Safety & Security & another (Institute for Security Studies & others as amici curiae)* [2012] JOL 28228 (CC) at para 57.

³⁶ *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* 2007 (5) SA 30 (CC) at para 29.

It also acknowledges South Africa's international and constitutional obligations, including the rights to equality, privacy, dignity, freedom and security of the person, which incorporate the right to be free from all forms of violence from either public or private sources; and the rights of children and other vulnerable persons to have their best interests considered of paramount importance. Added to this the preamble to the Act commits to affording complainants of sexual offences the maximum and least traumatising protection that the law can provide; to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act; and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic.

40. The vulnerable position of women in South Africa has also been recognised internationally. As recently as June 2016, the United Nations Special Rapporteur on Violence Against Women noted that the violence inherited from apartheid still resonates in South African society which remains dominated by deeply entrenched patriarchal norms and attitudes towards the role of women.³⁷ This makes violence against women and children, especially in rural areas and in informal settlements, a way of life and an accepted social phenomenon.

International law obligations

41. The Constitutional Court has recognised South Africa's international law duty to prohibit all gender-based discrimination that has the effect or purpose of impairing

³⁷ (See *Report of the Special Rapporteur on Violence Against Women, its causes and consequences on her mission to South Africa* UN A/HRC/32/42/Add.2, 14 June 2016).

the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent a violation of those rights.³⁸

- **Convention on the Elimination of All Forms of Discrimination Against Women**

42. South Africa is a signatory to a number of international human rights instruments, the most notable of which is the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).
43. CEDAW has been described as the definitive international legal instrument requiring respect for and observance of the human rights of women.³⁹ It is said to be “*universal in reach, comprehensive in scope and legally binding in character*”.⁴⁰
44. The South African Government ratified CEDAW on 15 December 1995 and is therefore bound by the obligations created by it.
45. CEDAW itself contains no less than six articles that indirectly relate to violence against women.⁴¹ General Recommendation No. 19⁴² explicitly states that the general prohibition of gender discrimination includes

³⁸ *Baloyi* para 13; *Carmichele* at para 62; *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 15.

³⁹ Kathree F ‘Convention on the Elimination of all forms of discrimination against women’ *SAJHR* (1995) 421 at 421.

⁴⁰ Cook R ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 30 *Virginia Journal of International Law* 643 at 643.

⁴¹ Articles 2,3,6,11,12 and 16.

⁴² U.N. Doc. HRI/GEN/1/Rev.1 at 84 (1994).

*“gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately”.*⁴³

46. General Recommendation No. 19 further recommends that in order to fulfil their duties under the Convention, states must take all measures necessary to provide effective protection to women, including comprehensive legal, preventative and other measures.⁴⁴
47. The principles underpinning CEDAW are also evident in the preamble to the Universal Declaration of Human Rights and article 4(d) of the Declaration on the Elimination of Violence Against Women.⁴⁵

- **African Charter on the Rights of Women**

48. The South African Government ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (“**the African Charter on the Rights of Women**”) on 17 December 2004.
49. Article 3 of the African Charter on the Rights of Women guarantees that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights and requires state parties to

⁴³ Para 6.

⁴⁴ Para 24 (t).

⁴⁵ U.N. GAOR, 48th Sess., art. 1 UN.doc. A/Res/ 48/104 (1994).

“adopt and implement appropriate measures to ensure the protection of every woman’s right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence.”

50. Article 4 states that “[e]very woman shall be entitled to respect for her life and the integrity and security of her person” and article 4(2) obliges the state to

*“enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public”.*⁴⁶

51. In the event of violation of women’s rights in this Protocol, Article 25 provides that parties:

“undertake to provide for appropriate remedies to any woman whose rights or freedoms, have been violated and ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.”

- **SADC Protocol on Gender and Development**

52. Part six of the SADC Protocol on Gender and Development⁴⁷ addresses gender based violence and it creates an obligation on state parties to enact and enforce legislation prohibiting all forms of gender based violence.⁴⁸

53. What is clear from the Constitution and the state’s international obligations is that the state has a constitutional duty to ensure that sexual offences are prosecuted. This duty is heightened in respect of sexual offences against women and girl children.

⁴⁶ Article 4 (a).

⁴⁷ South Africa has signed but not yet ratified the SADC Protocol on Gender and Development.

⁴⁸ Article 1 of SADC Protocol on Gender and Development.

- **Maputo Protocol**

54. Article 3 of the Maputo Protocol guarantees that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights. It requires states to ensure protection against “*all forms of violence, particularly sexual and verbal violence.*”⁴⁹

Official government statistics

55. The official statistics on crimes against women are released and reported on annually by the various South African government departments. The most recent South African Police statistics (2018/2019) indicate a total of 52 420 reported sexual offences (which include rape, sexual assault, attempted sexual offences and contact sexual offences). In 2018/2019, only 6 349 sexual offences cases were prosecuted (cases which went to trial, including guilty pleas), resulting in a verdict, of which 4 724 were a guilty finding. This translates into a 9,01% conviction rate of the total number of sexual offences reported to the police.
56. In 2018/2019, the SAPS reported the following on contact crimes against women: murder: 2 771; attempted murder: 3 445; assault with the intent to cause grievous bodily harm: 54 142; common assault: 82 728.

⁴⁹ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. South Africa ratified the Protocol on 17 December 2004.

57. While we do not know precisely how many sexual offences in South Africa go unreported, it is safe to say that there is massive under-reporting of gender-based violent crimes and sexual offences against adult women.⁵⁰

Violence experienced by the homeless

58. It is well-documented⁵¹ that living in shelters and on the streets is characterised by day-to-day threats to physical security and wellbeing at levels much higher than the general public. Different people's vulnerabilities influence how frequently and in what ways they are victimised. Many factors influence that vulnerability, including sex, gender, sexual orientation, financial status (employed or unemployed) as well as where the individual is sleeping (in a makeshift shelter on the streets, abandoned building or in a shelter). Secondary factors, which may influence vulnerability include a lack of social ties to people already living on the street, organisations or institutions on which an individual can rely on for support. Substance abuse and dependency is another such secondary factor because women who are inebriated are much more likely to fall prey to sexual violence and rape.
59. The levels of violence that women living on the street experience increase their vulnerability. Their vulnerability because of their status on the street opens them up to multiple forms of sexual violence. They may experience violence from men living

⁵⁰ "The war @ home" Preliminary findings of the Gauteng Gender Violence Prevalence Study" Gender Links and the Medical Research Council (2011) is at p713; Statistics South Africa "Statistical Release PO341" Victims of Crime Survey 2015/16 (2017); National Victims of Crime Survey 2015/2016 STATS SA; The Report "Quantitative research findings on Rape in South Africa" by Statistics South Africa (2000).

⁵¹ Olusola Olufemi (2000) Feminisation of poverty among the street homeless women in South Africa, Development Southern Africa, 17:2, 221-234, DOI: [10.1080/713661399](https://doi.org/10.1080/713661399); <https://doi.org/10.1080/713661399>

with them on the streets, strangers who they do not know men who frequent or work in shelters as well as from law enforcement officials themselves. Research and the WLC's experience⁵² has also shown that women living on the streets with compounded vulnerabilities are less likely to report such violence to the police or law enforcement, because of their experiences with militaristic authority who have criminalised their existence on the streets.

G. GENDER-BASED VIOLENCE DURING COVID-19

60. The United Nations (“UN”) has recognised that crises such as disease outbreaks affect women and girls differently to men and boys, and in ways that place women and girls at greater risk of GBV, particularly in contexts where gender inequality is already pronounced.
61. In South Africa concerns have been raised, especially by civil society organisations who provide services to women who are victims of violence, that there may be an increased exposure of women to intimate partner violence due to tensions in the home in the face of dwindling family resources and under confinement conditions. The Human Science Research Council laments that ‘the COVID-19 pandemic is exacerbating many of the factors that intersect to increase the risk for interpersonal violence, and in particular intimate partner violence;⁵³ while the National Shelter Movement argues that *‘victims of GBV are some of those most at risk, not only from coronavirus, during the nationwide lockdown.’⁵⁴*

⁵² “Stop Harassing Us! Tackle Real Crime A Report on Human Rights Violations by Police against Sex Workers in South Africa” Women’s Legal Centre publication August 2012 <http://wlce.co.za/wp-content/uploads/2017/02/210812-FINAL-WEB-version.pdf>

⁵³ <http://www.hsrc.ac.za/en/news/general/SRHR-covid-19>).

⁵⁴ <http://www.ngopulse.org/press-release/victims-gbv-are-some-those-most-risk-not-only-coronavirus-during-nationwide-lockdown%E2%80%9D->).

62. The national government has also expressed worry about violence against women, with Minister of Police, Bheki Cele stating that GBV remained a concern and he has called on communities to assist the police as most perpetrators are often known.⁵⁵
63. The under-reporting of both sexual and domestic violence is a big challenge in South Africa, and it is expected that due to the strict lockdown regulations, underreporting will be heightened due to lack of access to resources, restrictions on movement, and the ability to physically report matters of violence to the police. These challenges are exacerbated in situations where women may find themselves in temporary shelters and temporary sites established in terms of the Regulations.

H. NON-COMPLIANCE WITH INTER-AGENCY STANDING COMMITTEE GUIDELINES

64. The Inter-Agency Standing Committee (IASC), an inter-agency forum of the United Nations (“UN”) and non-UN humanitarian partners, which was founded in 1992 to strengthen humanitarian assistance and improve the delivery of humanitarian assistance to affected populations, has issued guidelines for integrating GBV interventions in humanitarian action, and identifying & mitigating GBV risks within the COVID-19 response.⁵⁶ According to these guidelines, the safety measures that must be taken into consideration for vulnerable groups in emergency shelters include the following:

⁵⁵ <https://ewn.co.za/2020/04/22/bheki-cele-concerned-about-gbv-while-other-crimes-decline-during-lockdown>.

⁵⁶ *Inter-Agency Standing Committee, 2015, Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing risk, promoting resilience and aiding recovery; Inter-Agency Standing Committee, 6 April 2020, Identifying & Mitigating Gender-based Violence Risks within the COVID-19 Response.*

- a. The site location and safety procedures and common practices should not exacerbate GBV.
- b. The safety of women, girls and other vulnerable groups should be prioritized.
- c. Women, adolescent and child friendly spaces should be set up as a way of facilitating access care and support for survivors and those at risk of GBV.
- d. If there are no safety shelters that exist for GBV survivors then such a space should be made available and be separate from the rest of those residing in the camp.
- e. Shelter personnel must be clearly identifiable to help prevent sexual exploitation and abuse as well as facilitate a transparent channel for reporting.
- f. Safety audits of GBV risks should be undertaken regularly, preferably at multiple times of the day and night. There should be follow-up protocols on GBV issues and danger zones identified during the audit.
- g. The findings for such an audit should be shared with the government, stakeholders and other humanitarian actors.
- h. Security personnel should regularly patrol the site including water, sanitation and hygiene areas.
- i. Security personnel should also receive GBV-sensitivity training.
- j. GBV prevention and mitigation strategies should be incorporated into the shelter policies and standards. The shelter policies and guidelines should

address the rights and needs of vulnerable groups particularly as they relate to GBV.

- k. The policies and guidelines must be communicated to the whole shelter populace. Particular care should be taken to ensure that timely, reliable and objective information about COVID-19 and any changes in the availability or delivery of essential services reaches women and girls, so their access is not compromised and they are not at increased risk of marginalization. Suggested adaptations can include radio messages, and/or announcements in the site. Messages can be shared through mechanisms including but not limited to camp committees, women's groups and informal networks, adolescent youth and women with disabilities groups.
- l. GBV prevention related messaging especially that relating reporting risks and accessing care should be placed in visible and accessible locations in the shelter.
- m. The registration should incorporate questions that will allow the shelter organizers to profile and disaggregate data by sex, age, disability and other vulnerability factors. The registration form should also not be limited to binary indicators such as male and female.
- n. With restrictions on travel and movement, civil society and humanitarian organizations play a critical role in supporting governments to respond.

65. The guidelines above have been issued with specific regard to responses directed at the COVID-19 pandemic. According to Ms AX⁵⁷, and indeed the disputed Report of

⁵⁷ May FA, pp 838 -839, paras 37 – 39.

the Commission, most, if not all these guidelines, have not been adhered to by the City.

66. Were it not for the evidence of Ms AX, this Court would not be in possession of the facts which highlight the serious omissions by the City to provide adequate and appropriate care for women in temporary shelters of this nature. This demonstrates the need for external monitors to ensure that interventions, such as those listed above, are implemented.
67. Norms and standards for interventions to protect and care for the specific needs for women must be put in place at any site established by the City in terms of the Lockdown Regulations, and external monitoring much be in place to ensure that these norms and standards are implemented and adhered to.

I. CONCLUSION

68. Appropriate oversight by the Commission is particularly important given the vulnerable nature of the residents of the site in this case, namely homeless individuals, who are completely dependent on an organ of state such as the City for food and shelter.
69. In accordance with the general principle applicable in constitutional litigation, an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs and no order as to costs should be made where wasted costs were incurred as the result of non-compliance with Rule 16A.⁵⁸

⁵⁸ *Phillips v SA Reserve Bank* 2013 (6) SA 450 (SCA) at 465B-H and 470G-H. *Biowatch Biowatch Trust v Registrar, Genetic Resources* 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

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19 May 2020
