THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 403/2015

In the matter between:

THE CITY OF JOHANNESBURG **APPELLANT**

and

DLADLA, ELLEN NOMSA **FIRST RESPONDENT**

& 33 OTHER RESPONDENTS **SECOND TO 34TH RESPONDENTS**

Neutral citation: *City of Johannesburg v Dladla* (403/15) [2016] ZASCA 66 (18 May 2016)

Coram: Mpati P and Leach, Pillay, Willis and Mbha JJA

Heard: 3 May 2016

Delivered: 18 May 2016

Summary: Local authority – powers and duties when providing temporary accommodation – rules of a shelter providing temporary accommodation in an emergency are not unconstitutional – appeal upheld.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Wepener J sitting as the court of first instance): reported *sub nom Dladla & others v City of Johannesburg Metropolitan Municipality & another* [2014] 4 All SA 51 (GJ).

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The application is dismissed.'

JUDGMENT

Willis JA (Mpati P and Leach, Pillay and Mbha JJA concurring):

[1] This appeal is against the following order made by the Gauteng Local Division, Johannesburg (Wepener J):

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

2. The respondents [appellant and Metropolitan Evangelical Services] are interdicted and restrained from enforcing rules 3 and 4 of the "Ekuthuleni Overnight/Decant Shelter House Rules" as against the applicants for the duration of the applicants' stay at Ekuthuleni.

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

4. The Respondents are directed forthwith to permit those of the applicants who wish to do so, to reside together with their spouses or permanent life partners in communal rooms at Ekuthuleni for the duration of the applicants' stay at Ekuthuleni.
5. The City is ordered to pay the costs of the application, such costs to include the costs of two counsel. The City is further ordered to pay the costs of the amicus curiae in relation to its application to be admitted as *amicus curiae*.'
The appellant, the City of Johannesburg (the City), brought the appeal with the leave of this court.

[2] The respondents in this appeal (the occupiers) are residents at Ekuthuleni Shelter ('the Shelter' also referred to simply as 'Ekuthuleni'), at the corner of De Villiers and Nugget Streets, Johannesburg. The second respondent in the application before the court a quo was the Metropolitan Evangelical Services (MES), a company incorporated not for profit in terms of s 21 of the Companies Act 71 of 2008. It is a community based, Christian organisation that operated the Shelter.

[3] The occupiers had been evicted from a dilapidated building in Saratoga Avenue, Berea, Johannesburg (Saratoga) in terms of an order granted by the same court that heard the matter that is now on appeal before us. That order was upheld in this court[1] and the Constitutional Court.[2] The case is well known as '*Blue Moonlight*'. In the Constitutional Court judgment, it was directed that the occupiers were to vacate their homes by 15 April 2012, but the court stipulated that the City was to provide the evictees with 'temporary accommodation in a location as near as feasibly possible to the area' in which Saratoga was situated, on or before 1 April 2012. For reasons that will appear more fully later, it needs to be emphasised that the order of the Constitutional Court was that the occupiers be provided with temporary accommodation and not that the City provide them with housing that was permanent in nature. Van der Westhuizen J, delivering the unanimous judgment of the court, said so in the following terms: 'It must be emphasised that this case concerns temporary as defined in Ch 12 and not permanent housing.'[3]

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[1] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd & another* [2011] ZASCA 47; 2011 (4) SA 337 (SCA) (*Blue Moonlight SCA judgment*).
[2] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33; 2012 (2) SA 104 (CC) (*Blue Moonlight CC judgment*).
[3] Para 98. The reference to 'Ch 12' is to the National Housing Code (National housing programme: housing assistance in emergency circumstances (April 2004 Final Version)).

[4] At the time that the application was launched, there were 33 occupiers. At the time when the application was heard this number had approximately halved. It is common cause that there are now only 11 occupiers. In addition, there is one child occupying the premises. The accommodation at MES can host approximately 100 persons. By reason of the order of the court a quo, MES cannot operate effectively with some of its residents being bound by its rules and others not. Accordingly, some 89 beds that could be used by other persons are not in use.

[5] The City engaged the services of MES to provide the kind of temporary accommodation in question, even though the accommodation had not been made available by 12 April 2012. Running like a golden thread in the City's papers is that it had recourse to the facilities of MES because it was doing the best it could with the resources available to it. The occupiers had brought an urgent application for an extension of their eviction until the accommodation had been provided. Satchwell J gave the occupiers an extension of time to 2 May 2012. Her order, which has been referred to by the parties as 'the interim order', relaxed the application of the impugned rules.

[6] In the meantime, some of those who had been evicted had negotiated with the City that they could stay at a building at the corner of Hancock and Claim Street in Johannesburg, paying a rental of R600 per month per unit. The remainder were told that they could stay at the Shelter. The City insisted that the occupiers could stay at the Shelter only if each one of them was to sign a document styled 'Client's Responsibilities and Standards'. This document incorporated 'house rules' and a disciplinary code. It was in this way that the Shelter came to be used in order to provide temporary accommodation for a number of the persons who had been evicted from Saratoga.

[7] The house rules of the Shelter included the regulation of food being prepared and consumed in a dining room area, provisions that the use of electrical appliances such as stoves, heaters, television sets and radios in bedrooms were prohibited, that violence, abusive language and unruly behaviour were not allowed, that drugs, alcohol and dangerous weapons were not permitted and that those who entered the

premises under the influence of drugs or alcohol could be required to vacate until they returned sober. Each of the occupiers in writing agreed to be bound by these rules but 'reserved' his or her rights. Other than rules 3 and 4 of the house rules, the occupiers have no objection thereto.

[8] Rules 3 and 4, which were the subject of the court a quo's order, provided for the closure of entry to the Shelter by 20h00 every night and that all residents sign a register every night (rule 3); and that all residents vacate the Shelter by 8h00 on Mondays to Fridays, and at 9h00 on Saturdays and Sundays (rule 4). The rules provided that the management of the Shelter could, in their discretion, exempt individual residents from the application of these rules. The answering affidavit indicates that exemptions have been allowed with a considerable measure of liberality. The primary purpose of the rules was not merely to ensure the safety and protection of the occupiers but also to encourage residents to get out into the world, to familiarise themselves with it and, so it is intended, find gainful employment, even if only in the informal sector. The costs of allowing permanent access to and egress from the Shelter would increase its running costs substantially, by reason of the increased costs in staff, supervision and wear and tear. These rules were challenged by the occupiers as being unconstitutional. The court a quo found that this was indeed so.

[9] The City has been laudatory about the effectiveness of the Shelter provided by MES. The City does not, however, hold it out as a model to be used whenever temporary accommodation is to be made available in an emergency. On the contrary, it contends that the facilities would be better used for the purposes and the persons for whom it had been designed. Moreover, as a result of the interim order, the MES, with the City's concurrence, decided that no persons additional to the occupiers would be accommodated at the Shelter, until all the occupiers had left.

[10] The design of the Shelter consists of 30 small dormitories, consisting of two to four bunks per dormitory. The dormitories were gender differentiated. The gender differentiation arises from the fact that each dormitory sleeps more than two persons. The unarticulated but self-evident premise of this gender differentiation is that it is required according to widely prevailing norms of modesty and decency in society.

The policy of gender differentiation has the consequence that the occupiers do not share the same room with their spouses or life partners. This separation of the occupiers from their spouses or life partners was also subject to constitutional challenge. Here again, the court a quo found in favour of the occupiers.

[11] There has, in fact, been only one married couple among the occupiers. They were married in terms of customary law. They were allocated a room designed for occupation by four people. The wife had left to go to Limpopo in December 2012, to take up temporary employment. These two persons have been residents, as a married couple, at the Shelter since that time. The question of married couples among the occupiers would seem to be of 'academic' relevance only. Ms De Vos, who appeared for the occupiers said that she wished to defend the order of the high court because of its future relevance, because, so she submitted, the City intended to apply this same policy to persons who may be given temporary accommodation in similar circumstances in future. This is not the case, as mentioned previously.

[12] The only child among the occupiers stays with her mother in a female dormitory. There are gender differentiated ablution facilities, having hot and cold water. The Shelter has a communal kitchen with cooking and dining facilities, as well as provision for storage facilities, enabling each occupier to store food. In addition, there is a communal study area, courtyard and television room. MES employs a cleaning crew that cleans the Shelter daily. The Shelter has a fulltime manager. The occupiers are protected by security guards. Access to and egress from the Shelter is controlled via a biometric system to ensure that only registered residents gain access thereto.

[13] MES also provides the residents of the Shelter with a free hot lunch every day as well as a resource and training facility with computers providing access to the internet. Local newspapers are also made available for free. Access is given to primary health care as well as the opportunity for recreation. The Shelter is known as a 'managed care model'. It is intended to provide short-term, often overnight, accommodation for the destitute. It aims to be a 'holistic model' addressing the physical, emotional, mental and spiritual needs of the destitute, helping to provide them with skills and opportunities to change their lives for the better.

[14] The affidavits of both the City and MES make it clear that the Shelter was not designed for the requirements demanded by the occupiers. Nevertheless, the City has succeeded in providing them with temporary accommodation – a 'roof over their heads'. The court a quo also correctly observed that the Shelter was neither designed for, nor intended to provide temporary accommodation for persons in the position of the occupiers. Indeed this was common cause. The accommodation provided at the Shelter is of a higher standard than that at Saratoga. All of this is also all provided free of charge.

[15] The court a quo also correctly noted that: 'What is not in dispute is that the need for temporary accommodation far outweighs the City's ability to provide it.' It is also clear that the City turned to MES in desperation. The statistics filed of record show that every year thousands of people stream into our cities, and especially Johannesburg, in search of a better life. This is a worldwide phenomenon. It is easily understandable: the pull of the cities gathers momentum from the poverty and drudgery of the rural areas. The conundrum is that accommodation that is consistent with human dignity is not readily available. In the short term, given the demands upon the State in other fields such as education, policing and health, the wherewithal to solve the problem of housing is not to hand. This is a difficulty with which all developing countries are faced. Relative to thousands of others, the position of the occupiers is a privileged one. The occupiers did not bring an application that the City provides them with alternative temporary occupation.

[16] There can be no doubt that, ordinarily, all persons in South Africa have a constitutional right to freedom of movement.[4] Likewise, falling at least under the constitutional rights to dignity, freedom, privacy, association and residence,[5] husbands and wives and permanent life partners have a constitutional right to live together. This was recognised even under the dark days of apartheid under the landmark case of *Komani NO v Bantu Affairs Administration Board, Peninsula Area*.[6] There can be no debate about this. Like the court a quo, I am acutely mindful of what

[4] See s 12 of the Constitution of the Republic of South Africa, 1996.
[5] See ss 10, 12, 14, 18 and 21 of the Constitution.
[6] *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A) at 473D.

the Constitutional Court said in *Bernstein & others v Bester & others NNO*[7] about the fact that a 'very high level of protection is given to the individual's intimate personal sphere of life'.[8] Nevertheless, it is important to note the qualification in *Bernstein* that: 'But this intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation.'[9] (Footnote omitted.)
Temporary accommodation provided to cover an emergency situation will often, necessarily, entail a 'social dimension' of which the law must take cognisance.

[17] I am also keenly mindful of the Constitutional Court's injunction in *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others*,[10] that a central aspect of marriage is cohabitation and any significant impairment thereof would be a limitation of the right to dignity.[11]

[18] Constitutional rights may, however, be limited.[12] As Kriegler J pointed out when delivering the majority judgment of the Constitutional Court in *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer Port Elizabeth Prison & others*,[13] no right enshrined in the Bill of Rights is absolute.[14] There may be circumstances where the limitation of a right, even one of fundamental importance, may be justified.[15] Kriegler J went on to say: 'In making the determination [whether the limitation of the right is justified], especially in regard to a right as fundamental as the one in question, namely personal freedom, one really

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[7] *Bernstein & others v Bester & others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC).
[8] Paragraph 77.
[9] Ibid.
[10] *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* [2000] ZACC 8; 2000 (3) SA 936 (CC).
[11] Paragraph 37.
[12] See s 36 of the Constitution.
[13] *Coetzee v Government of the Republic of South Africa; Matiso & others v Commanding Officer Port Elizabeth Prison & others* [1995] ZACC 7; 1995 (4) SA 631 (CC).
[14] Paragraph 11.
[15] Ibid.

need not go beyond the test of reasonableness'.[16] Reasonableness depends on the facts of each particular case.[17]

[19] The occupiers have described the Shelter as their home. The City has responded that this is dialectically false: to portray temporary emergency accommodation as a home is a contradiction in terms. Indeed, the thrust of the City's argument was that the occupiers incorrectly claimed to have the same rights as if they were living in their homes rather than in emergency temporary accommodation. The City contends that this distinction was recognised by the Constitutional Court in *Blue Moonlight*.[18] It was in failing properly to distinguish between emergency and ordinarily prevailing situations that, in the argument of the City, the court a quo had been clearly wrong.

[20] We were referred to the judgment of Binns-Ward J in *City of Cape Town v Hoosain NO & others*,[19] in which he said:

'Once it is recognised that emergency accommodation by its very nature will invariably fall short of the standards reasonably expected of permanent housing accommodation, it follows that those who need to occupy such accommodation must accept less than what would ordinarily be acceptable. The apparent harshness of an acceptance of this recognition has to be seen against the realities imposed by the vast scale of the housing backlogs which the State, in general, and the City, in particular, are having to engage.' [20]

I agree.

[21] I fail to see the relevance of the occupiers' reliance on *Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional Development & another*.[21] I do not see how the dignity and privacy of the single child who may be affected by an order of court are in any material way diminished by the rules of MES.

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[16] Ibid.
[17] See, for example, *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G; *Za v Smith & another* [2015] ZASCA 75; 2015 (4) SA 574 (SCA) para 24.
[18] *Blue Moonlight CC judgment* para 98.
[19] *City of Cape Town v Hoosain NO & others* unreported WCHC case number 1033/2011, delivered on 24 October 2012; [2012] ZAWCHC 180.
[20] Paragraph 14.
[21] *Teddy Bear Clinic for Abused Children & another v Minister of Justice and Constitutional Development & another* [2013] ZACC 35; 2014 (2) SA 168 (CC).

[22] The thrust of the argument by the amicus was that housing must have special regard to the needs of the vulnerable and, in particular, women and children. In this connection, we were referred to South African, foreign and international law. About this aspect of policy there can be no confusion: South African law in this field is, by now, trite. It is abreast of the best in the world and, in the submission of Mr Loxton, who appeared for the City, goes further to protect the socially disadvantaged than any other country. The evaluation of any municipal, regional or national government's housing policy – whether by an electorate, the courts, or experts in areas as diverse as urban and regional planning, social work, economics, architecture and building, construction and engineering – will have regard to a multiplicity of factors, including, but not limited to, safety, protection from the elements, access to utilities such as electricity and clean water, refuse collection, public transport, schools, clinics, parks and other centres of sport and recreation, regulation, aesthetics, inter-digitation and general spatial design. An evaluation of broad, long-term political policy takes place on a different footing from a judgment dealing with the facts in a temporary situation created by an emergency. With this proposition, counsel for both the amicus and the City agreed. It is self-evidently correct. The best must not become the enemy of the good.

[23] The rules relating to entry to and egress from the Shelter are not dissimilar from those at other institutional buildings. They were designed, inter alia, to ensure the safety and protection of the occupiers. They are also intended to discourage an attitude of dependence. There are cost factors too. These rules cannot, in all the circumstances, be said to be unreasonable. As for the sleeping arrangements, without displacing other persons at the Shelter, MES cannot both accommodate all the potential occupiers and allow men and women to sleep in the same dormitory without offending many people's sense of decency, modesty and decorum. The limitation on husbands and wives and permanent life partners sleeping together in the strictly temporary emergency accommodation provided was, in the single relevant instance, relaxed. In any event, husbands and wives and permanent life partners do not have the right, always and everywhere, to sleep together. There are instances in which this right must yield, albeit temporarily, to broader practical demands such as those related to the reason for which the Shelter was designed. In

context, the provision of temporary accommodation separated on the basis of gender, is not unreasonable and therefore not unconstitutional.

[24] The proper remedy for the occupiers was not to have applied for the striking down of the rules of a bona fide institution such as MES but to have applied for an order that the accommodation provided by the City, through the agency of MES, was not that which had been ordered by the Constitutional Court. In other words, the occupiers who wished to sleep with their spouse in temporary accommodation intended to cater for an emergency, should have applied for an order that they be given alternative accommodation, where they could exercise these rights. They may or may not have been successful but the rules of MES in the Shelter offered by the City, in an attempt to accommodate the occupiers in an emergency situation are not, in themselves, unreasonable. The appeal must succeed. Appropriately, the City did not seek an award of costs in the event that it was successful.

[25] The following order is made:

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

‘The application is dismissed.’

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N P WILLIS

Judge of Appeal

APPEARANCES:

For Appellant:	C D A Loxton SC (with him A W Pullinger) Instructed by: Moodie & Roberston, Johannesburg Lovius Block, Bloemfontein
For First to 33 Respondents:	A M De Vos SC (with her S Wilson and M Stubbs) Instructed by: Socio-Economic Rights Institute, Johannesburg Webbers, Bloemfontein
For Amicus Curiae:	E Webber (Heads of argument prepared by J Brickhill, with him, J Bleazard) Instructed by: Centre for Applied Legal Studies, Johannesburg Webbers, Bloemfontein