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

Case no.: 19/18156

RYCLOFF BELEGGINGS (EDMS) BEPERK	Applicant
and	
NTOMBEKHAYA BONKOLO AND 71 OTHER RESPONDENTS LISTED IN ANNEXURE "X" HERETO	1ST - 71 Respondents
CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY	72nd Respondent
THE INTERNATIONAL COMMISSION OF JURISTS	*Amicus Curiae*

AMICUS CURIAE'S WRITTEN SUBMISSIONS

A. INTRODUCTION

1. The International Commission of Jurists ("ICJ") was granted consent to be admitted as amicus curiae by the parties.

2. In summary, the ICJ seeks to make the following submissions:

2.1. International human rights law that is binding on South Africa, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), is necessarily applicable in South Africa in terms of South African law. Actually, The

Constitution requires the courts to consider the ambit of both binding and "non-binding"[1] international law on all organs of the state, including such legal standards' provenance and international jurisprudence that reflects authoritative interpretation of that law. This is furthermore in line with the consistent jurisprudence of our courts.

2.2. South Africa's legal obligations to respect, protect and fulfil the rights to adequate housing and work in international human rights law must be considered by the Court in its determination of whether, and under what conditions, an eviction is determined to be just and equitable. This is particularly true when one considers that the ICESCR provides protection for a range of economic, social and cultural rights to "everyone" including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation. This proposition has further support from Constitutional Court and Supreme Court of Appeal jurisprudence which has also defined "everyone" in similar texture to the ICESCR.

2.3. An eviction of the respondents that would reduce existing access to work as informal reclaimers is, in the absence of a full justification provided by the municipality, in violation of South Africa's international human rights obligations in terms of the rights to work and housing and is therefore unlawful.

[1] In line with the usage by the Constitutional Court, this brief is using "non-binding law" to refer to international standards that are not themselves treaty or custom, but may be forms of declaratory law or interpretive instruments of international law.

2.4. The protections afforded by these and all other human rights guarantees extends in terms of international human rights law to which South Africa is bound, to "everyone": this includes all persons regardless of their citizenship or immigration status;

2.5. In the ongoing context of COVID-19, and in terms of both South African and international law and standards, public health and welfare factors and the impact of any eviction on the rights to health and an adequate standard of living of those evicted and relocated weighs heavily against the granting of an eviction order unless the Court is fully satisfied that the temporary alternative accommodation provided will not result in unjustifiable interference with the respondent's rights.

2.6. Centrally, the City's report is in adequate and fails to consider, in any way whatsoever, the exacerbated risks to the economic position and health of the occupiers in the event of an eviction in the absence of such provision in the wake of COVID-19.

2.7. Overall it is submitted that allowing for an eviction order in the absence of the provision of alternative accommodation suitable for the reclaimers' work, amounts to a violation of a range of their constitutionally and internationally protected human rights.[2] The reclaimers, having shown tenacity and ingenuity to ensure

[2] 1st to 71st Respondents' Answering Affidavit at paras 8, 13 and 14.

access to housing and work by their own means, cannot be rendered destitute by the intervention of this Court.

THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN SOUTH AFRICA

3. Section 39(1) of the Constitution provides that courts "*must consider international law"* in interpreting rights in the Bill of Rights. Section 39(2) of the Constitution provides that courts must, when interpreting legislation, *"promote the spirit, purport and objects of the Bill of Rights"*.[3] Section 233 of the Constitution provides that courts must, when interpreting legislation, "*prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".*[4]

4. These provisions have consistently been interpreted by South African Courts to require the consideration of both binding and "non-binding" sources of international of international human rights law the interpretation of both legislation, such as the PIE Act, and provisions of the Constitution itself.[5] It must be emphasised that these Constitutional provisions on international law do not stipulate or limit which sources of international law must be considered and applied; the Constitution requires the courts to consider the ambit of both binding and "non-binding" international law as appropriate under the circumstances. This is in line with the consistent jurisprudence

[3] Constitution, s 39(1)-(2).
[4] Constitution, s 233.
[5] *Glenister v President of the Republic of South Africa and Others* (CCT 48/10) [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC) (17 March 2011), paras 106, 192.

of our courts.

5. In this regard in *S v Makwanyane and Another*[6] the Constitutional Court stated that:

> *"Customary international law and the ratification and accession to international agreements is dealt with in section 231 of the Constitution which sets the requirements for such law to be binding within South Africa. In the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation."*

6. There have been multiple decisions since the decision in *S v Makwanyane* that have built on, and reaffirmed, this principle.[7]

7. Furthermore, in *Glenister v President of the Republic of South Africa and Others*[8] the Constitutional Court reiterated the principle in Makwanyane and said:

> *"The amicus helpfully referred us to a report prepared in 2007 by the Organisation for Economic Co-operation and Development (OECD): Specialised Anti-corruption Institutions: Review of*

[6] [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1 at para 35.
[7] *S v Williams* 1995 (3) SA 632 (CC) at 639 in which the Court considered the jurisprudence of the United Nations Human Rights Committee, the European Commission and the European Court of Human Rights on the corresponding provisions in these treaties; *Ferreira v Levin NO* 1996 (1) SA 984 (CC) at 1035-6 and 1085; *S v Rens* 1996 (1) SA 1218 (CC) at 1225 in which the Court relied on a decision of the European Court of Human Rights on fairness in appellate proceedings*; Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) at 660-3 in which the international human rights norms were used to uphold a constitutional challenge to imprisonment for judgment debts.
[8] 2011 (3) SA 347 (CC) at para 187.

Models (OECD Report). It reports on a review of models of specialised anti-corruption institutions internationally. The OECD Report identified the main criteria for effective anti-corruption agencies to be independence, specialisation, adequate training and resources. The OECD Report is not in itself binding in international law, but can be used to interpret and give content to the obligations in the Conventions we have described."

8. It is therefore clear that "binding and non-binding international law" falls to be considered by courts under the Constitution.

9. This has also been the case in socio-economic rights litigation from the outset. In *Grootboom*, even before South Africa had ratified the ICESCR,[9] the Court indicated that the analysis and interpretation of the CESCR, including its General Comments on the right to housing are "*helpful in plumbing the meaning"* of the text of the constitutional right to adequate housing because *"there is no reason not to accept that it bears the same meaning in the Constitution as in the document from which it was so clearly derived."* [10]

10. The need for interpretations of constitutionally entrenched socio-economic rights that are consistent with international law was reinforced with South Africa's

[9] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.
[10] *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000), para 45.

ratification of the International Covenant on Economic Social and Cultural Rights on 12 January 2015.[11] This is complimented by existing obligations relating to socio-economic rights contained in various other treaties ratified by South Africa, including but not limited to the Convention on the Rights of the Child[12] and the African Charter on Human and People's Rights.[13] Indeed, the effective implementation of socio-economic rights is what the South African government sought to achieve by ratifying ICESCR. In a report to the Committee on Economic, Social and Cultural Rights (CESCR) submitted in 2017, South Africa indicated as much, noting that:

> *"South Africa's accession of the ICESCR has and **will continue to deepen the enforcement of socio-economic rights** in the country"*.[14]

11. In addition, reinforcing the strong position of international law emphasized by the Constitution and the subsequent jurisprudence of the Constitutional Court, as a matter of the general principles of international law and as expressed in the Vienna Convention on the Law of Treaties (VCLT): *"[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith"* and States *"may not invoke the provisions of its internal law as a justification for a failure to perform a*

[11] Though South Africa had signed ICESCR as early as 3 October 1994. See: https://treaties.dirco.gov.za/dbtw-wpd/exec/dbtwpub.dll; https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Countries.aspx?CountryCode=ZAF&Lang=EN.
[12] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.
[13] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[14] Committee on Economic, Social and Cultural, "Consideration of Reports Submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights", UN Doc. E/C.12/ZAF/1 (2017), para 5.

treaty" obligation.[15] The Constitutional Court itself has recently affirmed that the binding nature of the *"main provisions"* of the VCLT as customary international law.[16]

12. It is submitted, however, that in this matter the Court needn't resolve any conflicts between international human rights law and domestic constitutional law at all. The Constitution and the PIE Act are capable of reasonable interpretation consistent with South Africa's international legal obligations in terms of, *inter alia*, the rights to adequate housing and work protected under international law.

SOUTH AFRICA'S GENERAL OBLIGATIONS OF STATES IN TERMS OF ICESCR

13. With respect to the rights protected in ICESCR, Article 2(1) requires states to:

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

14. As a general matter these obligations are largely consistent with South Africa's

[15] Vienna Convention on the Law of Treaties, May 23, 1969 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969), Articles 26-27.

[16] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) (11 December 2018), paras 34-9. Para 39: "But, it is now settled that its main provisions like articles 18 and 26 are part of the customary international law envisaged in section 232 of the Constitution." It seems indisputable that Article 27 is also such a "main provision" of VCLT as it resolves a fundamental conflict otherwise existing between the application of domestic and international human rights law.

constitutional obligations to take "reasonable legislative and other measures" to ensure the "progressive realisation" of socio-economic rights within "available resources".[17]

15. However, despite the "progressive" nature of States' obligations in terms of socio-economic rights, in General Comment 3 the CESCR clarifies that this "*should not be misinterpreted as depriving the obligation of all meaningful content*". The obligation to progressively realize rights *"imposes an obligation to move as expeditiously and effectively as possible towards that goal*". This necessarily implies "*deliberately retrogressive measures"* are presumptively violations of the ICESCR and:

> *"require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."*[18]

16. In international human rights law therefore, the duty to ensure "non-retrogression" is therefore understood as "immediate obligation" on States. This approach has been fully endorsed by the Constitutional Court in *Grootboom*, for example, as the Court found that "*housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses"* and explicitly endorses the CESCR Committee's strong presumption against retrogressive

[17] The Constitutional Court has itself interpreted some socio-economic rights to be "immediately realisable". International human rights law places "immediate obligations" on States with regard to all such rights including the fulfilment of a minimum core or minimum level of access to all rights.
[18] General Comment 3, para 9.

measures.[19]

17. Some content of the ICESCR is not subject to immediate, and not progressive realization. In this connection, the ICESCR also places an "immediate obligation" on South Africa to ensure non-discrimination in access to and protection of socio-economic rights.[20] Discrimination for this purpose is defined as any:

> *"distinction, exclusion, restriction or preference or other differential treatment that is directly or indirectly based on the prohibited grounds of discrimination and which* ***has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of Covenant rights****."*

18. The immediacy of the application of the prohibition on non-discrimination in international human rights law is consistent with the approach of South African law. In *Khosa*, the Constitutional Court noted that:

> *"even where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole."*[21]

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[19] *Grootboom*, para 45. Cited again with approval in M*azibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC) (8 October 2009), para 40 and footnote 31.

[20] General Comment 20, para 7.

[21] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004), para 45.

19. In terms of both the Constitution and international human rights law, therefore, South Africa has immediate obligations to ensure the non-discriminatory, non-retrogressive realization of all socio-economic rights.

WHO IS ENTITLED TO THE ICESCR'S PROTECTIONS?

20. The ICESCR itself provides protection for the rights within its ambit to "everyone". In its General Comment 20, the CESCR Committee expands upon this protection in the context of non-citizens indicating firmly that:

> "*The Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation*."[22]

21. Importantly, this prohibition of discrimination on the grounds of citizenship or immigration status applies to all ICESCR rights including the right to work[23]. In General Comment 18, in the direct context of the right to work, CESCR reaffirms this in the following terms:

[22] General Comment 20, para 30.
[23] It should be noted that, in fact, all of international human rights law extends its protections to all persons irrespective of nationality or citizenship, the lone exception being the subset of political rights, like the right to vote, under article 25 of the International Covenant on Civil and Political Rights.

"States parties are under the obligation to respect the right to work by ... refraining from denying or limiting equal access to decent work for all persons, ***especially disadvantaged and marginalized individuals and groups****, including prisoners or detainees,* ***members of minorities and migrant workers."***[24]

22. In General Comment 23, CESCR confirms that this protection applies not only the right *to* work but to rights *at* work:

"Laws and policies should ensure that migrant workers enjoy treatment that is no less favourable than that of national workers in relation to remuneration and conditions of work."[25]

23. The Constitutional Court has consistently taken a similar approach to the definition of "everyone" as holders of constitutional rights.[26] South African courts have also acknowledged the constitutional protection afforded to non-citizens right to work in terms of the right to dignity. In *Watchenuka*, for example, the Supreme Court of Appeal emphasized that:

[24] General Comment 18, para 23.
[25] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights)*, 7 April 2016, E/C.12/GC/23, available at: https://www.refworld.org/docid/5550a0b14.html [accessed 1 July 2020], para 47(e).
[26] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004); *Dawood and Another v Minister of Home Affairs and Others ; Shalabi and Another v Minister of Home Affairs and Others* (CCT35/99) [2000] ZACC 8; 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000).

*"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – **for whatever reason** – it must be respected, and is protected, by s 10 of the Bill of Rights."*

24. The Court therefore had no difficulty concluding that preventing a refugee or asylum seeker from working amounts to a "*restriction upon his or her ability to live without positive humiliation and degradation*".[27] This was reaffirmed in *Somali Association* where the Court held that "*where persons have no other means to support themselves and will as a result be left destitute, the constitutional right to dignity is implicated"*.[28]

25. In *obiter*, in *Watchenuka*, the Court went as far as asserting that the right to work of non-citizens may be protected in terms of the right to dignity even where it is not required for survival:

> *"The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is preeminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful."*

[27] *Watchenuka*, para 32.
[28] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014), para 43.

26. Looking at the question from a comparative law perspective,[29] the broad approach of the Supreme Court Appeal is consistent with the approach of the Colombian Constitutional Court in *Decision T- 772 of 2003*. In this matter, the policies of the State resulted in the deprivation of informal workers of their existing work opportunities. The Court acknowledged that:

> *"[T] he petitioner's concrete problem— which needs an urgent solution— derives from the deprivation by the authorities of the only means of personal and family subsistence that he has available in the context of a very high unemployment rate, a massive displacement of people towards the capital city, and high rates of poverty."*

27. Citing ICESCR and its authoritative interpretation by the CESCR Committee the Court affirmed that the State held a duty not to adopt retrogressive measures which would reduce existing levels of access to socio-economic rights.

28. The Court indicated that in the absence of formal employment opportunities, many people are compelled to make use of informal work opportunities in order to subsist and survive. It held that in these circumstances, the eviction of informal vendors, even if there is a legitimate public interest in doing so, must not take place in the absence of the provision of economic alternatives to such informal workers because in the full

[29] Constitution, s 39(1)(c) requires Court's to consider foreign law when interpreting the Bill of Rights. See also *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391, para 37-

context: *"it is contradictory to increase unemployment without providing alternatives to mitigate it and, therefore justice cannot allow the use of force to worsen the crisis."*

29. In another decision of the Colombian Constitutional Court, in *Decision T-291 of 2009*, the Court built on this jurisprudence in the direct context of informal recyclers. In this matter the government had sought to close a "waste dump" at which recyclers were operating in pursuit of the legitimate government objective of ensuring environmental protection. Acknowledging that for many the "*waste dumps have represented their only chance at a livelihood in the cities",* the Court held that the dump could not be closed prior to the adoption of an "*effective policy for the inclusion of Cali's informal recyclers in the programs of collection, use and commercialization of waste, which strengthens their quality as entrepreneurs and their forms of collective organization"*.

30. Both of these decisions affirm the need for Court's to protect the rights of informal workers when State policies and actions, irrespective of whether objectives may be legitimate, displace them and/or restrict or reduce their existing access to employment. This is of direct relevance in the South African context where there are comparable large poverty and unemployment rates. The reclaimers' position in this matter is no more than that this Court should similarly insist that the municipality ensure alternative accommodation that does not reduce their existing access to work in a very similar context.

31. In this matter it is submitted that, on the applicant's own admission, virtually all of the reclaimers have no other access to employment opportunities outside of the informal reclaiming they undertake. It stands to reason, therefore, that their eviction to a location in which they are unable to operate as reclaimers would amount to an unlawful restriction on their *"ability to live without positive humiliation and degradation"* and leave them destitute.

THE RIGHT TO WORK IN INTERNATIONAL HUMAN RIGHTS LAW

32. Both the right *to* work and rights *at* work are protected under of Articles 6-8 of ICESCR. Article 6 (1) requires States to "*recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts"* and to *"take appropriate steps to safeguard this right"*. [30] Article 7 requires South Africa to ensure that all people can make "*a decent living for themselves and their families*",[31] and, Article 11 more broadly obliges South Africa to take measures to provide for the "*continuous improvement of living conditions*" of all people.[32] The right to work is similarly protected under the African Charter on Human and People's Rights.[33]

33. This right to work has been authoritatively interpreted by the CESCR in its

[30] ICESCR, Article 6(1).
[31] Id, Article 7(a)(ii).
[32] ICESCR, Article 11.
[33] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 29 June 2020], Article 15.

jurisprudence and most specifically in its General Comment 18 (Right to Work)[34] and General Comment 23 (Just and Favourable Conditions of Work).[35] Though not a right to a job or "an absolute and unconditional right to obtain employment" the right to work does include a right to not be "unfairly deprived" of existing employment.[36]

34. Indeed, in *Port Elizabeth Municipality* the Constitutional Court explicitly noted that marginalized persons should not be "*discouraged from regarding themselves as helpless victims, lacking the possibilities of personal moral agency*" and praised the "*tenacity and ingenuity*" of people in much the same position of the reclaimers in "***making homes out of discarded material and finding work*** *and sending their children to school"* as a "*tribute to their capacity for survival and adaptation*". It concluded that:

> *"Justice and equity oblige them to rely on this same resourcefulness in seeking a solution to their plight and to explore all reasonable possibilities of securing suitable alternative accommodation or land."*[37]

[34] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 18: The Right to Work (Art. 6 of the Covenant), 6 February 2006, E/C.12/GC/18, available at: https://www.refworld.org/docid/4415453b4.html [accessed 29 June 2020].
[35] UN Committee on Economic, Social and Cultural Rights (CESCR), General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), 7 April 2016, E/C.12/GC/23, available at: https://www.refworld.org/docid/5550a0b14.html [accessed 29 June 2020].
[36]
[37] Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004), para 41.

35. Moreover, the rights protected in terms of Articles 6-8 of ICESCR explicitly apply to "everyone", and the CESCR has emphasized that all workers, whether they are employed in "informal" or "formal" forms of employment, must enjoy the protections afforded by the right to work.[38] In General Comment 23, the Committee stresses that:

> *"The right to just and favourable conditions of work is a right of everyone, without distinction of any kind. The reference to "everyone" highlights the fact that the right applies to all workers in all settings, regardless of gender, as well as young and older workers, workers with disabilities,* ***workers in the informal sector, migrant workers,*** *workers from ethnic and other minorities, domestic workers,* ***self-employed workers,*** *agricultural workers, refugee workers and unpaid workers. The reference to "everyone" reinforces the general prohibition on discrimination in article 2 (2) and the equality provision in article 3 of the Covenant, and is supplemented by the various references to equality and freedom from distinctions of any kind in sub-articles 7 (a) (i) and (c)."*

36. The rights of informal workers in particular are given further content by the International Labour Organization's Recommendation 204.[39] Amongst other things the ILO recommends that States *"promote decent work and the rights of migrant*

[39] International Labour Organization "Recommendation Concerning The Transition From The Informal To The Formal Economy" (2014).

workers"[40] and "*take measures to achieve decent work and to respect, promote and realize the fundamental principles and rights at work for those in the informal economy"*.[41]

37. The substantial protections afforded by the right to work therefore apply to the informal waste reclaimers whose eviction is sought in the present proceedings. Most importantly for the present context in General Comment 18 the CESCR confirms that application of the principle of non-retrogression in the context of the right to work:

> *"As with all other rights in the Covenant, retrogressive measures should in principle not be taken in relation to the right to work.* ***If any deliberately retrogressive steps are taken, States parties have the burden of proving that they have been introduced after consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant*** *in the context of the full use of the States parties' maximum available resources."*

38. If measures are taken which inhibit the respondents current employment as informal reclaimers then the municipality carries a burden to justify such "deliberately retrogressive measures" including by showing that "all alternatives" have been considered in the context of the "totality of the rights provided in the Covenant" including the rights to work, adequate housing and health in the particular context of

[40] Id, 15(e).
[41] Id, 16.

the COVID-19 pandemic.

39. The eviction of the reclaimers in the absence of the provision of alternative accommodation which would allow the reclaimers to ply their trade are likely to render the overwhelming majority of them unemployed and incapable of making a decent living for themselves and their families.[42]

40. Through their own "tenacity and ingenuity" and in the context of high unemployment rates,[43] the reclaimers have contributed to the realization of their own rights by making provision for rudimentary housing and employment opportunities. The granting of an eviction order that would reduce their access to work and/or housing would result in a reduction of their already limited ability to access employment and therefore violate their right to work. In terms of international human rights law, a court order granting their eviction under such circumstances would amount to a "retrogressive measure", decreasing their access to work and is thus presumptively unlawful.[44]

41. In the specific context of COVID-19, this reduction in access to employment would likely have particularly dire results for their livelihoods. Indeed, it would be tantamount to leaving the reclaimers "*to their own destitution*" which the Supreme

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[42] 1st to 71st Respondent's answering affidavit at paras 8, 13, and 14.

43 According to StatsSA South Africa's unemployment rate at June 2020 stood at 30.1% [accessed 26 October 2020] https://businesstech.co.za/news/government/409897/south-africas-unemployment-rate-climbs-to-30-1/#:~:text=Stats%20SA%20has%20published%20its,first%20quarter%20of%20the%20year.

[44] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, available at: https://www.refworld.org/docid/4415453b4.html [accessed 29 June 2020], para 21.

Court of Appeal described in *Somali Association* as "*unacceptable and contrary to constitutional values*".[45] It would also be contrary to the specific guidance of CESCR in its Statement on COVID-19 and socio-economic rights in which it recommends that States implement "*targeted programmes to protect the jobs, wages and benefits of all workers, **including undocumented migrant workers".***[46]

42. As is submitted below, therefore, in addition to a violation of the right to access to adequate housing, an eviction order which does not ensure access to alternative accommodation suitable for the reclaimer's work, would be in violation of South Africa's obligations in terms of the right to work.

THE RIGHT TO HOUSING IN INTERNATIONAL HUMAN RIGHTS LAW

43. The right to adequate housing is protected under Article 11 of ICESCR as a component part of the right to an adequate standard of living.[47] The African Commission on Human and Peoples Rights has interpreted the African Charter to encompass "the right to housing or shelter" as the "corollary of the combination" several provisions of the Charter.[48]

[45] Somali Assocation, para 44.
[46] UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020): https://undocs.org/E/C.12/2020/1, para 15.
[47] The right is also protected in terms of other treaties binding on South Africa including, as examples: Convention on the Rights of the Child (Article 27) and the Convention on the Rights of Persons with Disabilities (Article 28).
[48] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* 155/96: https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf, para 61.

Components of the Right to Adequate Housing

44. The right to adequate housing has been authoritatively interpreted by the CESCR in its jurisprudence and, most specifically in General Comment 4 ("The Right to Adequate Housing")[49] and General Comment 7 ("Forced Evictions").[50] In terms of these General Comments, which bear direct relevance to this matter, the right to adequate housing includes the following components:

44.1. **Legal security of tenure:** protection of security of tenure entails the provision of legal protections (in the form of legislation and policy) against "forced evictions", harassment and other threats by State and non-State actors.

44.2. **Availability of services, materials, facilities and infrastructure:** adequate housing includes anything that is essential for the health, security, comfort, and nutrition of a tenant/owner/occupier of a particular household. It also includes access to basic services such as water, sanitation, electricity and refuse removal services.

44.3. **Affordability of housing:** the right to adequate housing encompasses a right to affordable housing. This applies both to "social housing" programmes

[49] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23, available at: https://www.refworld.org/docid/47a7079a1.html [accessed 29 June 2020].

[50] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions*, 20 May 1997, E/1998/22, available at: https://www.refworld.org/docid/47a70799d.html [accessed 29 June 2020].

provided for by the State and housing acquired privately, for example, on a rental market from private owners. The duty to protect the right to housing requires State authorities to regulate private rental markets for housing access to ensure the availability of affordable housing for those who require it.

44.4. **Habitability of housing:** for housing to be sufficiently habitable to be "adequate" the infrastructure must be stable and safe and provide protection from exposure to diseases and weather variations.

44.5. **Accessibility of housing:** housing must be accessible to all without discrimination based on race; colour, sex; language, religion; political or other opinion; national or social origin, property; birth; sexual orientation or gender identity; age; gender; citizenship; nationality or migration status; health status; disability; socio-economic status or other status in accordance with ICESCR (article 2).[51]

44.6. **Location of housing:** for housing to be adequate it has to be positioned in a location that allows for the protection of its residents' livelihoods. This includes consideration of access to employment (whether in city centres near to economic hubs or in rural areas near to opportunities for farming), healthcare, public transport, schools and other facilities. People from specific marginal and disadvantaged groups should not be forced to live in effectively segregated far

[51] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, available at: https://www.refworld.org/docid/4a60961f2.html [accessed 1 July 2020].

flung areas away from any economic opportunities necessary for their survival.

44.7. **Cultural adequacy:** Housing must be culturally acceptable and facilitate cultural identity and a diversity of housing needs. For some this might require housing in an area in which subsistence farming, grazing areas for domesticated farm animals and access to rivers and other natural resources are accessible.

45. In terms of the protections afforded to the right to adequate housing and in particular the "security of tenure" component, the ICESCR prohibits "forced evictions"[52] and defines a range of procedural and substantive requirements that must be fulfilled before an eviction may lawfully be undertaken. The standards pertaining to eviction are set out in some detail in General Comment 7 and overlap significantly with the protections afforded by the PIE Act as interpreted by the Constitutional Court in its housing rights jurisprudence.[53]

Evictions in the context of COVID-19

46. In the specific context of the COVID-19 pandemic, the United Nations Special Rapporteur on the Right to Adequate Housing has published guidance for States

[52] Forced evictions are defined in General Comment 7 as: "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."

[53] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 7: The right to adequate housing (Art.11.1): forced evictions, 20 May 1997, E/1998/22, available at: https://www.refworld.org/docid/47a70799d.html [accessed 1 July 2020].

relating to ensuring protection against unlawful evictions.[54] Recognizing the financial strain and public health harms threatened by eviction, the Special Rapporteur calls on States to "declare an end to all evictions of anyone, anywhere for any reason until the end of the pandemic and for a reasonable period of time thereafter".[55]

47. The CESCR, in its Statement on COVID-19, urged States to "as a matter of urgency, adopt special, targeted measures … to protect and mitigate the impact of the pandemic on vulnerable groups", expressly indicating that such measures should include "imposing a moratorium on evictions or mortgage bond foreclosures against people's homes during the pandemic".[56]

48. A spate of different "lockdown regulations" enacted by the Government in the wake of COVID-19 provided varied but significant protections against the execution of eviction orders during the pandemic.[57] Indeed, the currently applicable "Level 1" lockdown Regulations brought into force empower courts to "suspend or stay an order of eviction" until after the ongoing state of national disaster taking into account a number

[54] UN Special Rapporteur on the Right to Adequate Housing, COVID-19 Guidance Note: Prohibition of evictions (28 April 2020), available at: https://www.ohchr.org/Documents/Issues/Housing/SR_housing_COVID-19_guidance_evictions.pdf. See also International Commission of Jurists "Living Like People Who Die Slowly: The Need for Right to Health Compliant COVID-19 Responses" (1 Sep 2020) p 124-140: https://www.icj.org/wp-content/uploads/2020/09/Universal-Global-Health-COVID-19-Publications-Reports-Thematic-Reports-2020-ENG.pdf.

[55] Id at para 1. See also *Community of Hangberg and Another v City of Cape Town* (7837/2020) [2020] ZAWCHC 66 (15 July 2020); *South African Human Rights Commission and Others v City of Cape Town and Others* (8631/2020) [2020] ZAWCHC 84 (25 August 2020).

[56] UN Committee on Economic, Social and Cultural Rights, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights, U.N. Doc. E/C.12/2020/1 (7 April 2020): https://undocs.org/E/C.12/2020/1.

[57] For a summary of the regulations applicable in alert Levels 2,3,4 see: *South African Human Rights Commission and Others v City of Cape Town and Others* (8631/2020) [2020] ZAWCHC 84.

of factors. These include "the need, in the public interest for all persons to have access to a place of residence and basic services to protect their health and the health of others" and "the impact of the disaster on the parties" more broadly.[58]

49. South African Courts have similarly emphasized the importance of taking into account a broader range of factors before proceeding with evictions in the context of COVID-19. In *Hangberg,* the Western Cape High Court condemned continued evictions executed as "inhumane", "heartless" and done with "scant regard to his safety, security and health particularly in light of the Covid-19 health pandemic".[59] In *South African Human Rights Commission*, the same Court awarded an interdict against continued evictions and demolitions. The Court concluded that in the context of COVID-19 such evictions "not only leaves them homeless, it violates their dignity, threatens their health and multiple other constitutional rights that can only be enjoyed when one has shelter" and emphasized the importance of the right to housing in these "catastrophic times we are forced to endure while the coronavirus pandemic rages".[60]

Evictions and the right to work

50. As summarized above, housing is not "adequate" and incapable of complying with the requirements of the right to housing if dwellings are located in areas which does not allow for the enjoyment of other human rights. The CESCR has emphasized that:

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[58] GNR 999 of 17 September 2020: https://www.gov.za/sites/default/files/gcis_document/202009/43725gon999.pdf, Regulation 70(2).
[59] *Community of Hangberg and Another v City of Cape Town* (7837/2020) [2020] ZAWCHC 66 (15 July 2020), para 10.
[60] *South African Human Rights Commission and Others v City of Cape Town and Others* (8631/2020) [2020] ZAWCHC 84, paras 47, 55.

"***Adequate housing must be in a location which allows access to employment options,*** health-care services, schools, childcare centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households."[61]

51. This requirement, as with all other components of the right to adequate housing, applies to housing of both a temporary and permanent nature. An interpretation of the right to housing consistently with States obligations to ensure the right to work reinforces the importance of ensuring that the reclaimers do not face reduced access to employment as a result of their eviction and relocation.

52. The applicant merely asserts that the reclaimers can perform their reclaiming activities from any location. As the evidence presented by the reclaimers illustrates, this is simply not the case.[62] It is therefore submitted that if an order of eviction is granted against the reclaimers, that the Court should exercise its broad remedial powers in terms of section 172 of the Constitution to permit eviction only to temporary alternative accommodation that can be illustrated by the municipality to be suitable for the reclaimers continued work.

THE INADEQUACY OF THE CITY'S REPORT AND RESOURCE AVAILABILITY

[61] General Comment 4, para 8(f).
[62] 1st to 71st Respondents Answering Affidavit at paras 8, 13 and 14.

53. The City's report fails to consider, in any way whatsoever, the exacerbated risks to the economic position and health of the occupiers in the event of an eviction in the absence of such provision in the wake of COVID-19.

54. Importantly the applicable lockdown regulations empower courts hearing eviction applications to in "addition to any other report that is required by law", request a "*report from the responsible member of the executive* ***regarding the availability of emergency accommodation*** *or quarantine or isolation facilities pursuant to these Regulations*".[63]

55. This reiterates the importance of the Court's proactive role in determining "all relevant circumstances" in determining whether the granting of an eviction order that is just and equitable. As the Constitutional Court concluded in *De Wet* courts are obliged in PIE eviction matters to:[64]

> "be proactive in gathering information about all the relevant circumstances, considering that information and arriving at a just and equitable order in the circumstances of each case. The High Court thus failed to probe the matters that it was statutorily enjoined to do."

56. Given the City's failure to provide sufficient information about the potential impact of the eviction in the context of COVID-19, it is submitted that the Court should exercise its broad remedial powers to require the City to provide more detail information about

[63] Id, Regulation 70(3).
[64] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (*CCT108/16) [2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017), para 55.

the overall impact an eviction would have on the reclaimers' rights to work, housing and health.

57. Moreover, the City's report alleges that the reallocation of resources for the purposes of the COVID-19 pandemic contribute to its inability to provide any temporary alternative accommodation to the occupiers. However, the report omits specific budgetary information supporting the averment that reallocation of resources has contributed to its inability to provide temporary alternative accommodation. This omission is striking given that the South African government's stance to combating COVID-19, has been that response measures to the pandemic must be implemented "*as far as possible, without affecting service delivery in relation to the realisation of the rights contemplated in sections 26 to 29 of the Constitution*"[65]

58. In *Blue Moonlight*, the Constitutional Court noted that although the City of Johannesburg had "provided information relating specifically to its housing budget", it had not provided "information relating to its budget situation in general" or its "overall financial position". It concluded that this was unsatisfactory and that "*it is not good enough for the City to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.*"[66]

59. Similarly, in *Rail Commuters* the Constitutional Court found more generally that a "bald assertion of resource constraints" does not meet the States obligation to illustrate

[65] https://www.gov.za/sites/default/files/gcis_document/202003/regulations.pdf, Reg 2(4)(b), 18 March 2020.
[66] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011), para. 74.

resource unavailability:

> *"**In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided**. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."*[67]

60. Article 2 of ICESCR requires the State to ensure the "full realization" of the rights to work and housing "to the maximum of its available resources". In the specific context of COVID-19, the CESCR has emphasized that States are required to:

> "make every effort to mobilize the necessary resources to combat COVID-19 in the most equitable manner, in order to avoid imposing a further economic

[67] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004), para 88.

burden on these marginalized groups. Allocation of resources should prioritize the special needs of these groups."[68]

61. Adding to this CESCR clarifies this will require the "***extraordinary mobilization of resources*** *to address the COVID-19 pandemic"* which can provide *"the impetus for long-term resource mobilization towards the full and equal enjoyment of the economic, social and cultural rights enshrined in the Covenant".*[69]

62. It is submitted that the City's report amounts to a "bald assertion of resource constraints" which is inadequate in overturning its burden to illustrate the lack of resources to provide temporary accommodation that it claims. It has neither provided adequate budgetary information for the Court to accept this assertion, nor has it shown, as is required pursuant to South Africa's international legal obligations, that it has taken any measures to ensure the "extraordinary mobilization of resources to address the COVID-19 pandemic".

63. Finally, The City's report does not provide an illustration of how, as is required by the lockdown regulations, it has taken measures to ensure that it has responded to COVID-19 "as far as possible, without affecting service delivery in relation to the realisation of the rights contemplated in sections 26 to 29 of the Constitution," which includes the rights to work and adequate housing.

[68] CESCR Statement, para 14.
[69] Id, para 25.

CONCLUSION

64. In light of the above the ICJ prays for an order dismissing the applicants' application for an eviction order as that eviction order would not be just and equitable in the circumstances of this case.

65. The basis for the dismissal is that in the absence of the provision of alternative accommodation suitable for the reclaimers' work, amounts to a violation of, inter alia, their rights to adequate housing and work.

MLULEKI MARONGO

Sandton Chambers

30 October 2020