

# Curing the Poor: State Housing Policy in Johannesburg after *Blue Moonlight*

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## I INTRODUCTION

*I need a guy to share a bed: R450 [per month];  
Space in a bedroom. R900;  
Lady to share a bed: R550;  
Door space to rent.*

The wall outside Shoprite Checkers, in Yeoville, Johannesburg, is covered with such advertisements. Placed by those seeking, and letting, residential accommodation,<sup>1</sup> the advertisements reveal the crisis facing poor people in need of a place to live in urban Johannesburg.

Residential accommodation in Johannesburg is scarce. Formal residential accommodation in the private sector starts at around R1 700 per month for a single room, for a maximum of two people to share.<sup>2</sup> In the non-profit or state-subsidised sector, accommodation is priced as low as R600 per month. However, demand for this accommodation far outstrips supply. The City of Johannesburg's own social housing provider, the Johannesburg Social Housing Company (Joshco), which rents rooms for between R600 and R2 700 per month,<sup>3</sup> claimed, in late 2012, that this accommodation was oversubscribed.<sup>4</sup>

Internationally, it is generally accepted that a household can spend around 25 per cent of its income on rent. (That percentage, it should be noted, excludes necessary services such as water, electricity, refuse collection and sewerage.) The United States Department of Housing and Human Services defines a family paying more than 30 per cent of its income in rent, *including* services, as being in

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<sup>1</sup> K Tissington 'Minding the Gap: An Analysis of Supply of and Demand for Low-Income Rental Accommodation in the Johannesburg Inner City' Socio-Economic Rights Institute of South Africa (SERI) Working Paper (2014) ('Minding the Gap') 64–67.

<sup>2</sup> *Minding the Gap* (note 1 above) 56–57.

<sup>3</sup> *Minding the Gap* (note 1 above) 61.

<sup>4</sup> City of Johannesburg: Accommodation Report for the Purposes of Section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, dated 1 September, 2012, para 12.8.3, on file with author. Also available from the City of Johannesburg Legal and Compliance Department.

housing distress,<sup>5</sup> and provides subsidy assistance. In the Johannesburg inner city alone, 33 861 households, or 121 899 people, earn less than R3 183 per month. They must find housing for no more than R765 per month in rent, or R1 061 per month in rent and services, if they are to avoid housing distress. Some of the higher earners in this income bracket will be lucky enough to be accommodated in one of the 1 352 rooms currently provided by Joshco, and ‘Madulammoho’ (a private, non-profit social housing provider). These rooms are available at between R600 and R1 200 per month, often excluding services.<sup>6</sup> The only other major, non-profit social housing provider in central Johannesburg is the Johannesburg Housing Company. It generally cannot assist people who can only afford to pay less than R1 000 per month in rent.<sup>7</sup>

Assuming all of these rooms are full, what about the 32 000 or so households, or 115 000 people, living in central Johannesburg alone, who cannot afford formal accommodation, whether subsidised or otherwise? Those households and individuals with some income end up either paying R450 per month to share a bed with a stranger, or sleeping in a door space. One man, interviewed as part of the ‘Yeoville Studio’ project implemented by the Centre on Urbanism and Built Environment Studies (CUBES) at the University of the Witwatersrand, said that he paid R600 per month to sleep on a balcony.<sup>8</sup> These residents of urban Johannesburg and those persons with no income, or income less than about R1 800 per month (and who are unable to pay more than about R600 per month in rent including services), are the inhabitants of urban Johannesburg’s ‘bad’ buildings.

The ‘bad’ buildings sector is a loose category of buildings in and around the inner city that the Johannesburg municipality (‘the municipality’) has identified as unsafe, slum-like and potentially unfit for occupation. Bad buildings are ‘properties where little or no investment is being made in maintaining the building, either because the owner has abandoned the building or the building has been hijacked, and so there are no clear landlord/caretaker structures or arrangements in place; residents are not paying rents and so owners do not have the means to pay for building upkeep; [or] residents are paying, but the payments are not being utilised by the owner or manager to maintain the building or pay Council rates and service charges, often leading to restriction/disconnections of services, with a resultant

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<sup>5</sup> See [http://portal.hud.gov/hudportal/HUD?src=/program\\_offices/comm\\_planning/affordable\\_housing/](http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordable_housing/) (last visited 14 October 2013).

<sup>6</sup> These figures do not, of course, account for ‘downward raiding’, which describes the phenomenon of people from more affluent sections of the housing market receiving accommodation meant for people with lower affordability ranges. Given that housing demand outstrips supply in almost every segment of the market catering for incomes of less than R10 000 per month, downward raiding siphons off a small but significant section of the housing supply for very poor people.

<sup>7</sup> *Minding the Gap* (note 1 above) 61–63.

<sup>8</sup> *Minding the Gap* (note 1 above) 65.

compounding of the problem?<sup>9</sup> Depending on the source consulted, there are anywhere between 122<sup>10</sup> and 1500<sup>11</sup> ‘bad’ buildings in the Johannesburg inner city.

The ‘bad’ buildings sector is itself highly differentiated. Those ‘lucky’ enough to be able to afford a bed space or balcony are likely to be living in properties that have access to rudimentary services. Overcrowding one’s room or flat is the chief strategy for being able to make rental and service payments to slum landlords. It also helps in paying municipal utility bills. The municipality has opened water and electricity accounts for people living in what its Debt Collection and Credit Control Policy<sup>12</sup> calls ‘abandoned buildings’. Abandoned buildings have no extant owner, and residents must club together to pay the bills themselves. Those persons and households with little to no income are likely to be living in shacks constructed in abandoned warehouses, houses, workshops, or in shacks constructed in and around such properties.

The City of Johannesburg’s urban regeneration policy is predicated upon the ‘elimination’ of these ‘bad’ buildings. Although the plan has gone through many iterations, at its core is a programme of state-led gentrification. ‘Bad’ buildings are ‘closed down’ by the municipality because they are considered uninhabitable, or the city provides massive financial incentives to private property developers to purchase and to renovate properties for formal residential or commercial purposes.<sup>13</sup>

What this means for those persons currently living in ‘bad’ buildings has now been the subject of two Constitutional Court decisions,<sup>14</sup> four decisions of the Supreme Court of Appeal<sup>15</sup> and no less than six decisions of the South Gauteng High Court, Johannesburg (since 23 August 2013 known as the ‘Gauteng Local

<sup>9</sup> City of Johannesburg, Inner City Charter: Residential Housing Development, Inner City Housing Plan. Available at: [http://www.joburg.org.za/index.php?option=com\\_content&task=view&id=2131&Itemid=49](http://www.joburg.org.za/index.php?option=com_content&task=view&id=2131&Itemid=49) (last accessed on 28 February 2014).

<sup>10</sup> Nigel Fraser, ‘Reconsidering “Bad” Buildings’ Citichat, March 2010. Available at: [http://www.joburg.org.za/index.php?option=com\\_content&task=view&id=4939&Itemid=58](http://www.joburg.org.za/index.php?option=com_content&task=view&id=4939&Itemid=58) (last accessed on 28 February 2014).

<sup>11</sup> Felicity Kitchin ‘Cities Need to Plan with the Poor, Not for the Poor’ South African Civil Society Information Service Newsletter, 6 February 2013, available at: <http://sacsis.org.za/site/article/1564> (last accessed on 28 February 2014).

<sup>12</sup> Available at <[http://www.joburg.org.za/bylaws/credit\\_control\\_annexd.pdf](http://www.joburg.org.za/bylaws/credit_control_annexd.pdf)>.

<sup>13</sup> For a fuller critique of this process see S Wilson (2011) ‘Planning for Inclusion in South Africa: The State’s Duty to Prevent Homelessness and the Potential of “Meaningful Engagement”’ 22(3) *Urban Forum* 265–282; S Wilson (2011) ‘Litigating Housing Rights in Johannesburg’s Inner City: 2004–2008’ (2011) 27 *South African Journal on Human Rights* 127.

<sup>14</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* [2008] ZACC 1, 2008 (3) SA 208 (CC); *City of Johannesburg v Blue Moonlight Properties 39 (Pty) Ltd* [2011] ZACC 33, 2012 (2) SA 104 (CC).

<sup>15</sup> *City of Johannesburg v Rand Properties* [2007] ZASCA 25, 2007 (6) SA 417 (SCA); *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28, 2010 (9) BCLR 911 (SCA); *City of Johannesburg v Blue Moonlight Properties* [2011] ZASCA 47, 2011 (4) SA 337 (SCA) and *City of Johannesburg v Changing Tides* [2012] ZASCA 116, 2012 (6) SA 294 (SCA).

Division, Johannesburg’).<sup>16</sup> All but one of these decisions<sup>17</sup> have stated that if the municipality or a private property developer wishes to evict people currently living in ‘bad’ buildings, the municipality must provide accommodation to people who would otherwise be rendered homeless. People only live in ‘bad’ buildings in the first place because they cannot afford formal residential accommodation, so the implication of these decisions is that the municipality must either leave the urban poor where they are, or provide affordable accommodation to them.

The municipality fought these decisions hard, but unsuccessfully. At first, it denied any obligation to anyone evicted from their home, even if the municipality itself was seeking the eviction. That position was rejected in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg*.<sup>18</sup> After *Olivia Road*, the municipality took the stance that, while it does have obligations to people it seeks to evict, it bears no obligation to people evicted by private landowners. The municipality stopped seeking eviction orders against large numbers of people altogether and relied on its incentives to the private sector to encourage them to evict the inner city poor.

In *City of Johannesburg v Blue Moonlight Properties*,<sup>19</sup> the Constitutional Court put a stop to this strategy. Ruling that the municipality has a general constitutional duty to provide accommodation to people facing homelessness on eviction, the *Blue Moonlight* Court held that it does not matter who or what causes someone to be deprived of their home. The municipality bears the primary responsibility for addressing the housing needs of those persons who, after an eviction, are unable to find accommodation on their own.<sup>20</sup>

In response to *Blue Moonlight*, the municipality has adopted what it calls a ‘managed care’ policy. In terms of this policy, people facing homelessness as a result of eviction will be relocated to a ‘managed care’ facility and provided with therapeutic support. This article engages critically with the ‘managed care’ policy as a response to *Blue Moonlight*. It begins with an analysis of the legal requirements for the provision of alternative accommodation already implicit in existing constitutional jurisprudence. It then sets out the main features of the municipality’s ‘managed care’ policy and argues that it is constitutionally deficient in several critical respects. At its core, the ‘managed care’ policy now implemented by the municipality posits the poor as patients with a sickness that can be cured with a short programmatic intervention over a period of six to twelve months. After this intervention, the policy assumes that the poor and

<sup>16</sup> *City of Johannesburg v Rand Properties* [2006] ZAGPHC 21, 2007 (1) SA 78 (W); *Lingwood and Another v Unlawful Occupiers of R/E ERF 9 Highlands* [2007] ZAGPHC 231, 2008 (3) BCLR 325 (W); *Sailing Queen Investments v Occupants La Colleen Court* [2008] ZAGPHC 15, 2008 (6) BCLR 666 (W); *Blue Moonlight Properties 039 (Pty) Ltd v the Occupiers of Saratoga Avenue and Another* [2008] ZAGPHC 275, 2009 (1) SA 470 (W); *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another* [2010] ZAGPJHC 3; *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

<sup>17</sup> *Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village* [2012] ZAGPJHC 230, 2013 (1) SA 583 (GSJ).

<sup>18</sup> *Olivia Road* (note 14 above).

<sup>19</sup> *Blue Moonlight* (note 14 above).

<sup>20</sup> *Blue Moonlight* (note 14 above) at para 92.

dispossessed will be able to purchase their own accommodation on the private rental housing market. The article contends that this approach ignores crucial structural imbalances in the urban housing market that effectively exclude the poor from access to affordable accommodation. These structural imbalances invariably mean that the municipality's 'managed care' policy is self-defeating. It is unlikely to resolve the problem of 'bad' buildings in central Johannesburg, or anywhere else. It will instead condemn the urban poor to an endless cycle of evictions from 'bad' buildings, to 'managed care' shelters, and then back to 'bad' buildings. This vicious cycle will recur until the broader problem of the exclusion of the urban poor from the provision of housing in urban areas is addressed.

## II LEGAL REQUIREMENTS FOR THE PROVISION OF ALTERNATIVE ACCOMMODATION

The provision of alternative accommodation to prevent homelessness on eviction is action taken to protect and promote socio-economic rights: in particular the right of access to adequate housing.<sup>21</sup> South African courts have been habitually reluctant to give substantive content to positive socio-economic rights obligations.<sup>22</sup> They prefer instead to review socio-economic policy against requirements drawn substantially from administrative law. The question is not whether the state has acted to fulfil a specified list of basic needs, but rather whether socio-economic policy formulation and implementation has been 'reasonable'.<sup>23</sup> So, for example, a failure to act to devise and implement a policy is unreasonable, because it is akin to a failure to take a decision at administrative law;<sup>24</sup> and unreasonable limitations or exclusions in socio-economic policy are generally set aside because they are comparable to the exclusion of relevant considerations, or the inclusion of irrelevant ones, in taking an administrative decision. Socio-economic policy designed under a misconception has been set aside in much the same way that a decision taken under a material mistake of fact or of law will generally be set aside.<sup>25</sup> Steps taken in breach of policies adopted by the state in a particular area of socio-economic provision will generally be set aside, as will steps taken which violate other, intersecting constitutional rights.<sup>26</sup> Socio-economic policy, including a municipal strategy to provide housing or shelter to people evicted from their homes, will be subjected to these general requirements.

<sup>21</sup> Also at stake are the rights to life and dignity: See *Olivia Road* (note 14 above) at para 16.

<sup>22</sup> For a general critique of South African socio-economic rights jurisprudence, see S Wilson and J Dugard (2011) 'Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights' 22 *Stellenbosch Law Review* 664–682; S Wilson and J Dugard (2014) 'Constitutional Jurisprudence: The First and Second Waves' in M Langford, B Cousins, J Dugard and T Madlingozi (eds) *Socio-Economic Rights in South Africa: Symbols or Substance?* (2014).

<sup>23</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 2001 (1) SA 46 (CC).

<sup>24</sup> See Wilson and Dugard 'Taking Poverty Seriously' (note 22 above) at 668–669.

<sup>25</sup> See *Blue Moonlight* (note 14 above) at para 74 (Court refused to have regard to a budget drawn up under a misconception).

<sup>26</sup> See *Kbosa and Others v Minister of Social Development and Others, Mablaule and Another v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC).

In addition, however, there are specific requirements which have developed in decisions taken under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('PIE'). A court will generally order that alternative accommodation, if it is to be provided, be located as near as reasonably possible to the property from which an occupier is being evicted.<sup>27</sup> Alternative accommodation must generally comply with the requirements set out in the national emergency housing policy.<sup>28</sup> An occupier provided with accommodation ought to be given an assurance that he will not be evicted from that accommodation again, unless he has somewhere else to go, or is provided with permanent housing by the state.<sup>29</sup> From these requirements, it is possible to derive a few basic standards which alternative accommodation provided in the aftermath of eviction must meet.

### A Security of Tenure

Alternative accommodation must generally provide a degree of tenure security. In *Baartman v Port Elizabeth Municipality*, the Supreme Court of Appeal set aside an eviction order on the grounds that, although alternative accommodation had been made available to the occupiers in that case, the accommodation was insufficient because it did not come with a guarantee of tenure security. Mpati DP, writing for a unanimous court, wrote as follows:

... it is certainly not in the public interest to evict the appellants from the property only for them to be evicted again ... [I]n the absence of an assurance that the appellants will have some measure of security of tenure ... I consider that the Court a quo should not have granted the order sought.<sup>30</sup>

The Constitutional Court confirmed these findings on appeal in *Port Elizabeth Municipality v Various Occupiers*. Sachs J held that:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when State action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments, rather than reduces denial of claims of the desperately poor to the basic elements of a decent existence.<sup>31</sup>

For that reason—

In general terms ... a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.<sup>32</sup>

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<sup>27</sup> *Blue Moonlight* (note 14 above).

<sup>28</sup> *Ibid.* Emergency Housing Programme, Volume 4, Part 3, National Housing Code, 2009.

<sup>29</sup> *Baartman v Port Elizabeth Municipality* [2003] ZASCA 99, 2004 (1) SA 560 (SCA). See also *City of Johannesburg v Rand Properties* (note 15 above) para 78.

<sup>30</sup> *Ibid.* at para 19.

<sup>31</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 18.

<sup>32</sup> *Ibid.* at para 28.

This suggests that ‘reasonable’ alternative accommodation is, at the very least, accommodation provided *pending* access to other formal housing, whether from the state, or through the market. This requirement is echoed in the National Housing Code, 2009, which emphasises that, where possible, the provision of emergency housing must be the first phase of a permanent housing solution.<sup>33</sup> Both of these requirements suggest that alternative accommodation must come with a degree of tenure security.

## B Family Accommodation

Even apartheid courts were reluctant to permit state action to interfere with family life. They interpreted influx control legislation to allow a person with a permit to live in an urban area to reside with a spouse who did not have a permit.<sup>34</sup> The post-apartheid courts have laid emphasis on the importance of the right to family life as a constituent of the rights to privacy and dignity.<sup>35</sup> They have also refused to limit the definition of ‘family’ to ‘nuclear family’, deciding that, in appropriate cases, the right to reside with one’s extended family may be protected in terms of the Constitution and subordinate legislation dealing with eviction.<sup>36</sup>

While the courts have never directly addressed the issue of the provision of family accommodation in shelters for people evicted from their homes, the assumption that family accommodation must be provided is implicit in more recent decisions. For example, in *City of Johannesburg v Changing Tides*, Wallis JA held that: –

[W]ithout greater detail as to their circumstances and their needs if evicted – the needs of a family with three children being different from those of three young men sharing living quarters – [the High Court] could not be satisfied that the order it was making was just and equitable.<sup>37</sup>

and

What the City needs to know is who requires temporary emergency accommodation and the nature of their needs, for example, whether dormitory accommodation would suffice or whether a flat of some sort is required for a family with children or whether an aged or disabled person has some special needs.<sup>38</sup>

International law, too, recognises the potential impact of an eviction on the right to family life. As a result, evictions, if carried out, must be executed in a manner that preserves and protects the right to family life.<sup>39</sup>

<sup>33</sup> Emergency Housing Policy, Volume 4, Part 3, National Housing Code, 2009, section 2.2.

<sup>34</sup> *Komani NO v Bantu Affairs Administration Board, Peninsula Area* 1980 (4) SA 448 (A).

<sup>35</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* [2000] ZACC 8, 2000 (3) SA 936 (CC).

<sup>36</sup> *Hattingh and Others v Juta* [2013] ZACC 5, 2013 (3) SA 275 (CC).

<sup>37</sup> *City of Johannesburg v Changing Tides* (note 15 above) at para 10.

<sup>38</sup> *Ibid* at para 48.

<sup>39</sup> General Comment 7 of the United Nations Committee on Economic, Social and Cultural Rights at paras 4 and 16.

### C Physical Structure and Access to Services

Both the courts and the National Housing Code, 2009, set out some basic requirements for the provision of alternative accommodation. In *City of Johannesburg v Rand Properties*, the Supreme Court of Appeal required ‘a structure that is waterproof and secure against the elements; and with access to basic sanitation, water and refuse services.’ It also required that the occupiers in that case be required to reside there ‘secure against eviction’.<sup>40</sup> In *Residents of the Joe Slovo Community, Western Cape v Thubelisha Homes*, the Constitutional Court set detailed and exacting requirements for the physical structure of alternative accommodation (although the order was in a form that effectively had the consent of the state), including the material from which the temporary shelters to be provided had to be constructed.<sup>41</sup>

The National Housing Code, 2009, also specifies that alternative accommodation must be provided with access to basic services, including water and sanitation, and that a floor space of at least 24 square metres must be provided per ‘household’.<sup>42</sup> The reference to a ‘household’ further underscores the assumption that families will be accommodated together where necessary.

None of these requirements is extravagant. The National Housing Code, 2009, also makes clear that the space requirements can be varied when appropriate.<sup>43</sup> What they are designed to achieve is basic, dignified living conditions – ‘a zone of intimacy and family security’<sup>44</sup> – for people who are unable to provide shelter for themselves, and have been deprived of a home through no fault of their own.

### III THE ‘MANAGED CARE’ POLICY

The requirements set out above are, on one level, directed towards ensuring that accommodation provided in the aftermath of an eviction respects critical aspects of the personhood and dignity of those facing the trauma of an eviction. Even for the privileged, moving house can be a difficult experience, full of emotional turmoil, and a sense of displacement and unease.

Poor residents who are provided with alternative accommodation in the aftermath of an eviction face all of these difficulties, together with the deep insecurity that comes with a non-consensual relocation. The provision of alternative accommodation itself often comes at the end of a long fight for recognition – that the residents are not simply ‘obnoxious social nuisances’<sup>45</sup> to be expelled from their homes and forgotten as soon as possible, but are worthy of concern and respect, and the provision of somewhere else they may stay in peace and dignity. It is accordingly important that the accommodation provided after an eviction affirms a person’s agency, responds to their reasonable needs, and affords them the basic associative privileges and freedoms that come with a home.

<sup>40</sup> *City of Johannesburg v Rand Properties* (note 15 above) at para 78.

<sup>41</sup> *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16, 2010 (3) SA 454 (CC) at para 5.

<sup>42</sup> Emergency Housing Programme, Volume 4, Part 3, National Housing Code, 2009, § 2.5.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) at para 17.

<sup>45</sup> *Ibid* at para 41.



## A The Assumptions of the ‘Managed Care’ Policy

The municipality’s ‘managed care’ policy accomplishes none of these ends. Its working assumption would appear to be that the urban poor are alienated from society and, beyond this, that they actively and pathologically reject it. This assumption produces the stereotype of people evicted from their homes as free-floating, hedonistic, anti-social trouble-makers, who have no ability to generate or adhere to rules and practices necessary to live in a community; that they do not have meaningful family relationships; that they are work-shy, and unable to seek out or obtain gainful employment unless forced to do so; and that their inability to find their own accommodation springs from their personal failings (and not from their structural exclusion from the housing market or the economy as a whole.) In other words, the ‘managed care’ policy posits poor people in need of accommodation from the state as afflicted with a sickness which causes a series of personal pathologies that need to be cured in an institutional setting.

The municipality has entered into a contract with Metropolitan Evangelical Services (MES), a religious organisation, to run one of its shelters – or ‘managed care facilities’. It has provided accommodation to 30 people evicted in the aftermath of *Blue Moonlight*. MES is also the municipality’s chosen service provider to manage a further three shelters that the City intends to open within the next year.<sup>46</sup> The municipality claims that the MES is an appropriate service provider because it has identified and has experience of a range of important characteristics in poor urban populations. It is important to understand these alleged characteristics, because they are deeply troubling.

One of MES’ Executive Managers describes ‘homeless people’ as lacking ‘capacity to control or plan for the future’.<sup>47</sup> He opines that ‘life on the streets is difficult. Many problems are perpetuated, such as physical and sexual abuse, hunger and emotional degradation’.<sup>48</sup> He continues that, in MES’ view, homeless people or potentially homeless people (MES draws no distinction) become angry, despondent and often feel powerless to change their circumstances. They often have low self-esteem. They feel rejected and demotivated. They cannot recognise their own potential. They often ‘give up’ and are defeatist. Homeless people, potentially homeless people and those living in dilapidated buildings develop defence mechanisms in order to survive. They reject rules imposed on them by society, often as a survival mechanism. They are used to making their own rules and see the submission to rules as regression and a threat to their survival. They therefore generally balk at the imposition of rules in a restorative programme.

This state of affairs, MES argues, can lead to or aggravate existing substance abuse, which prevents homeless people from reintegrating with society. Substance abuse is often used as a crutch to deal with the position in which homeless people find themselves, or as an avoidance technique in respect of some form of trauma.

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<sup>46</sup> Personal Communication with the City of Johannesburg Housing Department, 14 June 2013.

<sup>47</sup> Francois Pienaar Affidavit (24 June 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ).

<sup>48</sup> Francois Pienaar Affidavit at para 51.

MES asserts that violence is prevalent amongst homeless people. The possibility of violence is exacerbated by poverty, substance abuse and the state of being homeless. Women and children are particularly vulnerable to violence and sexual exploitation. Rape and prostitution is, according to MES, commonplace. These acts of gender violence may also have additional untoward consequences – an increase in HIV/AIDS infection. Children are often exposed to inappropriate sexual conduct between adults.

MES' ostensible solution to the problems that it identifies is to give the homeless time to 'get their affairs in order', while relieved of some of the immediate distress caused by homelessness and the financial demands of fending for oneself. MES suggests that the sooner homeless people become self-sustaining, the easier it is for them to reintegrate. However, MES warns, this reintegration requires a *desire* to become self-sustaining and to participate in a process toward that end.<sup>49</sup>

But how can *desire* be legitimately described as a causal factor in the homelessness of persons and communities born into abject poverty and without the economic or political means to radically alter their status? Whose desire, or fantasy, is MES really talking about?

MES's description of even truly vagrant populations is neither fair nor accurate. However, it is clearly an inappropriate description of people who are not homeless, but who face eviction from their homes. They already have homes, and the provision of alternative accommodation is meant to prevent them from becoming homeless (and presumably also subject to the privations that MES associates with homelessness). MES' analysis also ignores the possibility that structural defects in the housing market may have a role to play in making people homeless or driving them to occupy dilapidated buildings.

MES' analysis has no room for these complexities. People who are admitted to its shelters are anti-social, violent, sexually delinquent drug abusers. They have experienced trauma. They are sick. They need to be healed. However, the thesis that the urban poor are essentially diseased, and in need of treatment, does not extend to recognising that the urban poor may lack adequate housing for reasons beyond their control. All that is required is that they be relieved of some of the immediate distress caused by homelessness. They can become self-sustaining and reintegrate, and fend for themselves, but only if they are willing to participate MES's therapeutic process to that end.

MES' stereotypes of, and prescriptions for, the urban poor, map strikingly onto what Thomas Ross calls 'the rhetoric of poverty'. Ross identifies this rhetoric in Supreme Court decisions in the United States. The rhetoric, Ross says, tends to abstract and externalise poor people as feckless, inept and authors of their own misfortune. The poor are posited as morally weak and undeserving, and severe limits are placed on what can be done to resolve poverty, lest the undeserving poor be permitted to become perpetually dependent on the state.<sup>50</sup> In the UK, similar cultural motifs identify the poor as 'chavs' – violent, welfare-scrounging,

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<sup>49</sup> Francois Pienaar Affidavit at para 51.

<sup>50</sup> T Ross 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1990) 79 *Georgetown Law Journal* 1499.

recidivists, living largely on an over-generous welfare state.<sup>51</sup> In South Africa, MES' therapeutic approach can be understood as an effort to prevent the evolution of a system of welfare provision which results in the undesirable 'dependent' class identified in the US and UK literature. The net effect, however, is the same: the poor are treated as something less than fully human, and therefore undeserving, or incapable of understanding or taking advantage, of anything other than the most tightly managed or restricted levels of social provision.

### **B Ekuthuleni: A Case Study in 'Managed Care'**

Once residents facing eviction have been stripped of their humanity, and reduced to the status of dysfunctional half-people, it becomes easy to justify subjecting them to rules and conditions in alternative accommodation which would normally shock the conscience. The municipality and MES have adopted an array of standard rules and conditions in the accommodation they intend to provide, and have provided, to people evicted from their homes.

It is important to consider the effect of these rules and conditions on the residents of the Ekuthuleni shelter – the first of the municipality's 'managed care' facilities. Thirty residents of Ekuthuleni were relocated to the shelter from their former homes at Saratoga Avenue, Berea. They had lived there for periods of up to 15 years before the relocation, and had engaged in a six-year legal battle with the municipality to win the right to alternative accommodation in the event that they were evicted. Finally, on 1 December 2011, the Constitutional Court directed that the residents of Saratoga Avenue be provided with accommodation on eviction from their homes. About 70 of the 100 residents, who could afford to pay R600 per month to Joshco, were relocated to a social housing project known as 'MBV Phase 2'. The remaining 30 residents, who could not afford to pay R600 per month to Joshco, were relocated to Ekuthuleni. Provision of shelter at Ekuthuleni was a hurried affair, and renovations at the shelter were not complete until a few days before the residents were to be evicted and the relocation was to take place.<sup>52</sup>

The municipality and MES kept the precise terms and conditions upon which the shelter would be run from the residents until about a week before the relocation. When they were finally revealed, the municipality and MES did not invite discussion. The residents were faced with a stark choice: move into Ekuthuleni on the municipality's terms, or be evicted and left homeless.<sup>53</sup> In the end, the residents moved into the shelter and reserved their rights to challenge aspects of the shelter regime later on. Many aspects of this regime are disturbing, and reflect a need to control the social pathologies MES imputes to the residents.

At Ekuthuleni, and in other shelters set up in terms of the 'managed care' model, residents' possessions are subject to random searches.<sup>54</sup> Residents are not given keys to their rooms. A 'disciplinary code' embraces offences such as

<sup>51</sup> O Jones *Chans: The Demonisation of the Working Class* (2012).

<sup>52</sup> Affidavit of Nomusa Ellen Dladla (19 October 2012) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at paras 34 to 45.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* paras 62.12 and 62.13.

‘refusing to obey an instruction’, ‘making of and/or presenting false documents, information or evidence for personal gain’, ‘inciting other residents to commit an act detrimental to the programme’, being ‘absent from the shelter for less than four days without informing the house manager’, ‘desertion’ and ‘failing to maintain high standard (sic) of personal hygiene’.<sup>55</sup> Infractions are ultimately punishable by eviction from the shelter.<sup>56</sup>

Three further aspects of the ‘managed care’ regime have now been challenged in the South Gauteng High Court by Ekuthuleni’s residents. The first challenge takes on MES’ refusal, with the municipality’s support, to allow families to reside together. MES operates a strict gender separation regime in its shelters. So strict is this regime that MES and the municipality insist on splitting married or cohabiting couples up. If the couple have a ‘younger’ child (the ‘managed care’ policy does not say how young), that child is accommodated with his or her mother in a dormitory shared with about a dozen or more other women. ‘Older’ children (again, nobody knows how old) are accommodated with a parent of the same gender. The managed care policy does not specify what happens when an ‘older’ child has a single parent of a different gender.

Secondly, all residents of ‘managed care’ facilities are locked out of their shelters during the day. Generally, they are expected to vacate the shelter by 8am on weekdays and 9am on weekends. They are not permitted to return until 5:30pm. If they return after 8pm, then they are locked out for the night. MES maintains that it has a discretion to permit a resident with a good excuse to stay inside a shelter on a particular day to do so. However, neither MES’ shelter rules, nor the municipality’s ‘managed care’ policy specifies the conditions under which this discretion should be exercised.

Finally, both the municipality and MES maintain that alternative accommodation will be made available for a fixed period of six months. Thereafter, the municipality and MES retain the discretion to extend a resident’s stay up to a maximum period of 12 months. The managed care policy specifies no guidelines for the exercise of this discretion. When a resident’s stay comes to an end, MES and the municipality maintain the right to evict them from the accommodation, without a court order, whether or not they have anywhere else to go. ‘Disciplinary’ evictions of the type set out above will also take place without a court order.<sup>57</sup>

In the affidavits filed in support of the Ekuthuleni residents’ challenge to the daytime lock-out rules, the separation of families by gender, and eviction without a court order, a desperate picture emerges. Residents working during the night were not permitted to sleep at the shelter during the day.<sup>58</sup> One young man who returned to the shelter after 8pm at night was locked out on the streets for the

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<sup>55</sup> Schedule to the Disciplinary Code for the Linatex Managed Care Facility, annexed to the Affidavit of Thabo Maisela, filed on 11 June 2013, in the matter of *Philani Hlophe v the City of Johannesburg*, [2013] ZAGPJHC 98, 2013 (4) SA 212 (GSJ).

<sup>56</sup> *Ibid.*

<sup>57</sup> Affidavit of Thabo Maisela (1 July 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) para 146.

<sup>58</sup> Affidavit of Nomusa Ellen Dladla (19 October 2012) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at paras 80–84.

night, and stabbed.<sup>59</sup> One woman, in her fifties, had to consent to her grandchild being taken into care by the state, because she could not care for her on the streets during the day.<sup>60</sup> A married couple was split up into gender differentiated dormitories. Their children were sent to live with relatives in rural Limpopo, because they were not permitted to live with both their mother and father at the shelter.<sup>61</sup> The residents' affidavits describe feelings of humiliation, helplessness, frustration and anger caused not by their status as people evicted from their homes, but by the rules and conditions to which they are now subject.<sup>62</sup>

MES and the municipality's response to these allegations is to rely on what they say is the underlying purpose of the rules: to assist the residents to make a 'transition' from homelessness to self-sustaining urban citizenship. MES also emphasises that it provides social work assistance, including education and training and assistance in finding a job, to the residents. This is to help them 'get back on their feet', and leave the shelter. The residents say that they have not been provided with any meaningful assistance, that social workers promise help but do not provide it, and that no-one has suggested where they might find affordable accommodation other than at the shelter – except by leaving the shelter and going to live in a rural area.<sup>63</sup>

MES' programme does not engage with the fact that the residents of Ekuthuleni were neither homeless nor without work when they were admitted to the shelter. They had homes at their previous accommodation, and all were already engaged in some sort of income-generating activity. Some have low-wage jobs: as security guards, as part-time cleaners or handing out leaflets at road intersections. Others are informal traders, selling clothes, sweets and cigarettes on the inner city streets.<sup>64</sup> The problem is not that the residents are idle: it is that, despite working hard, they are unable to generate the incomes necessary to secure accommodation on the current housing market.

Even were they not able to retain low-income employment, no meaningful programme of social assistance can be deemed constructive when it separates persons from their family, locks them out on the streets during the day, and subjects them to the ever-present threat of immediate eviction without court intervention. These rules and conditions undermine rather than promote the self-esteem that MES and the municipality say is necessary to exercise the agency necessary to move on to self-supported accommodation elsewhere. Both local experts<sup>65</sup> and the available international literature on the topic,<sup>66</sup> suggest that shelter conditions premised on close discipline of residents, coupled with an outwardly 'therapeutic' approach to what is fundamentally an economic problem, are likely to retard

<sup>59</sup> Ibid at para 62.2.

<sup>60</sup> Ibid at paras 65–73.

<sup>61</sup> Ibid at paras 91–93.

<sup>62</sup> Ibid at paras 65–115.

<sup>63</sup> Ibid at para 62.9.

<sup>64</sup> Ibid at paras 65–115.

<sup>65</sup> Affidavit of Garth Stevens (30 August 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) (Garth Stevens is a professor of psychology at the University of the Witwatersrand.)

<sup>66</sup> Stacey Murphy 'Compassionate' Strategies of Managing Homelessness: Post-Revanchist Geographies' (2009) 41 *Antipode* 305.

rather than enhance individual agency. If anything, the residents of Ekuthuleni feel as though control of their lives is being taken away from them, rather than given back.

MES' paradigm is, however, attractive to the municipality. It absolves the municipality of all responsibility to devise a *housing* programme that responds meaningfully to the massive structural imbalances which exclude the urban poor from formal accommodation. These imbalances are airbrushed out of the picture, and are replaced by a discourse of self-help and hard work. The problem, as they see it, is not that the municipality, having deliberately set out to gentrify the urban core, has not made proper provision within its housing policies to accommodate the people it must have foreseen would have been displaced as result. The problem is rather that the poor themselves are to blame for not being able to take advantage of a programme of regeneration almost tailor-made to exclude them.<sup>67</sup> As the municipality has itself said, in defending its managed care model, 'transition' (meaning the individual transformation of each person evicted from their home from an aggressive vagrant into a wage-earning paragon of the virtuous poor) is central to its policy.<sup>68</sup> The 'managed care' policy depends on ignoring the fact that the urban poor are structurally excluded from the urban housing market. Not enough accommodation in urban Johannesburg exists to cater for the poor. Such accommodation as may be accessible to the poor is either oversubscribed, or is overcrowded, squalid, unsafe and vulnerable to eviction in terms of the municipality's urban regeneration programmes.

'Transitional' shelter schemes have been tried in Johannesburg before, and have failed. Studies of their efficacy have demonstrated that people generally have nowhere else to go once their stay in transitional shelters comes to an end, and that transitional shelter schemes such as the 'managed care' policy do not work unless the state provides longer-term subsidised accommodation to people who are unable to afford their own housing at the end of the transitional period.<sup>69</sup> For so long as the municipality is allowed to blame poor people themselves for being homeless or vulnerable to eviction, it will be permitted to obscure its own role, both in encouraging evictions as part of its urban regeneration strategy and in failing or refusing to provide decent, affordable accommodation that is genuinely accessible to the poor.

Understood in this light, the managed care policy becomes much easier to explain. It is premised, not on any genuine concern to address the root causes of social exclusion, but on a need to move the residents through MES' shelters as quickly as possible. The daytime lockout rule and the separation of families, taken together with the other demeaning aspects of the disciplinary code for managed care facilities, is simply meant to make residents feel as uncomfortable as possible, so that anywhere else seems preferable to life at a shelter. If that does not work,

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<sup>67</sup> *Olivia Road* (note 14 above) at para 19.

<sup>68</sup> Affidavit of Thabo Maisela (1 July 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 54.

<sup>69</sup> L Poulsen 'A Room in the City: Strategies for Accessing Affordable Accommodation' (2010) *Urban Forum* 21.

then the municipality and MES can simply evict a resident when they decide his or her time is up.

This assessment is borne out by the experience of Ekuthuleni residents. In the 18 months since the residents were relocated to the shelter, not one has become ‘self-sustaining’. Despite their gainful employment, not one can afford accommodation on the private rental housing market in the city. Fifteen of the residents still live at the shelter. A further 12 have moved in with friends and relatives relocated from Saratoga Avenue to MBV Phase 2. Two have died. One now lives in a shack under the M1 Bridge.<sup>70</sup> No ‘transition’ has occurred, at least not of the nature to which the municipality and MES say they are committed. In April 2013, lawyers acting for the residents obtained a temporary order suspending the rules on daytime lockouts and the separation of families. MES and the municipality have also agreed not to evict the residents until the challenge to the shelter regime has been finally determined. Since then, apart from one death, the numbers of residents at the shelter have remained stable.

### C Illegality

Whatever the basis of the managed care policy, key features of the policy are likely to be held unlawful or unconstitutional. The right to evict the residents without a court order is not a right recognised by a statutory or constitutional provision. Indeed, it is dressed-up ‘self-help’ – prohibited by the common law<sup>71</sup> and the FC s 34 (read with FC s 1).<sup>72</sup> FC s 26(3) also prohibits evictions from homes without a court order. MES and the municipality say that their managed care facilities are not ‘homes’ within the meaning of FC s 26(3), but rather ‘institutions’.<sup>73</sup> This argument is unlikely to succeed. It cannot realistically be said that a shelter provided to people evicted from their homes, precisely to prevent them from becoming ‘homeless’ is not a ‘home’ for the purposes of the Constitution. In any event, subjecting residents of shelters to eviction without court orders is in breach of the guarantees of security of tenure the Supreme Court of Appeal and the Constitutional Court have consistently held ought to be supplied to people relocated to alternative accommodation.

Both spousal/partner separation and the refusal to house families – especially families with children – together, are at express odds with the constitutionally recognised right to family life, the right to dignity and the freedom of (intimate)

<sup>70</sup> Affidavit of Paul Maobelo (30 August 2013) *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 162.

<sup>71</sup> *Nino Bonino v De Lange* 1906 TS 120.

<sup>72</sup> *Chief Lesapo v North West Agricultural Bank & Another* [1999] ZACC 16, 2000 (1) SA 409 (CC). See also *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

<sup>73</sup> Affidavit of Thabo Maisela (1 July 2013) in *Dladla v City of Johannesburg* [2014] 4 All SA 51 (GJ) at para 146.

association.<sup>74</sup> Moreover, they fly in the face of constitutionally well-established expectations (in eviction cases) that families must be provided alternative accommodation. As set out above, the justifications advanced for locking residents out of alternative accommodation during the day are unlikely to survive scrutiny on a plain rationality test – let alone the more exacting test for reasonableness demanded by the Court’s gloss on FC s 26(2).

However, even assuming that the worst features of its shelter regime are set aside, the municipality’s recalcitrant failure to devise and to implement a meaningful strategy to provide decent housing for those displaced by its urban regeneration programmes remains unaddressed. The local state’s wilful blindness to the needs of its poorest citizens in Johannesburg has not, as yet, been ‘cured’ by housing litigation.

#### IV CONCLUSION

*Blue Moonlight* presented the municipality with the opportunity to devise and to implement a comprehensive public housing policy which would have addressed the needs of poor people displaced by urban regeneration in a progressive, fair and sustainable manner. It could have done so in a manner reflected in the Constitutional Court’s decision in *Olivia Road*. In that matter, the Court required the municipality to provide accommodation to the residents of an inner city building through the allocation of one room per family at rent as low as R100 per room per month. No plausible reason exists for its deplorable response to *Blue Moonlight*. With a little imagination, the city could have provided the sort of accommodation demanded by *Olivia Road* at scale.

The municipality’s refusal to adopt the *Olivia Road* approach, and instead to rely on a suboptimal solution which requires people evicted from their homes to accept responsibility for their situation and engage in therapeutic programmes to address it, speaks as much to the poverty of our socio-economic rights jurisprudence as it does to the senselessness of the municipality’s approach to poverty. Our socio-economic rights jurisprudence has not, yet, achieved the depth necessary to put such a miserable regime beyond the bounds of possibility. In the years to come, the Constitutional Court will have to engage much more directly with the state’s poverty-alleviation schemes and its underlying depiction of the poor as suffering from individual psychological pathologies. Fear and apathy, not genuine regard for the well-being of the most disadvantaged, characterises the city’s response to *Blue Moonlight*.<sup>75</sup>

<sup>74</sup> See, especially, *Dawood & Another v Minister of Home Affairs & Others* [2000] ZACC 8, 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 (CC) at para 35 (‘The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was routinely and cruelly denied [through the pass laws and Bantustans that destroyed intimate relationships and family life]. It asserts it to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings.’)

<sup>75</sup> Cf *Khosa & Others v Minister of Social Development & Others; Mablale & Others v Minister of Social Development & Others* [2004] ZACC 11, 2004 (6) SA 505 (CC), 2004 (6) BCLR 569 (CC) (‘The Court in *Khosa* notes that the Final Constitution commits us to an understanding of such rights as dignity, equality and social security in terms of which ‘wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole.’)



One possible way of strengthening socio-economic rights jurisprudence to deal with the conditions imposed in Ekuthuleni would be to draw stronger links between socio-economic rights on the one hand, and the right to dignity and family life on the other. By insisting that policies and programmes adopted to fulfil socio-economic rights respect the dignity and the rights to family life of those to whom they apply,<sup>76</sup> the Constitutional Court might be able to develop socio-economic rights in a way that provides them with the depth and the meaning necessary to rule out repressive and demeaning measures such as the managed care policy and still operate in a manner consistent with the institutional restraint it has shown by refusing to develop socio-economic rights in terms of specific, concrete entitlements. However, whether the Court is willing to face the challenge of developing our socio-economic rights so as to ensure that we secure the dignity of the poor while they receive state housing assistance, remains to be seen.<sup>77</sup>

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<sup>76</sup> See, generally, S Liebenberg 'The Value of Human Dignity in Interpreting Socio-Economic Rights' (2005) 21 *South African Journal on Human Rights* 1; S Woolman 'The Architecture of Dignity' in D Cornell, S Woolman, S Fuller, J Brickhill, M Bishop & D Dunbar (eds) *The Dignity Jurisprudence of the Constitutional Court of South Africa* (2013) 55.

<sup>77</sup> As this article was going to press, the High Court handed down judgment in *Dladla v City of Johannesburg Metropolitan Municipality and Another* [2014] 4 All SA 51 (GJ). In this case, the residents of the Ekuthuleni Shelter challenged the three aspects of the 'managed care' model discussed in section IIC of this article. By the time of the hearing, the City of Johannesburg had abandoned its contention that a court order was not required to evict a resident from one of its shelters. Accordingly, the Court focussed on the legality of the daytime lockout rule and the separation of families by gender. Wepener J held that both are a violation of the rights to dignity, privacy and freedom and security of the person. Holding that the gender separation rule 'cuts to the very heart of the right to dignity and the right to family life' (para 38), Wepener J directed the City to permit all those residents who wish to do so to reside in a private room with their spouses or life partners. Wepener J also held that 'the lock-out [rule] also results in residents being exposed to dangers inherent in street life and inhibits their freedom in material respects and thus clearly infringes on their right to freedom, security and dignity' (para 42). He interdicted and restrained the City from applying the rule against the residents. Wepener J's judgment is notable for its emphasis on the interplay between the rights to dignity and housing.