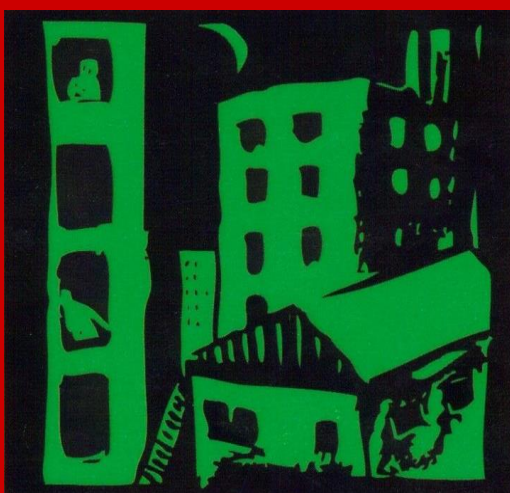
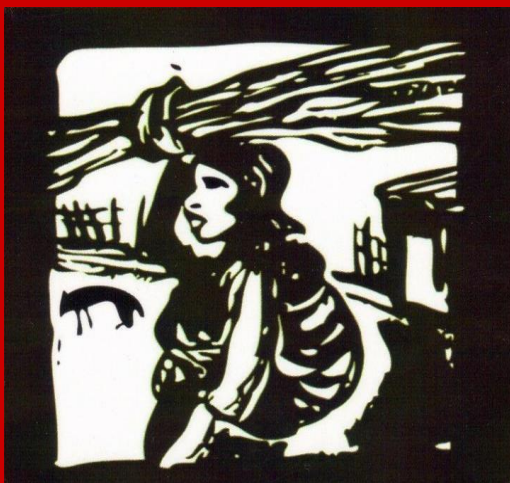


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**eThekwini's
discriminatory by-
laws: criminalising
homelessness**

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ABSTRACT

The eThekwini Municipality's Nuisances and Behaviour in Public Places By-Laws of 2015, and the Beaches By-Laws of 2015, seek to regulate and prohibit some of the life-sustaining activities of homeless persons in the city through petty offences. The article considers whether these measures indirectly discriminate against homeless persons, disproportionately impact on them, are contrary to the rule of law, and are an irrational extension of local government powers to develop and maintain law and order within municipal boundaries. Marius Pieterse's concept of the "right to the city" is relied on to explain why immediate implementation of an adequate and sustainable policy and plan

that will give teeth to the local government's developmental mandate for the homeless, is needed. Lessons learned from advocacy and litigation by other marginalised groups, such as, sex workers and informal traders, are outlined. A short review of recent developments, including litigation, advocacy and local government approaches to homelessness in South Africa, including during the COVID-19 era, is provided. The repeal of the by-laws that effectively criminalise poverty and homelessness is called for.

Keywords: Petty offences, begging, homelessness, right to the city.

“The enforcement of these [petty offences] laws also perpetuates the stigmatisation of poverty by mandating a criminal justice response to what are essentially socio-economic issues. In this regard, the criminalisation of petty offences reinforces discriminatory attitudes against marginalised persons.”¹

“To conceive of homelessness simply as a problem for the Department of [Social Development] or for charity ignores the role city officials, planners, and developers have in structuring city spaces that lead to the exclusion and repression of its poor. Few city officials understand homelessness as an issue of land use; most prefer the politically safe understanding of homelessness as a social welfare issue.”²

1 INTRODUCTION

In this article the argument is made that the eThekweni Municipality's Nuisances and Behaviour in Public Places By-Laws of 2015 and Beaches By-Laws of 2015 are contrary to the rule of law and an irrational extension of local government powers to develop and maintain law and order within municipal boundaries, and constitute unfair discrimination in respect of a number of protected and unlisted bases that cannot be justified, because they criminalise homelessness and poverty. In essence, Marius Pieterse's concept of the “right to the city” is relied on to explain why immediate implementation of an adequate and sustainable policy and plan that will give teeth to the local government's developmental mandate for the homeless, is needed. By-laws, if properly crafted to ensure access to the basket of rights that The Constitution of the Republic of South Africa, 1996 extends to all – including, and particularly, homeless persons and other marginalised groups – can be used as a tool for development, and not repression. I focus on the rights of homeless persons, and draw on lessons learned from advocacy and litigation by other marginalised groups, such as, sex workers and informal traders. The COVID-19 pandemic has brought, in part, relief for homeless persons in some cities, including Durban, which is discussed in a short review of recent developments, including litigation, advocacy and local government approaches to

¹ See SK Kaggwa in African Commission on Human and Peoples' Rights *Principles on Decriminalisation of Petty Offences* (2017) 1 at 5.

² Wright T *Out of place: homeless mobilizations, subcities, and contested landscapes* Albany: State University of New York Press (1997) at 308, cited in Du Toit JL “Local metropolitan government responses to homelessness in South Africa” (2010) 27(1) *Development Southern Africa* 111 at 126.

homelessness in South Africa. However, whether or not the humanitarian crisis response will bring the long-term systemic change needed to decriminalise homelessness is not yet certain.

Around the world, diversity-intolerant public ideologies have been used, through loitering laws (also known as vagrancy laws), to arrest, detain, and forcibly remove members of marginalised groups in society, including homeless persons (street-living and shelter-living),³ street children,⁴ refugees and asylum seekers,⁵ local and foreign migrants,⁶ and sex workers⁷, from city streets. Informal sector workers, such as street traders, also experience the ire of public order municipal planning⁸ and policing through confiscation of goods and permit enforcement.⁹ For the latter group, at least, advocacy and litigation, with a small measure of emerging jurisprudence, is slowly chipping away at these anti-poor sentiments in South Africa.¹⁰

³ Lowenstein International Human Rights Clinic “Forced into Breaking the Law”: The Criminalization of Homelessness in Connecticut available at https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf (accessed on 1 January 2019); See also O’Sullivan E “Varieties of punitiveness in Europe: homelessness and urban marginality” (2012) 6(2) *European Journal of Homelessness* 69 at 79.

⁴ *Villagrán Morales v Guatemala* 1999 Inter-Am Ct HR. (ser C) No 63 (Nov 19 1999) (Guatemala was held liable for the detention and murder of four street children) – discussed in Ewelukwa UU “Litigating the rights of street children in regional or international fora: trends, options, barriers and breakthroughs” (2006) 9(1) *Yale Human Rights and Development Law Journal* 85.

⁵ Palmery I “Refugees, safety and xenophobia in South African cities: The role of local government” 3 available at <http://www.csvr.org.za/docs/foreigners/refugeessafteyand.pdf> (accessed on 1 January 2019).

⁶ Maharaj B “Migrants and Urban Rights: Politics of Xenophobia in South African Cities” (2009) 8(2) *L’espace Politique* 15 available at <https://Doi.Org/10.4000/Espacepolitique.1402>.

⁷ Open Society Foundation *Laws and policies affecting sex work: A reference brief* (2012) available at <https://www.opensocietyfoundations.org/sites/default/files/sex-work-laws-policies-20120713.pdf> (accessed on 5 December 2018); KELIN *Punitive laws affecting sex worker* (2016) 5 (“Nairobi, Mombasa, Kisumu By-laws outlaw loitering for the purpose of ‘prostitution’”) available at <http://kelinkenya.org/wp-content/uploads/2010/10/punitive-laws-practices-affecting-HIV-responses-in-Kenya.pdf> (accessed 1 December 2018); SALC *No Justice report: Use of vagrancy laws against sex workers* (2017) 85 available at http://www.southernafricallitigationcentre.org/wp-content/uploads/2017/08/09_SALC-NoJustice-Report-Use-of-Vagrancy-Laws-Against-Sex-Workers.pdf (accessed 5 December 2018).

⁸ Municipal planning is understood as “... the term [municipal planning] is not defined in the Constitution. But ‘planning’ in the context of municipal affairs is a term which has assumed a particular, well-established meaning which includes the zoning of land and the establishment of townships. In that context, the term is commonly used to define the control and regulation of the use of land”. *MACCSAND (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC).

⁹ See SERI & SALGA *Informal trade in South Africa: Legislation, case law and recommendations for local government* (2018) available at <http://www.salga.org.za/Documents/Knowledge%20Hub/Publications/Research%20Projects%20and%20Results/SERI-SALGA%20Informal%20Trade%20Jurisprudence.pdf> (accessed 5 December 2018); SERI & SALGA *Towards recommendations on the regulation of informal trade at local government level: A discussion document* (2018) available at http://seri-sa.org/images/SERI_SALGA_Informal_Trade_Discussion_Doc_WEB.pdf (sets out recommendations for what by-laws relating to informal trade should contain) (accessed 5 December 2018).

¹⁰ *Somali Association of South Africa & others v Limpopo Department of Economic Development, Environment and Tourism* 2015 (1) SA 151 (SCA); *Makwickana v Ethekwini Municipality* 2015 (3) SA

Another group that has had some positive measure of protection is evictees, or unlawful occupiers, who are rendered homeless by circumstance, but can rely on primarily procedural legislation¹¹ for measures to ensure alternative accommodation in some instances, in order to avoid homelessness.¹² Meaningful engagement on alternative accommodation for unlawful occupiers is a requirement that has been fleshed out in our jurisprudence.¹³ At other times, property owners routinely ... disregard residents' legal rights by pushing eviction cases through unopposed court hearings – or, worse still, effect illegal evictions without any court oversight.¹⁴ Often these evictees were residents of “bad buildings”¹⁵ that were subject to being condemned by the local government, or which are slated for redevelopment; or were residents of “slums”¹⁶ situated in undesirable parts of the city. These groups, however, have some measure of protection from harassment by landlords or the State, and interference with their rights to freedom of movement and access to housing or shelter – while homeless persons generally do not.

Under vagrancy by-laws, persons are effectively “evicted” from where they reside on the streets or in public spaces, and detained or fined when transgressing these laws – or in the main harassed by law enforcement. The poverty targeting that occurs through use of these laws, undermines homeless persons’ “life-sustaining activities in public spaces”, which includes movement, sleep, food security, sanitation and personal hygiene (bathing, urinating, defecating, menstruation) and livelihood activities (trading, touting and hawking).¹⁷ Not only is poverty targeted, but poverty is also caused and social isolation entrenched by these laws.

Harassment and denigration of these marginalised groups of people by city officials is a daily occurrence. The City of Durban is not a stranger to such conduct, including

165 (KZN) (*Makwickana* (2015)); *Thipe v City of Tshwane* (North Gauteng High Court) unreported case nos 7922/17 & 6048/17 (10 February 2017).

¹¹ See Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

¹² *Occupiers of erven 87 & 88 Berea v Christiaan Frederick De Wet NO* [2017] ZACC 18; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).

¹³ *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras 39 and 42; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & others* 2009 (9) BCLR 847 (CC) at paras 167, 237 & 239 to 244; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg & others* 2008 (3) SA 208 (CC) at para 168.

¹⁴ Webster D & Leonard M “Look to Owners and State for ‘Bad Buildings’” *The Mail & Guardian* 30 July 2015 available at <http://Mg.Co.Za/Article/2015-07-30-Look-To-Owners-And-State-For-Bad-Buildings> (accessed 01 December 2018).

¹⁵ Wilson S “Curing the poor: State housing policy in Johannesburg after *Blue Moonlight*” (2015) *Constitutional Court Review* 280.

¹⁶ *Abahlali Basemjondolo Movement SA & another v Premier of the Province of Kwazulu-Natal & others* 2010 (2) BCLR 99 (CC); KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007.

¹⁷ See SK Kaggwa in African Commission on Human and Peoples’ Rights *Principles on Decriminalisation of Petty Offences* (2017) at 4.

street removals (also called “dumping”)¹⁸ of homeless persons (and street children), which conduct is unlawful but cloaked with a legal veneer by the by-laws that provide broad discretion to law enforcement. The UN Special Rapporteur on Extreme Poverty and Human Rights questions the legitimacy of measures such as these where homeless persons are moved from the cities ostensibly to “remove any image of poverty... in order to beautify the city and attract investment and development”.¹⁹ Such aims, she argues, are not “legitimate” nor do they “justify the severe sanctions” imposed by such laws or regulations for violations.

Residents of bad buildings are often marginalised persons, including migrants and refugees, for whom the alternative to living in cheap inner city accommodation is street- or shelter-living. In recent years, anti-poor profiling has been used to frustrate the right to freedom of movement of homeless persons in KwaZulu-Natal suburbia, where police and community policing forums resort to the fingerprinting of homeless persons, to check their criminal records and to regulate their freedom of movement, ostensibly to combat crime.²⁰ The municipality’s seeming indifference to the plight of the homeless and other marginalised persons in terms of its actions or failure to act when necessary, as opposed to rhetoric, is exacerbated by the underlying ideology of the municipality that seeks to “other” people through its by-laws that criminalise homelessness and poverty.²¹ Homelessness, in this article, excludes the broader category of persons with inadequate shelter (informal settlements or inner city bad buildings, for example), and refers to those temporarily residing in the city and also transient persons.²²

As with migrants and refugees, the policy of local government for homeless persons has ranged “from one of benign neglect to active hostility”.²³ This entrenched classism will not withstand constitutional scrutiny. Marius Pieterse identifies urban spaces as the site of struggle for this group of persons, in the context of projects for the “regeneration” of cities.²⁴

¹⁸ Ngema T “Railway vagrant gives eThekweni Municipality a big headache” *Daily News* 24 July 2018 available at <https://www.iol.co.za/dailynews/railway-vagrant-gives-ethekwini-municipality-a-big-headache-16197059> (accessed 1 December 2018). See also Dawood Z “Anger over vagrants ‘dumping’” *Daily News* 23 March 2018 available at <https://www.iol.co.za/dailynews/anger-over-vagrants-dumping-14004694> (accessed 1 December 2018).

¹⁹ United Nations Office of the Human Rights Commissioner (UNOHRC) *Report of the Special Rapporteur on extreme poverty and human rights, Ms. Maria Magdalena Sepúlveda Carmona on the penalization of people living in poverty* 4 August 2011 A/66/265 at para 21.

²⁰ Comins L “Westville CPF Slammed for Targeting Beggars” *The Post* 20 October 2018 available at <https://www.iol.co.za/the-post/westville-cpf-slammed-for-targeting-beggars-17538386> (accessed 1 December 2018).

²¹ This article does not consider the causes of homelessness. For an exposition, see Roets L, Botha A, Greeff M, Human SP, Strydom H, Watson MJ & Chigeza S “A synthesis of homelessness in South Africa: A rapid critical appraisal” (2016) 33 *Development Southern Africa* 613.

²² See generally Du Toit JL *Containment, displacement or exclusion? Local metropolitan government responses to homelessness in South Africa* Pretoria: Human Sciences Research Council (2010).

²³ Maharaj (2009) at 15.

²⁴ Pieterse M “Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa” (2014) 131 *South African Law Journal* 149 at 151. See also Coggin T &

2 BEING “OTHER” IN DURBAN – POLICING THROUGH BY-LAWS

By-laws, enforced through the city police (in eThekweni municipality through the metropolitan police), are a tool to control “anti-social behaviour” through prohibition and punishment of such conduct.²⁵ The functions of the metropolitan police have shifted from mostly crime prevention to a broader mandate, including enforcement of by-laws, such as control of nuisances: addressing both prevention of crime *and* maintenance of social order.²⁶ Key to the criminalisation of homelessness is the enabling law legislated by the municipal council (by-laws) and the role of the metropolitan police (who enforce the by-laws).

In recent years, there have been ample indications that the eThekweni Municipality, in Durban, has increasingly and daily failed in its obligations to homeless persons and migrants. For example, there are insufficient clean and affordable shelters available in the greater Durban area.²⁷ Instead, there are reports in the media that homeless persons are extorted by exploitative private shelter owners to live in intolerable conditions in the inner city.²⁸

Historically, the eThekweni Municipality has a poor and unacceptable record as regards its treatment of street children. For example, the Municipality has conducted what have been described as “street sweeps” – when street children have in essence been dumped outside of the city’s boundaries, ostensibly with the aim of making the city “safer”.²⁹ The deep-seated xenophobia and its repercussions in terms of the eviction of, and violence toward, foreign migrants in Durban’s public spaces is well documented.³⁰

Pieterse M “Rights and the city: an exploration of the interaction between socio-economic rights and the city” (2012) 23 *Urban Forum* 257 at 258.

²⁵ Memeza M “By-law enforcement in South African cities” Centre for the Study of Violence and Reconciliation (undated) available at <http://www.csvr.org.za/docs/urbansafety/bylawenforcement.pdf> (accessed 1 December 2018).

²⁶ Riekert R & De Vries I “Strategic approaches to by-law enforcement as a means of crime prevention in the Tshwane metropolitan area” (2015) *Acta Criminologica* 99 at 113.

²⁷ Dube MC *Understanding homelessness and migratory behaviour: A case study of adult homelessness in Durban South Beach area, South Africa* (unpublished Masters in Population Studies, School of Built Environment and Development Studies, University of KwaZulu-Natal, 2015) at 67.

²⁸ Carte Blanche *Durban Homeless Shelters* Available at <https://M-Net.Dstv.Com/Page/Home/Carte-Blanche-Durban-S-Homeless-Shelters/Videos> (Accessed 1 December 2018); Rondganger L “Shelters ‘Exploiting’ Durban’s Homeless” *Iol* 24 August 2015 Available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/shelters-exploiting-durbans-homeless-1904928> (accessed on 5 December 2018).

²⁹ Street children sweeps historically: Laganparsad M “Metro police deny charges of street children abuse” *Sunday Times* 14 February 2010 available at <http://www.timeslive.co.za/sundaytimes/article305799.ece> (accessed 1 December 2018); Tolsi N “Rounded up and shipped out” *Mail and Guardian* 22 January 2010 available at <https://mg.co.za/article/2010-01-22-rounded-up-and-shipped-out> (accessed 1 December 2018); Packree S & De Boer H “Where are Durban’s street children?” *The Mercury* 22 November 2007 available at <https://www.iol.co.za/news/south-africa/where-are-durbans-street-children-379838> (accessed 1 December 2018).

³⁰ Patrick Bond, Rebecca Hinely & Oliver Meth “Human rights have been drowned” 12 November 2008 cited in Amisi B, Bond P, Cele N, Hinely R, ka Manzi F, Mwelase W, Naidoo O, Ngwane N, Shwarerm S, & Zvavanhu, S *Xenophobia and civil society: Durban’s structured social divisions* (2010) 79 available at

Such actions by the Municipality clearly violate the rights of its homeless (including other marginalised) persons. Its policy in relation to street children has improved marginally, after advocacy by civil society and threats of litigation.³¹ The situation of street children in Durban, however, continues to be precarious.³² Furthermore, homeless adults are increasingly forcibly removed and dumped during “clean-up” operations prior to international events, and after the festive season. These tactics evince anti-poor sentiments on the part of the Municipality, notwithstanding any arguments to the contrary.

The eThekweni Municipality adopted the Nuisances and Behaviour in Public Places By-Laws in 2015. The By-Laws criminalise conduct, such as loitering and begging.³³ The Beaches By-Laws of 2015 create a similar offence for begging, as well as for sleeping in a public place.³⁴ Urinating in public is also criminalised, and yet insufficient ablution blocks are available within the city limits and many are closed between 5 pm and 6 am. The precursor in 2000 to these By-Laws also outlawed loitering.³⁵

Urinating or defecating in a public space, except at a public toilet;³⁶ bathing and washing oneself without the use of a bath or shower (and not as part of a religious or cultural ceremony);³⁷ bathing or washing clothes or animals;³⁸ lying or sleeping on a bench, seat, street, or sidewalk; can all result in a R500 fine. These are all essentially human and bodily functions that persons with rental or own accommodation can conduct in the safety of their residential or work premises. Begging, through “gesture, words or

http://www.atlanticphilanthropies.org/wp-content/uploads/2010/07/3_Durban_c.pdf (accessed 1 December 2018); Nene N & Naidoo M “Government ‘failed’ to act on 2015 xenophobia alert” *Sunday Tribune* 20 May 2018 available at <https://www.iol.co.za/sunday-tribune/news/government-failed-to-act-on-2015-xenophobia-alert-15068513> (accessed 1 December 2018). In 2015, seven foreign nationals were killed and 5 000 displaced after xenophobic attacks took place in KwaZulu-Natal). Ironically, the Durban Declaration and Programme of Action of 2001 took a stand against xenophobia after hosting the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Item 8 of the Durban Review Conference Outcome Document, 2010, identifies that some obstacles to preventing and eradicating racism and xenophobia had not been addressed. See https://www.ohchr.org/Documents/Publications/OutcomeDocumentDurban_en.pdf (accessed 1 December 2018).

³¹ Holness W “Safeguarding the best interests of street children” Legal Resources Centre Annual Report 2012/2013 available at http://lrc.org.za/art_external/pdf/2012%202013%20Annual%20Report%20LRC.pdf (accessed 1 December 2018).

³² Hills F, Meyer-Weitz A & Oppong Asante K “The lived experience of street children in Durban, South Africa: violence, substance abuse and resilience” (2016) 11 *International Journal of Qualitative Studies on Health and Well-being* available at <http://dx.doi.org/10.3402/qhw.v11.30302> (accessed 1 December 2018).

³³ Clauses 5(2)(c), (d), (e), (k), (r) and (u), as well as clauses 12(1)(b) and 12(2) of the Nuisances and Behaviour By-laws.

³⁴ Clause 10(1)(5) of the Beaches By-laws.

³⁵ Durban Transitional Metropolitan Council and The North Central and South-Central Local Councils *Control Of Public Behaviour Bylaw* in Kwazulu-Natal Provincial Gazette 5531 Of 6 July 2000 (Clauses 1.2 and 1.3 made it an offence to loiter or beg, subject to a fine or imprisonment for 6 months, or both).

³⁶ Clause 5(2)(c) of the Nuisances By-laws.

³⁷ Clause 5(2)(d) of the Nuisances By-laws.

³⁸ Clause 5(2)(e) of the Nuisances By-laws.

otherwise”³⁹, is banned and is subject to a R100 fine.⁴⁰ Loitering, either “for the purpose of or with the intention of committing an offence”, is criminalised,⁴¹ and is punishable with a fine of R2 500.⁴²

Contraveners may be issued with a verbal warning, failing which there is a “warning notice” (which on its own is not an admission of guilt) and being asked to desist from the unlawful behaviour.⁴³ Alternatively, a written notice is issued to ensure the person’s attendance in court, in terms of section 56 of the Criminal Procedure Act 51 of 1977. The Standard Operating Procedure for these by-laws is aimed not only to standardise the procedural steps for enforcement of the by-laws, but also to mitigate the municipality’s “exposure to possible litigation” and “possible claims for compensation”.⁴⁴ The Standard Operating Procedure does not provide sufficient guidance on how the discretion should be exercised, except for the following. On receipt of a complaint from the Control or Radio Room, verification of previous warnings issued to the “offender” and the number and frequency of the complaints relating to the same offender, needs to take place. Thereafter, several factors must be taken into account when investigating the complaint:

- “(i) whether there has been a transgression of the By-law;
- (ii) the nature and seriousness of the transgression;
- (iii) whether the situation giving rise to the complaint impacts on the safety, security or rights of others, including the general public;
- (iv) whether the situation giving rise to the complaint creates a possible threat to life and/or property; and
- (v) the offender’s interventions, if any, undertaken to remedy the situation giving rise to the complaint, as well as his/her level of co-operation in relation to the complaint/s.”⁴⁵

The Metro Police, in terms of the Standard Operating Procedure, should ensure immediate compliance where there is a reasonable belief that the behaviour is a “threat

³⁹ Clause 5(2)(r) of the Nuisances By-laws.

⁴⁰ eThekweni Municipality *Nuisances and Behaviour in Public Places By-law 2015: Admission of Guilt Fine Schedule*.

⁴¹ Clause 5(2)(u) of the Nuisances By-laws.

⁴² eThekweni Municipality: *Nuisances and Behaviour in Public Places By-law 2015: Admission of Guilt Fine Schedule*.

⁴³ The warning notice is referred to as a “section 20” notice, as it is issued in terms of clause 20(3) of the By-laws.

⁴⁴ Clause 2 of the Standard Operating Procedure of the eThekweni Municipality’s *Nuisance and Behaviour in Public Places By-law, 2015*.

⁴⁵ Clause 5.3(c) of the Standard Operating Procedure of eThekweni Municipality’s *Nuisance and Behaviour in Public Places By-law, 2015*.

to life, property, health or peace” , and where a contravention is confirmed, either a verbal warning, warning notice or “section 56 notice” is to be issued.⁴⁶

The Human Sciences Research Council’s (HSRC) study of homelessness in 2016 – *Ikhaya Lami: Understanding Homelessness in Durban* – found that approximately 4000 persons were living on Durban city streets and in formal homeless shelters during a census in February 2016.⁴⁷ One of the main challenges facing street living persons was reported to be victimisation and harassment by police (68 per cent reported experiencing intimidation or violence by police).⁴⁸ Over half of the child participants reported experiencing intimidation from police in the past. Violence was reported to be by way of “personal property confiscation, inappropriate arrests, and violently dislocating them outside the environments where they often access services”.⁴⁹ Police respondents reported that the violence that the street living participants reported in the study was “over-estimated” and that “physical contact is inevitable” “when waking and moving on those sleeping on the street”.⁵⁰ A “shake”, “prod” or using a “baton” , when no gloves were available “to protect their hands”, “to wake someone up is too often inappropriately called assault” – indicated the police respondents. It is submitted that these justifications are perilously close to apartheid era security police excuses for different treatment based on race or class. Furthermore, the metropolitan police also indicated that their role is also to support waste removal efforts by removing the cardboard boxes that homeless persons use to sleep on – but identified the tension with this duty and protecting homeless persons’ private property.⁵¹ Such a stance is not defensible from a dignity perspective. As will be seen later, in the discussion of the decision in *Ngomane & others v City of Johannesburg Metropolitan Municipality & another* (*Ngomane* (2020)) the denigrating treatment suffered by the dispossessed homeless persons infringes their dignity.⁵²

The city’s vaunted “holistic” social development strategy of 2017⁵³ that would develop shelters and drop-in centres to address the massive housing and basic survival needs, has not yet actualised tangible changes. The Municipality has not addressed this problem, has not regulated it, and has, at times, aggravated the situation – for example,

⁴⁶ Clauses 5.3(d) and (e) of the Standard Operating Procedure of the eThekweni Municipality’s Nuisance and Behaviour in Public Places By-law, 2015.

⁴⁷ See HSRC “Ikhaya Lami: Understanding homelessness in Durban” (2016) available at <http://www.hsrc.ac.za/en/research-outputs/view/8181> (accessed on 1 December 2018).

⁴⁸ See HSRC (2016) at 25.

⁴⁹ HSRC (2016) at 26.

⁵⁰ HSRC (2016) at 26.

⁵¹ HSRC (2016) at 26.

⁵² 2020 (1) SA 52 (SCA) at para 21.

⁵³ Integrated social development strategy by the office of the deputy city manager: community and emergency services, with different stakeholders including safer cities, area based management, human settlements, health, metro police and the parks, recreation and culture unit, outlined in Magubane t ‘ethekweni outlines ambitious plans to aid homeless, addicts’ *the mercury* 9 May 2017 available at <https://www.iol.co.za/news/south-africa/kwazulu-natal/ethekweni-outlines-ambitious-plans-to-aid-homeless-addictts-9022652> (accessed 1 December 2018).

by removing homeless persons from “undesirable areas”, such as during the Albert Park raids.⁵⁴

The HSRC report categorically states that the by-laws “essentially criminalise homelessness”.⁵⁵ The HSRC study identified that the relational issue (the relationship between police and homeless persons) in eThekweni is a concern - as identified by the participants in the study - and that this mirrors findings in other cities and jurisdictions.⁵⁶ Accordingly, the panel involved in the law enforcement aspect of the study identified that the enforcement of the by-laws by police is done without adequate support from other stakeholders, leaving the police to tackle the “social, economic and emotional issues” faced by homeless persons - without the requisite training to do so. The HSRC study recommends a change from “policing homelessness” toward an “arrest-alternative” approach that would require multi-stakeholder involvement and an approach premised on problem solving, and not an “arrest first” mentality.⁵⁷

The HSRC study further recommends a public awareness campaign to address stigmatisation through raising awareness of the “nature and extent of homelessness, as well as the pathways into homelessness and the daily challenges faced”, in order to change attitudes and the treatment of homeless persons and to “reduce the demand on the police services and increase the demand for the municipality to adopt progressive policies”.⁵⁸ With respect, this reasoning is flawed. While public awareness is sorely needed, as will be explained below, public sentiment cannot be relied upon for the formulation of constitutional by-laws and policies. It is a constitutional imperative that laws and policies are compliant with the basket of rights to which all individuals are entitled.

Several statements by the metropolitan police indicate their stance toward homeless persons : they were a nuisance, drug addicts and criminals, and subject to enforcement of the by-laws.⁵⁹ Policy clarity on interventions is lacking, as this statement shows:

⁵⁴ Asmal F “Durban's Homeless face Harassment” *Mail & Guardian* 14 February 2014 available at <https://Mg.Co.Za/Article/2014-02-13-Durbans-Homeless-Face-Of-Harassment> (Accessed 1 December 2018); Rall S-A “Fears After Homeless Settlement Causes Crime Spike In Durban Suburb” *Daily News* 1 March 2018 available at <https://Www.lol.Co.Za/Dailynews/Fears-After-Homeless-Settlement-Causes-Crime-Spike-In-Durban-Suburb-13521825> (accessed 1 December 2018).

⁵⁵ HSRC (2016) at 39.

⁵⁶ HSRC (2016) at 39. Hipple NK “Policing and homelessness: using partnerships to address a cross system issue (2016) 11(1) *Policing: A Journal of Policy and Practice* 14; Moyo U & Ross E “Homelessness and mental illness in Hillbrow, South Africa: a situation analysis” (2015) 51(1) *Social Work* 1; Sewpaul V, Osthus IS, Mhone CK, Sibilo E & Mbhele S “Life on the streets of Durban: no millionaire ending” (2012) 48(3) *Social Work* 241.

⁵⁷ HSRC (2016) 39, referring, with approval, to this approach followed in Indianapolis, as outlined by Hipple (2016).

⁵⁸ HSRC (2016) 40.

⁵⁹ Nkabane P “More metro police officers deployed in crime hotspots 14 February 2017” available at http://www.durban.gov.za/Resource_Centre/new2/Pages/More-Metro-Police-officers-deployed-in-crime-hotspots.aspx (accessed 1 December 2018); eThekweni Municipality’s Head of Communications “Law enforcement operation at King Dinuzulu Park” 3 July 2014 available at

“if the vagrants were at Berea Park, it should be reported to them so they could be removed. ‘Through joint operations with Prasa, we have found that more than 150 of the vagrants have criminal records’, Sewpersad [the Metropolitan police spokesperson] said. *He said the city’s leadership might have a long-term solution to get rid of vagrants, but he was not sure what this was. He was aware that there had been discussions about the matter ...* Last month, Mandla Nsele, eThekweni Municipality’s acting head of communications, told the Daily News they had been addressing vagrancy with daily Nuisances and Behaviour in Public Places operations. ‘A person arrested for vagrancy is taken to a police station and given a warning and entered into the Warning Register’, he said.”⁶⁰

Criminalising homelessness through prohibition of begging and “loitering” is also the modus of other cities, including, for example, Pretoria/Tshwane⁶¹ and the City of Cape Town.⁶² Local governments that internalise anti-vagrant and anti-poor sentiments in their legislative and executive functions are acting unconstitutionally. These by-laws are liable to challenge for failing the principle of legality and offending the equality clause, which are discussed in part four. Next, the right to the city and its relationship with local government’s developmental mandate is explored.

http://www.durban.gov.za/Resource_Centre/Press_Releases/Pages/Law-Enforcement-Operation-at-King-Dinuzulu-Park.aspx (accessed 1 December 2018); Tabloid Newspaper “Calls for vagrancy to be addressed” 6 November 2018 available at <https://tabloidmedia.co.za/calls-for-vagrancy-to-be-addressed/> (accessed 1 December 2018).

⁶⁰ Ngema T “Railway Vagrant Gives Ethekeeni Municipality a Big Headache” 24 July 2018 *Daily News* available at <https://www.iol.co.za/dailynews/railway-vagrant-gives-ethekeeni-municipality-a-big-headache-16197059> (Accessed 1 December 2018).

⁶¹ Clause 8(21) of the City of Tshwane Metropolitan Municipality By-Laws Pertaining to Public Amenities (2014) prohibits begging, and clause 11 prohibits loitering and begging (“No person leading the life of a loiterer or who lacks any legal and determinable place of refuge or who leads a lazy, debauched or disorderly existence or who habitually and illegally sleeps in a public street, public place or on a private place or who habitually begs for money or goods or persuades others to beg for money or goods on his/her behalf, may loiter or linger about in a public amenity”); and clause 14(3) prohibits sanitation, except in designated facilities. However, the draft Street Homelessness Policy for the City of Tshwane as Annexure A to the *Community and Social Development Department Feedback of the Research Report on Homelessness and the request for Approval for the review of the current City of Tshwane Homelessness Policy and Approval for the draft Street homelessness Policy* 30 March 2017 (2017) at 22 mentions that by-laws can “dehumanize homelessness” and does not address the disjuncture between this by-law and the vaunted policy, which seeks to address services to homeless persons. Annexure B to the City of Tshwane’s *Health and Social Development Department Homelessness Policy of the City of Tshwane and report on Public Participation* 28 March 2013 at 48, refers to the chief of police commenting that the police will continue to enforce the by-laws (including confiscation of blankets) and that lack of residence and identity documents make it difficult to issue fines or warrants of arrest to homeless persons.

⁶² The City of Cape Town *By-law relating to Streets, Public Places and the Prevention of Noise Nuisances*, 2007. See Clause 2(1)(c) prohibiting aggressive, not passive, begging; clauses 2(3)(c) and (d) referring to sanitation except in designated facilities; and clause 2(3)(m) prohibiting sleeping overnight in a public space. See generally City of Cape Town *Street People Policy* (2013) available at <http://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Street%20People%20-%20%28Policy%20number%2012398B%29%20approved%20on%2004%20December%202013.pdf> (accessed 1 December 2018).

3 THE RIGHT TO THE CITY AND LOCAL GOVERNMENT'S DEVELOPMENTAL MANDATE

Local government has a developmental mandate that is not only enumerated in the Constitution, but also is concretised in legislation.⁶³ This duty requires government to prioritise “the basic needs of the community” and to promote their social and economic development through the way in which it structures and manages both administration and budgeting – as well as planning processes.⁶⁴

This mandate is in accordance with what Marius Pieterse calls the “right to the city”.⁶⁵ The right to the city as a concept was developed in 1968 – referring to “the equitable usufruct of cities by adhering to the principles of sustainability, democracy, equity and social justice”.⁶⁶ A decent or adequate standard of living and self-determination is conferred on all inhabitants by right, including vulnerable groups, such as homeless persons. However, the ability to participate in a city’s services and activities generally requires a residence – a domicile.

This “right” is an entitlement to the basket of interrelated, mutually supportive and interdependent rights ascribed to all persons – including rights to equality, life, freedom of movement, physical safety, freedom of assembly and association, freedom of trade and occupation, political participation, a healthy environment, and socio-economic rights (housing, food, water, health care services, social security, and education).⁶⁷ These rights include the life-sustaining activities referred to earlier. Since local government is the vehicle of delivery of many of these entitlements – particularly to socio-economic rights with concomitant social services – and the site for the exercising of civil rights, such as freedom of movement, means that local government may not conduct itself or legislate to detract from these rights or deny them.

Homeless persons primarily need adequate shelter, sufficient food, access to water and sanitation, and access to health care – but cannot provide these for themselves. Secondary needs are access to education and vocational skills. Jaap de Visser explains that municipalities’ developmental mandate does not only extend to material needs,

⁶³ Municipal planning is expected to be developmentally orientated, according to s 23(1) of the Act and to give effect to socio-economic rights: “A municipality must undertake developmentally-oriented planning so as to ensure that it— (a) strives to achieve the objects of local government set out in section 152 of the Constitution; (b) gives effect to its developmental duties as required by section 153 of the Constitution; and (c) together with other organs of state contribute to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution.”

⁶⁴ Section 153(a) of the Constitution.

⁶⁵ Pieterse (2014) at 149. See generally Pieterse M *Rights-Based Litigation, Urban Governance And Social Justice In South Africa: The Right To Joburg* Routledge (2017).

⁶⁶ Kriel I, Tembe MJP & Mashjava VR “Homelessness in Pretoria: exploring the survival challenges of the homeless and their right to the city” (2017) 34(4) *Development Southern Africa* 428 at 429, citing Grahl J *World charter for the right to the city* (2015) available at <http://www.urbanreinventors.net/3/wsf.pdf> (accessed 1 December 2018).

⁶⁷ Coggin & Pieterse (2012) at 261-263. Parnell S & Pieterse E “The ‘right to the city’: institutional imperatives of a developmental state” (2010) 34 *International Journal of Urban and Regional Research* 146 at 148.

such as, the improvement of one's standard of living and reduction of absolute poverty, but also includes a choice element – requiring the provision of opportunities for persons to make choices about their own wellbeing.⁶⁸ The latter is linked to the right to dignity. The developmental mandate also has an equity element, which requires that development must benefit all persons.⁶⁹ Homeless persons' choices are removed, not just limited – where they sleep, interact with friends and family, have sexual intercourse, and to other human necessities, such as sanitation. As to the use of shelters, the cost and scarcity of adequate shelters makes it a fraught option.

In terms of legislation, municipalities are on the front lines of basic service delivery for all persons within their boundaries – including homeless persons. The Local Government Systems Act expects municipalities to ensure the sustainable development of the community they serve, defining development as “sustainable development”, which

“includes integrated social, economic, environmental, spatial, infrastructural, institutional, organisational and human resources upliftment of a community aimed at improving the quality of life of its members with specific reference to the poor and other disadvantaged sections of the community; and ensuring that development serves present and future generations”.⁷⁰

At provincial level, the Departments of Human Settlements (previously Housing)⁷¹ and Social Development (previously Social Welfare) offer different policy and legislative responses to the housing and social protection and development needs of homeless people.⁷²

Where municipalities mete out inhumane treatment to homeless persons, or omit to provide for their basic needs, they are not meeting their developmental mandate. In the words of Justice Edwin Cameron in the Constitutional Court, in *Dladla v City of Johannesburg (Dladla (2018))*⁷³

“The question is not whether others are worse off, but whether these measures the City is taking here, now, with this vulnerable group, affords them sufficient care, respect and dignity. That question must be answered each time in concrete terms, within the framework the Bill of Rights sets, including available resources.”

⁶⁸ See De Visser J *Developmental local government: a case study of South Africa* Antwerp: Intersentia (2005) at 71.

⁶⁹ See De Visser (2005) at 13.

⁷⁰ Section 1 of the Local Government: Municipal Systems Act 32 of 2000 defines “development”.

⁷¹ See, for example, the Gauteng Street Children Shelters Act 16 of 1998.

⁷² For a discussion of these, see Naidoo V “Government responses to street homelessness in South Africa” (2010) 27(1) *Development Southern Africa* 129. See generally Lund C, Ramoshidi R, Poulsen L & Brand D *Exploring transitional and communal housing as a form of social housing in South Africa* Johannesburg: Social Housing Foundation Series, Social Housing Foundation (2004).

⁷³ 2018 (2) BCLR 119 (CC) at par 88.

It would seem an almost impossible task to argue that eThekweni Municipality's response to the needs of its homeless persons affords them sufficient care, respect and dignity, because not only has the local government not taken sufficient steps to prevent or mitigate the causes of homelessness in Durban, it also silently condoned the heavy-handed actions taken by police in enforcing by-laws that denigrate self-sustaining activities.

Development, ostensibly on behalf of or for the benefit of marginalised persons, can only be legitimate if done in consultation with affected persons. Litigation on behalf of informal traders in Durban has shown that a lack of consultation can have potentially dire socio-economic consequences and will not be constitutionally compliant. This includes the formulation of unconstitutional by-laws (inter alia challenging permit requirements for barrow operators in Warwick junction under the by-laws; and challenging confiscation of traders' goods under the by-laws as unconstitutional).⁷⁴ Traders have also fought local government actions ostensibly aimed at enhancing socio-economic development, when interdicting the City from demolishing the historic Early Morning Market to make way for a mall that would have threatened the livelihood of thousands of informal traders and approximately 70 000 households; there was insufficient consultation with those most affected.⁷⁵ Development planning, which includes how city spaces are regulated, requires consultation with affected persons. The HSRC study is a start, in that it consulted widely through its census of homeless persons in eThekweni – with the recommendation that the eThekweni Municipality rethink its approach to the policing of public spaces.⁷⁶

4 LEGAL CHALLENGES TO THE BY-LAWS

4.1 Introductory remarks

The argument proposed below is, first, that the by-laws entrench an irrational differentiation between homeless persons and other city users and habitants, and that

⁷⁴ *Makwickana* (2015) discussed in Dobson R & Quazi T 'Landmark legal case defending informal workers' rights' *Asiye eTafuleni* 18 February 2015 available at <http://aet.org.za/landmark-legal-case-defending-informal-workers-rights/> (accessed 1 December 2018); and Broughton T 'Court victory for trader' *The Mercury* 18 February 2015 available at <https://www.iol.co.za/news/court-victory-for-informal-trader-1820045#.VOULbC5KW9Y> (accessed 1 December 2018). *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* 2014 (4) SA 371 (CC) which focused on "legal" informal trading.

⁷⁵ Legal Resources Centre *Annual Report 2009-2010* (2010) at 14 available at http://lrc.org.za/art_external/pdf/2009-2010%20Annual%20Report%20LRC.pdf (accessed 1 December 2018); Legal Resources Centre *Annual Report 2010-2011* (2011) at 14 (available at <http://lrc.org.za/annual-report-2010-2011> (accessed 1 December 2018); Mdletshe C "Demolition of eThekweni market halted" *Bizcommunity* 30 July 2009 available at <http://www.bizcommunity.com/Article/196/345/38470.html> (accessed 1 December 2018); Mbonambi G "Legal wrangles stop plan for Warwick mall" *IOL News* 13 April 2011 available at <https://www.iol.co.za/news/legal-wrangles-stop-plan-for-warwick--mall-1056065> (accessed 1 December 2018).

⁷⁶ HSRC (2016) at 39.

enforcement is arbitrary; and secondly, that the by-laws disproportionately impact on homeless persons and constitute unfair discrimination on the basis of their socio-economic status (and other statuses, such as race, and social origin). Violation of the right to freedom of movement has been suggested as a possible ground of unconstitutionality.⁷⁷

Both international and regional law, both in soft law instruments and guidance from General Comments, require the State to refrain from infringing the rights of homeless persons and require positive measures to address the causes of homelessness and to provide basic services to the homeless while they remain on the streets or in shelters. Vagrancy by-laws, particularly, are banned. For example, the foreword to *Principles on Decriminalisation of Petty Offences* issued by the African Commission, recognises the

“adverse socio-economic impact of the enforcement of these offences, such as the imposition of fines on persons without means to pay, prolonged or arbitrary pre-trial detention, harassment by law enforcement officials, the economic and social cost to the families of people in detention, adverse health consequences from conditions of detention, and potential criminal records, which further entrench the marginalisation and burden of people living in poverty”.⁷⁸

Prior to the Principles, other soft law instruments sought to decriminalise rogue and vagabond and loitering offences,⁷⁹ to divert minor offences from the criminal justice system, and stipulated that arrest is to be based on legality and equality.⁸⁰ They also stated the need to address the socio-economic impact of inequality requiring poverty alleviation measures, particularly for key vulnerable populations.⁸¹ These regional law principles and guidelines have however not trickled down to local governments as the continued regulation and control of homelessness through vagrancy laws attest.

The UN Special Rapporteur on Extreme Poverty and Human Rights in her report on penalisation of people living in poverty has noted the absurdity of incarceration for non-payment of fines when the poor targeted by by-laws are unable to pay these, and criticises this as not only a “considerable waste of State financial and administrative

⁷⁷ Killander M “Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality” (2019) 35(1) *South African Journal on Human Rights* 70 at 85 discusses the decision in *V&A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* [2004] 1 All SA 579 (C) where the Court refused an interdict prohibiting access to the V&A Waterfront, a private property considered to be a suburban space partly because of the burden of historical racial exclusion from public spaces.

⁷⁸ Commissioner Maria Teresa Manuela, Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa, Preface to the African Commission on Human and Peoples’ Rights *Principles on Decriminalisation of Petty Offences* (2017) at 7.

⁷⁹ African Commission on Human and Peoples’ Rights *Ouagadougou Declaration and Plan of Action on Accelerating Prisons and Penal Reforms in Africa* (2003).

⁸⁰ African Commission on Human and Peoples’ Rights *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2015) (the Luanda Guidelines).

⁸¹ African Commission on Human and Peoples’ Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights*, 2010.

resources, but contributes significantly to perpetuating the social exclusion and economic hardship of persons living in poverty”.⁸²

Further support for decriminalisation of offences in relation to children in street situations, is found in the General Comment of the Committee on the Rights of the Child, which obliges States Parties to

“abolish any provisions allowing or supporting the round-up or arbitrary removal of children and their families from the streets or public spaces; abolish where appropriate offences that criminalize and disproportionately affect children in street situations, such as begging, breach of curfews, loitering, vagrancy and running away from home”.⁸³

Article 15(2) of the United Nations Convention on the Rights of the Child (CRC), according to this General Comment, requires the following interpretation:

“[P]olicing or other measures relating to public order are only permissible where such measures are taken on the basis of the law, entail individual rather than collective assessment, comply with the principle of proportionality and represent the least intrusive option. Such measures should not be applied on a group or collective basis. This means that harassment, violence, round-ups and street sweeps of children in street situations, including in the context of major political, public or sporting events, or other interventions that restrict or interfere with their rights to association and peaceful assembly, contravene article 15(2).”

In a case at the other end of the spectrum – where children were forced to beg against their will - the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), in *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l’Homme (Senegal) v Government of Senegal*,⁸⁴ found that the Senegalese State did not take sufficient measures to enforce prohibition of child begging. These children, known as *talibés*, were not ordinary street children, but rather children seeking a better education who were then forced to beg by their teachers (from Qur’anic private schools called *daaras*) to survive and enrich the teachers. The Committee found the State’s failure to provide administrative measures to enforce prohibition of begging as violating provisions on the best interests of the child, the rights to survival, development, education and health, and against prohibitions against child labour and forced child begging.⁸⁵ The African Charter on the Rights and Welfare of the Child (ACRWC)⁸⁶ prohibits child begging in Article 29.⁸⁷ However, where

⁸² UNOHRC (2011) at para 43.

⁸³ Committee on the Rights of the Child *General Comment No 21 on Children in Street Situations* (2017) CRC/GC21/2017 at para 14.

⁸⁴ ACERWC, DECISION NO 003/COM/001/2012.

⁸⁵ Articles 4, 5, 11, 14, 15(2), 16, 21(1) & 29 of the ACRWC.

⁸⁶ Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990).

children are prosecuted for being homeless or for begging, the non-discrimination, best interests and protection and development of the child clauses of the ACRWC, amongst others, are violated.⁸⁸

Moving away from repressive systems, such as, the eThekweni by-laws, is needed, and will require positive measures to be taken at both national and local government level. At national level, specific legislation is needed to address the plight of children in street situations, together with “enabling policies, mandates, operating procedures, guidelines, service delivery, oversight and enforcement mechanisms, and developed in collaboration with key stakeholders, including children in street situations”.⁸⁹ At local government level, the General Comment calls for implementation to be child friendly – with participation by children in street situations in planning processes and with adequate budgetary support for interventions, including in partnership with civil society and the private sector.⁹⁰ One can draw on similar obligations for the State in relation to adult persons who are homeless. Next, the arbitrariness of by-laws that criminalise homelessness is considered.

4.2 Rationality

The eThekweni by-laws are seemingly neutral in their application – yet they, as elsewhere in the world, disproportionately affect homeless persons.⁹¹

Section 9(1) of The Constitution of the Republic of South Africa, 1996, (Constitution) states : “Everyone is equal before the law and has the right to equal protection and benefit of the law.” Albertyn and Goldblatt explain that section 9(1) “protects claimants against inequality qua irrationality” primarily from “arbitrary and irrational distinctions made by the legislature or the administration” to enforce the legality principle and the rule of law doctrine.⁹² A law or conduct must not be arbitrary or “manifest naked

⁸⁷ This is widespread in other countries too: Fuseini T & Daniel M “Child begging, as a manifestation of child labour in Dagbon of Northern Ghana, the perspectives of mallams and parents” (2020) 111 *Children and Youth Services Review* 1 available at <https://doi.org/10.1016/j.childyouth.2020.104836> (accessed 20 November 2020).

⁸⁸ Articles 3, 4 and 5 of the ACRWC. Muntingh L & Peterson K *Punished for being poor: evidence and arguments for the decriminalisation and declassification of petty offences* Bellville : Dullah Omar Institute & Pan-African Lawyers Union (2015) at 21.

⁸⁹ Committee on the Rights of the Child (2017) at para 14.

⁹⁰ Committee on the Rights of the Child (2017) at para 20.

⁹¹ Lurie K, Schuster B & Rankin S “Discrimination at the margins: The Intersectionality of homelessness & other marginalized groups” (2015) *Homeless Rights Advocacy Project* available at <http://digitalcommons.law.seattleu.edu/hrap/8> (accessed on 1 December 2018). Lurie et al at 15 explain that by-laws that appear “facially neutral” nonetheless “function to remove visibly poor people from public spaces”. *Central Methodist Mission, Johannesburg & others v City of Johannesburg & others* 09/45915 Founding Affidavit at para 153.

⁹² See generally Albertyn C & Goldblatt B “Equality” in Woolman S & Bishop M (eds) *Constitutional law of South Africa* Cape Town : Juta (2014) ch 35. Price A “The content and justification of rationality review” (2010) 25 *South African Public Law* 346 at 353.

preference”, according to this principle.⁹³ Where mere differentiations occur for the sake of good governance, these must be done on a rational basis.⁹⁴ The test is:

“Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section [9](1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.”⁹⁵

For homeless persons whose conduct is criminalised by the by-laws, the differentiation is clear – persons in stronger socio-economic positions and who do not live on the streets or in shelters, generally are not detained or harassed on the basis of these laws (they may fall foul of these by-laws where they urinate in public, for example, but the usual suspects are the homeless). The by-law on its own does not differentiate between persons directly, but does so indirectly in terms of who is targeted for its enforcement. The by-laws are selectively enforced – anecdotal evidence indicates that the “presence of soap” is usually taken by metropolitan police as evidence that a person is using public facilities for ablution and not recreational purposes (similar to the possession of condoms by a person being taken as evidence of sex work).⁹⁶ In other words, tourists using the beach showers are not prosecuted for washing themselves at a public facility, but street-living persons who use soap would be. A discriminatory purpose is not legitimate under the rationality principle.

A rational connection to a legitimate governmental purpose is the next leg of the test. For the municipal council, the governmental purpose is ostensibly to act in accordance with its competency to control nuisances in public spaces.⁹⁷ On the face of it, this may be a legitimate reason and there is a link between control of “anti-social” behaviour and the by-law. The Constitutional Court has warned that where one questions the rational connection to an identified purpose of a measure decided on by a legislative or executive function:

“[T]he question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply

⁹³ *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) SA 1 (CC) at para 16.

⁹⁴ *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) (*Prinsloo* (1997)) at para 25.

⁹⁵ *Harksen v Lane* 1998 (1) SA 300 (CC) (*Harksen* (1998)) at para 50, referring to s 8(1) of the interim Constitution, which is also the test for s 9(1) of the final Constitution.

⁹⁶ Open Society Foundations: *Criminalizing condoms: How policing practices put sex workers and HIV services at risk in Kenya, Namibia, Russia, South Africa, the United States, and Zimbabwe. Report* (2012) at 10 available at <https://www.opensocietyfoundations.org/sites/default/files/criminalizing-condoms-20120717.pdf> (accessed 1 December 2018).

⁹⁷ Schedule 5B of The Constitution of the Republic of South Africa, 1996 (Constitution).

whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose”.⁹⁸

A closer examination deals swiftly with this caution. The reasons the municipal council could advance for its by-law criminalising homelessness are based on ideas of maintaining public order, safety and security within municipal borders – which ideas are “outdated, arbitrary and absurd”, and hark back to apartheid.⁹⁹ The by-law is outdated because vagrancy prohibitions (eg of urination, sleeping, loitering) are based on the notion that public spaces are only to be used by particular classes of persons, and this excludes the homeless. That street-living persons must be “moved on” (or along) as stated by the metro police participants in the HSRC study – ostensibly as they are “mandated to enforce” the by-laws.¹⁰⁰ This is not a legitimate governmental purpose, but rather “serves to exacerbate the cycle and problem of homelessness”.¹⁰¹ In fact, in the United States, research has persistently shown that the ordinances (similar to our by-laws) that prohibit life-sustaining activities of homeless persons do not improve the health and safety of the public or economic activity of the homeless.¹⁰² If we apply what Price calls “an evaluative purpose requirement and a vague effect requirement”,¹⁰³ we see the following.

The wording of the by-law’s objects shows how absurd, vague and irrational the reason proffered for criminalising homelessness is. The by-law identifies its objects as providing measures to regulate and control conduct or behaviour, which causes or is likely to cause *discomfort, annoyance or inconvenience* to the public or users of any public place – so as ensure that any such discomfort, annoyance or inconvenience is avoided; and where total avoidance is impossible or impractical, that it is minimised and managed.¹⁰⁴ It is concerning that the criminalisation of activities, such as, begging, sleeping and sanitation, are ostensibly legitimate in order to avoid the “discomfort, annoyance or inconvenience” (all constituting stigma inducing sentiments) that these activities may cause to other persons. This cannot be a legitimate governmental purpose in any sense of the term.

Considering both the general and specific reasons identified above, there is therefore not a rational connection between the by-law’s ostensible purpose of social control for the public good and its effect – which is the criminalisation of homelessness.

⁹⁸ *East Zulu Motors (Pty) Ltd v Empangeni/Ngwelezane Transitional Local Council & others* 1998 (2) SA 61 (CC) at para 24; *Prinsloo* (1997) at paras 35 to 38.

⁹⁹ See, for example, *Van der Merwe v Road Accident Fund* 2006 (4) SA 230 (CC) at para 55.

¹⁰⁰ HSRC (2016) at 39 & 33.

¹⁰¹ Lurie et al (2015) at 1.

¹⁰² National Law Center on Homelessness and Poverty *Criminalizing crisis: The criminalization of homelessness in US Cities* (2011) https://nlchp.org/documents/Criminalizing_Crisis (accessed 1 December 2018) at 10; Berkeley Law Policy Advocacy Clinic *Does sit-lie work: Will Berkeley’s “Measure S” increase economic activity and improve services to homeless people available at <http://www.law.berkeley.edu/files/1023sit-lie2.pdf>* (accessed 20 November 2020).

¹⁰³ See Price (2010) at 356.

¹⁰⁴ Clause 3 of the eThekweni Nuisances and Behaviour in Public By-law.

Evaluating the purpose of the by-law shows that it is not legitimate, but offends constitutional values, such as, equality, dignity and freedom; further, that the effect of the by-law (whether the law serves its purpose in that it has a rational connection or relationship with the purpose) is arbitrary and vague, as it does not meet the ostensible objects.

In the United States, loitering laws have been found wanting for vagueness on a number of grounds – including that the laws in question do not indicate which actions are prohibited and grant police wide discretion to arrest persons.¹⁰⁵ Unfortunately, in some states, laws were simply altered to create more specific offences, such as loitering for the purpose of prostitution.¹⁰⁶ Closer to home, there is the *Central Methodist Mission & others v City of Johannesburg & others* case, which challenged the arrest of foreign nationals by the City of Johannesburg successfully through settlement.¹⁰⁷ The challenges to the by-law and its enforcement did not get their day in court. They were, inter alia, challenging the by-law enforcement for ulterior purposes (as the arrest of the homeless persons was not intended to prosecute but to harass and intimidate), and the challenge of the by-law on loitering as, inter alia, being vague and operating disproportionately, and unfairly discriminating against poor black foreign migrants. However, the threat of litigation (drafting of the pleadings), and engagement by the attorneys on behalf of the affected persons, proved to be effective.

The rule of law requires that discretionary powers are not broadly provided to officials and that guidelines are needed for exercising such powers.¹⁰⁸ The Socio-Economic Rights Institute of South Africa (SERI) argues that it is necessary that

“the conduct of local government officials who are responsible for the implementation of the by-laws complies with the standards of administrative law. Where municipal by-laws grant local government officials discretionary powers, the by-laws should provide clear guidelines on how those powers should be exercised by officials.”¹⁰⁹

Where this discretion is abused, SERI argues, mechanisms should be provided “to hold local government officials responsible for the implementation of the by-laws accountable for their unlawful actions”.¹¹⁰

¹⁰⁵ *Kolender v Lawson* 461 US 352 (1983); *Leal v Town of Cicero* 2000 WL 343232; *Nunez v City of San Diego* 114 F3d 935 (9th Circuit, 1997); *Papachristo v City of Jacksonville* 405 US 156 (1972).

¹⁰⁶ Meerkotter A ‘Litigating against loitering laws: PILG Panel’ 13 July 2012 available at <http://www.southernafricalitigationcentre.org/2012/07/13/litigating-against-loitering-laws-pilg-panel/> (accessed 1 December 2018). Ranasinghe P “Refashioning vagrancy: a tale of law’s narrative of its imagination” (2015) 11(3) *International Journal of Law in Context* at 320.

¹⁰⁷ Cited by Meerkotter (2012).

¹⁰⁸ *Dawood & another v Minister of Home Affairs & others; Shalabi & another v Minister of Home Affairs & others; Thomas & another v Minister of Home Affairs & others* 2000 (3) SA 936 (CC) at para 47.

¹⁰⁹ SERI & SALGA *Towards recommendations on the regulation of informal trade at local government level*: A discussion document (2018) 1 at 12 available at http://www.seri-sa.org/images/SERI_SALGA_Informal_Trade_Discussion_Doc_WEB.pdf (accessed 1 December 2018).

¹¹⁰ SERI & SALGA *Towards recommendations* (2018) at 16.

The by-laws provide great discretion to metro police to act and enforce them against homeless persons. They do this without guidelines as to which factors, specific to the living conditions and needs of street-living and shelter-living persons, need to be considered when enforcing the by-laws. The by-laws, and the training on enforcing them, should clearly identify what factors a decision-maker (metro police) should take into account, and which are irrelevant when exercising the discretion granted to them in terms of the by-laws.

SERI suggests that rights promotion can be attained through the provision of “adequate training to local government officials”.¹¹¹ Role identification is important, and referral networks that are effective with relevant stakeholders are necessary to address the gaps in service provision to homeless persons.

Killander strongly opposes the offence of “loitering” as being an overbroad offence, and also one with inadequate limitations on the police’s discretion to enforce.¹¹² Should the rationality argument fail to convince the courts, as is likely considering the track record of irrationality complaints, the argument for unfair discrimination (discussed next) is likely to receive more traction. In *Union of Refugee Women*,¹¹³ the Constitutional Court’s majority found a law that contains xenophobic notions to be a legitimate means to protect public safety¹¹⁴ – it is hoped that fear of homelessness as being a threat to public health and safety would not promote a similar finding.

4.3 Unfair discrimination

The by-laws offend the principle of equality in that they unfairly discriminate against persons who live on the street or in shelters on the basis of their socio-economic status (poverty and homelessness). Socio-economic status is not a listed ground under section 9 of the Constitution, but it is listed under the Promotion of Equality and Prohibition of Unfair Discrimination Act 3 of 2000 (Equality Act), to be considered by Parliament for inclusion in the future.¹¹⁵ This potential ground, “socio-economic status” , is defined in the Equality Act as including “a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications”. This clearly would apply to homeless persons. In the jurisprudence, unspecified grounds are recognised where they are “based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings ...”.¹¹⁶

¹¹¹ SERI & SALGA *Towards recommendations* (2018) at 22.

¹¹² See Killander (2019) at 89.

¹¹³ *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 4 BCLR 339 (CC).

¹¹⁴ Bishop M “Rationality is dead: long live rationality! Saving rationality basis review” (2010) 8 *South African Public Law* 312 at 324.

¹¹⁵ Section 34 of the Equality Act.

¹¹⁶ *Harksen* (1998) (1) at para 53. *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 15.

An unlisted ground under the Equality Act can be considered where it “(i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a [listed] ground”.¹¹⁷ The discrimination suffered by homeless persons perpetuates their systemic disadvantage and undermines their dignity.

The discrimination suffered in this instance is indirect. Indirect discrimination happens “where differentiation appears to be neutral and hence benign but has the effect of discriminating on a prohibited ground, whether listed or unlisted”.¹¹⁸ The Constitutional Court’s jurisprudence shows an emphasis on the “impact” of the law or conduct – ie its consequences on a particular group.¹¹⁹ The impact of the by-law on homeless persons is clear. As a direct result of the by-law, police harassment, criminalisation of life-sustaining activities, community stigmatisation and rights infringements (dignity; interference with right of movement; property deprivation by confiscation of blanket, cardboard and other goods) occur. The impact of these actions is demeaning and harmful – both physically and psychologically.

To be clear, application of the classic *Harksen v Lane* test to show unfair discrimination in three steps, is as follows:

“1. *Does the differentiation amount to discrimination?*” Differentiating between homeless and non-homeless persons in a law is differentiation. It amounts to discrimination, because an approach to substantive equality would recognise the power differential¹²⁰ between homeless persons and the metropolitan police and members of the public and the prejudice that homeless persons suffer when specifically targeted by a law.

“2. *If so, was it unfair?*” Fairness is the litmus test here. An unlisted ground would mean the presumption of unfairness does not kick in and the litigant must prove the unfairness. This can be done as follows: “(a) the position of the complainants in society, whether they have suffered from past patterns of disadvantage, and whether the discrimination is on a listed ground.” Homeless persons are one of the most marginalised groups and the fact of their reliance on public spaces for life-sustaining activities cannot be changed. Homeless persons have historically suffered from disadvantage, and will continue to do so due to the status and stigma attached to their daily living. They continue to suffer from systemic disadvantage and inequality, socially and economically, and are deeply vulnerable to abuse.¹²¹

¹¹⁷ Section 1 of the Equality Act defining prohibited grounds as including several listed grounds, as well as “any other ground” subject to these qualifiers.

¹¹⁸ *Albertyn & Goldblatt* (2014) OS 03-07 chs 35-48.

¹¹⁹ *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at paras 31-32.

¹²⁰ Jagwanth S “What is the difference? Group categorization in *Pretoria City Council v Walker*” (1999) 15 *SAJHR* 200 at 204.

¹²¹ *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) at para 27.

“(b) the nature of the provision or power and the purpose sought to be achieved by it. If it is aimed at achieving a worthy social goal and not at impairing the complainants it may be fair.” The by-laws criminalising homelessness through loitering, begging or life-sustaining activities clauses, are ostensibly to promote public health and safety and to avoid homelessness as being a “nuisance” to members of the public. This criminalisation does not serve this purpose, as has been shown by research in other jurisdictions. Aiming this by-law at dehumanising one category of persons in the pursuit of avoiding “inconvenience” to other classes, is not a worthy social goal and indeed impairs the rights to equality and dignity of homeless persons, so rendering it unfair.

“(c) with due regard to (a) and (b) and other relevant factors, the extent to which the complainants’ rights or interests has been affected, whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.” Homeless persons’ rights are affected on a daily basis – even when they may not be victims of the by-law enforcement, the threat of potential enforcement itself is harmful. Enforcement of the by-law invades their rights to freedom of movement, safety and security of the person, the right not to be arbitrarily deprived of their property, and the right to dignity. The extent of deprivations is egregious. Furthermore, the wide discretion afforded to law enforcement in identifying these offences and charging the offenders impact on their presumption of innocence.¹²²

“3. *If so, can it be justified in terms of the limitations clause (section 36)?*” Here only laws of general application fall to be examined. A court will weigh and balance the purpose and effect of the provision and “a determination as to the proportionality thereof in relation to the extent of its infringement of equality”.¹²³ Albertyn and Goldblatt explain that this leg of the test considers the “broader social interests implicated”, including “administrative, financial and other considerations relevant to the pursuit of valuable public policy”. The Special Rapporteur on Extreme Poverty and Human Rights stressed that the burden rests on the State to prove that limitations on rights such as these by-laws comply with safeguards, such as proportionality (see earlier discussion on rationality).¹²⁴ Again, the ostensible purpose or social interest sought to be advanced by criminalising life-sustaining conduct in the by-law, cannot be sustained – a disproportionate impact is felt by homeless persons and their right to equality is severely impinged.

A bench that adheres to the formalistic application of the majority judges in *Jordan v the State*, could find that the law applies equally to all.¹²⁵ Substantively, however, this by-

¹²² UNOHRC (2011) at para 82(f).

¹²³ *Harksen* (1998) at para 52.

¹²⁴ UNOHRC (2011) at paras 20-21.

¹²⁵ *S v Jordan & others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae)* 2002 (6) SA 642 (CC) at para 64.

law does not. Procedurally, also, it applies only to persons within the geographic space of eThekweni. In any event, section 36 would not save the by-law as there are less restrictive means available to the municipality to regulate public spaces that do not criminalise poverty. For example, prohibition of aggressive begging, which can constitute harassment, is less restrictive than a total ban on begging, and yet also disproportionately affects poor persons who may have no choice but to beg for survival and utilise strategies that may be effective to do so.¹²⁶ Furthermore, where cities do not have sufficient measures in place to provide for homeless persons, both street- and shelter- living, such as accessible and adequate shelters, ablution facilities, and relevant access to psycho-social services, it is difficult to argue that blunt instruments, such as banning of urinating, defecating and sleeping in public spaces, are appropriate measures. The Special Rapporteur recommends that resources spent on “policing, surveillance and detention” that disproportionately punish life-sustaining activities of the poor could be better utilised to “address the causes of poverty and improving access to public services”.¹²⁷ The nature of the rights infringed and the level of infringement was discussed earlier.

There are lessons to be learned from the implementation of loitering laws and their broad impact in relation to sex workers.¹²⁸ Three cases will be discussed. In *Sex Workers Education and Advocacy Taskforce v Minister of Safety and Security & others*¹²⁹ (*SWEAT* (2009)) a sex worker organisation challenged the continued unlawful and wrongful arrest of sex workers by members of the South African Police Services in Cape Town. The High Court held that the applicant had shown, on a balance of probabilities, that the arrests of sex workers took place in circumstances where the arresting officers knew with a high degree of probability that no prosecutions would result.¹³⁰ The arrests had been effected for the purpose of harassing sex workers. The Court specifically found that the purpose of arresting a person must be prosecution, and that the arrest of sex workers where arresting officers knew that no prosecutions would result, was an unlawful exercise of public power.¹³¹ The High Court issued an interdict preventing police officers from arresting sex workers within the City of Cape Town – unless with the intention of bringing them before a court of law.¹³² The Court held:¹³³

¹²⁶ UNOCHR (2011) at para 31.

¹²⁷ UNOHRC (2011) at para 23.

¹²⁸ Fick N “Sex workers’ experiences with the local law enforcement in South Africa” (2005) 8 *Research for Sex Work* 4; Scorgie F, Vasey K, Harper E, Richter M, Nare P, Maseko S & Chersich MF “Human rights abuses and collective resilience among sex workers in four African countries: a qualitative study” (2013) 9(33) *Global Health* 1.

¹²⁹ *The Sex Worker Education and Advocacy Taskforce v Minister of Safety and Security & others* 2009 2 SACR 417 (WCC) (*SWEAT* (2009)).

¹³⁰ *SWEAT* (2009) at para 15.

¹³¹ *SWEAT* (2009) at paras 17 & 35.

¹³² *SWEAT* (2009) at para 60.

¹³³ *SWEAT* (2009) at para 54.

“However, the fact that prostitution is rendered illegal does not, for the reasons advanced in this judgment, destroy all the constitutional protection which may be enjoyed by someone as appellant, were they not to be a sex worker.”

This is an important finding – even the potential for committing criminal activities does not render a person violable. In fact, the vulnerable status of persons, such as sex workers, requires positive measures by the State to protect their civil, political and socio-economic rights. The status of being a homeless person (or “vagrant”) is criminalised by the by-laws, where no other national law (logically) has done so. Homeless persons are detained under the by-laws for the purpose of potentially issuing them with a “warning” letter, as the statements from the metro police described (see above). Merely detaining someone for a supposed crime of status infringes their rights to equality, dignity and freedom of movement. However, Killander and Pieterse note the irony in the findings of the Courts in the *SWEAT* judgment and in *V&A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape*¹³⁴ (*V&A Waterfront* (2004)) where they did not pronounce on the constitutionality of the economic activities (sex work and begging, respectively) but rather appear to support the legitimacy of these restrictions on the right to trade and other rights; yet the same Courts posited that enforcement of the restrictions on persons’ conduct results in social exclusion from public spaces.¹³⁵

The Economic Community of West African States (ECOWAS) Court, in *Njemanze & others v The Federal Republic of Nigeria*¹³⁶ (*Njemanze case*) found that an arrest of purported sex workers in a night raid “was targeted against women” showing “evidence of discrimination”.¹³⁷ The purported sex workers challenged their arrest and detainment as unlawful, and as gender discrimination. The ECOWAS Court found that the treatment by the police and military constituted gender-based discrimination and cruel, inhumane and degrading treatment.¹³⁸ The key to the South African and Nigerian (ECOWAS) decisions is that the arrest and detainment were ostensibly in terms of legislation, but were executed or enforced in such a way that it caused harm to the sex workers and purported sex workers. The vulnerability of these groups of persons to police brutality and abuse of process where the discretion to arrest and detain is broad, is very clear. Similarly, the enforcement of the by-laws harm, both physically and psychologically, homeless persons.

In Kenya, a challenge to by-laws that targeted sex workers was unsuccessful. In *Lucy Nyambura & another v Town Clerk, Municipal Council of Mombasa & 2 others*,¹³⁹ the arrested sex workers contended that the by-laws infringed the Kenyan Constitution, because they “privileged treatment to the male gender, while excluding the female gender”. The sex workers averred that they were discriminated against on a number of bases, including how they choose to dress, and that this violated their right to dignity.

¹³⁴ *V&A Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* [2004] 1 All SA 579 (C).

¹³⁵ See Killander (2019) at 91; Pieterse M (2014) 131.

¹³⁶ ECW/CCJ/JUD/08/17 (ECOWAS).

¹³⁷ *Njemanze case* at 38.

¹³⁸ *Njemanze case* at 41.

¹³⁹ [2011] eKLR available at <http://kenyalisync.africanlii.org/node/117667> (no page numbers).

The Municipal Council defended the by-law as reasonable and proportionate – particularly in the context of protecting children (girls) from prostitution. The Council denied that the by-law discriminated against women by targeting them specifically. The Kenyan High Court, however, found no basis to declare the by-laws in dispute unconstitutional and a violation of the rights and dignity of women – and therefore declined to make an order that the arrest, detention and trial of the petitioners was an abuse of their constitutional rights. The sex workers led specific evidence of a pattern of human rights violations meted out against sex workers from 2008, but the Court was not convinced. What is clear, is that the discretion to arrest and detain persons in Durban under the by-laws is similarly broad. The Standard Operating Procedure does not articulate any further guidance for metropolitan police on how these broad by-laws are to be interpreted.

The arrests of sex workers in two jurisdictions – South Africa and Nigeria – were found to be unlawful, where they are not done for the purpose of prosecution but rather harassment. In Kenya, the evidence was not sufficient to convince the Court of the disproportionate arrest of sex workers as loiterers under the by-law.¹⁴⁰ As in the *SWEAT* (2009) case, litigants wishing to challenge the by-laws for their disproportionate impact on the homeless, may be successful if they can rely not only on evidence of a few incidents of abuse, but on proof of systemic abuse by the police that is given the force of law under the by-laws.

4.4 Recent decisions and advocacy on decriminalisation of homelessness

The treatment of homeless persons has not only been censured in eviction proceedings, such as the *Dladla* (2018) case, but also in the *Makwickwana* (2015) case as well as the more recent *Ngomane & others v City of Johannesburg Metropolitan Municipality & another*¹⁴¹ (*Ngomane* (2020)). In *Ngomane* (2020) a group of homeless persons had been living and kept their possessions and sleeping materials under a bridge for a period of four years. The City of Johannesburg, alleging that the site was obstructing the pavement and enabling crime, conducted a raid during which the property of the people was confiscated and destroyed by the metropolitan police. The Court declared the conduct of the police and their destruction of the property unlawful and unconstitutional.¹⁴² The Court upheld homeless people’s right to dignity, privacy and not to be deprived of their property.¹⁴³

The Court stated that “the conduct of the respondents’ personnel was not only a violation of the applicants’ property rights in their belongings, but also disrespectful and demeaning. This obviously caused them distress and was a breach of their right to

¹⁴⁰ *Canada (Attorney General) v Bedford*, 2012 ONCA 186 (a nuisance law on prostitution was not found to be unconstitutional).

¹⁴¹ 2020 (1) SA 52 (SCA).

¹⁴² *Ngomane* (2020) at para 22.

¹⁴³ *Ngomane* (2020) at para 21.

have their inherent dignity respected and protected”¹⁴⁴. Holness and Hicks comment that the Court’s decision identifies the need for a transformative approach to homelessness and policing to be followed by the municipality.¹⁴⁵

In Cape Town, the issue of by-laws criminalising homelessness has garnered attention from many corners. First, The National Association of Democratic Lawyers (NADEL), with support from the South African Human Rights Commission, sought to impugn the City’s by-laws particularly on the issue of fines issued to homeless persons.¹⁴⁶ Secondly, an interim interdict in an unreported and not yet finalised matter, was granted by the Western Cape High Court in September 2019 and extended in December of that year, prohibiting interference with the seven applicants’ personal property and the receipt of fines under the by-laws on criminalising homelessness.¹⁴⁷

The review hearing would take place at a later date. The original interim interdict disallowed enforcement and prosecution of fines or summonses issued to the applicants under the by-laws and ordered the City to “desist and refrain” from “interfering with or confiscating the personal property of the Applicants (and any other homeless people in the City of Cape Town) in ostensible reliance on the By-Laws ”¹⁴⁸. Thirdly, in another case, urgent court action was sought to stop the eviction of homeless persons from a temporary shelter during the COVID-19 pandemic.¹⁴⁹ However, the shelter was closed and a number of residents faced an uncertain future under a bridge.¹⁵⁰ Fourthly, further advocacy on this issue is that of Ndifuna Ukwazi, a law clinic that seeks to challenge the amendments to the City of Cape Town’s municipal by-laws that would allow search and

¹⁴⁴ Ngomane (2020) at para 21.

¹⁴⁵ W Holness & J Hicks ‘Court gives glimmer of hope to street people and the homeless’ 10 April 2019 *Daily Maverick* available at <https://www.dailymaverick.co.za/article/2019-04-10-court-gives-glimmer-of-hope-to-street-people-and-the-homeless/#gsc.tab=0> (accessed 1 July 2020).

¹⁴⁶ Daniels N “Lawyers Association to Challenge City of Cape Town over By-Laws ‘Penalising’ Homeless” *Iol News* 10 July 2019 available at <https://www.Iol.Co.Za/Capetimes/News/Lawyers-Association-To-Challenge-City-Of-Cape-Town-Over-By-Laws-Penalising-Homeless-28970172> (accessed 1 July 2020).

¹⁴⁷ Ethridge J “Ubuntu Demands we Operate in a Different Way to the Past - Judge Extends Interim Relief to Cape Town's Homeless” *News24* 12 December 2019 available at <https://www.News24.Com/News24/Southafrica/News/Ubuntu-Demands-We-Operate-In-A-Different-Way-To-The-Past-Judge-Extends-Interim-Relief-To-Cape-Towns-Homeless-20191212> (Accessed 1 July 2020).

¹⁴⁸ Kretzmann S “Homeless people win court victory against City of Cape Town” 12 December 2019 *Ground Up* available at <https://www.groundup.org.za/article/high-court-extends-order-protecting-homeless-against-city-harassing-by-laws/> (accessed 1 July 2020).

¹⁴⁹ Cruywagen V “Confusion and controversy as City of Cape Town shuts down homeless camp” *Daily Maverick* 1 May 2020 available at <https://www.dailymaverick.co.za/article/2020-05-01-confusion-and-controversy-as-city-of-cape-town-shuts-down-homeless-camp/#gsc.tab=0> (accessed 1 July 2020).

¹⁵⁰ Evans J “Cape Town homeless group face uncertain future in tents under bridge” *News24* 23 May 2020 available at <https://www.news24.com/news24/southafrica/news/cape-town-homeless-group-face-uncertain-future-in-tents-under-bridge-20200523> (accessed 1 July 2020).

seizure without a warrant and eviction of homeless persons without the interference of a court.¹⁵¹

Finally, a co-ordinated national advocacy campaign has also been undertaken by a consortium of civil society organisations with the launch of a decriminalisation of petty by-laws campaign in South Africa which, inter alia, seeks to review and ensure the repeal of municipal by-laws that criminalise homelessness.¹⁵²

In the midst of these recent developments are the juxtaposed positive local government responses in some cases during the COVID-19 pandemic. The eThekweni Municipality, for example, has been said to be an example of better engagement with homeless persons, their organisations and faith-based organisations, in its dignified treatment of homeless persons and support for safer living conditions during the regulated lockdown period at the outset of the pandemic, with mass screening for the virus, as well as accommodation being offered under the quarantine conditions in 11 “camp” shelters.¹⁵³ In the ostensible spirit of *ubuntu*, contradicted by its historical approach to homelessness, the Municipality is putting forward a “permanent” approach for homelessness, including dealing with substance abuse in the City¹⁵⁴ and so-called “safe open spaces” for homeless persons once lockdown ends.¹⁵⁵ The new approach is sparse on detail and does not reflect on the unconstitutionality of the by-laws.

5 CONCLUSION

In eviction matters the High Court plays an “active judicial management” role to ensure protection is afforded to unlawful occupiers, particularly as the Constitution and legislation require not only “considering the lawfulness of the occupation”, but also “the

¹⁵¹ Mabuza E “Public Law Centre Opposes Cape Town’s Search and Seizure Bylaw Amendments” *Timeslive* 18 May 2020 available at <https://www.timeslive.co.za/news/south-africa/2020-05-18-public-law-centre-opposes-cape-towns-search-seizure-bylaw-amendments/> (accessed 1 July 2020).

¹⁵² Sonke Gender Justice “Launch of the decriminalisation of petty by-laws campaign in South Africa” (10 October 2019) available at <https://genderjustice.org.za/news-item/launch-of-the-decriminalisation-of-petty-by-laws-campaign-in-south-africa/> (accessed 10 October 2019). These organisations include: Africa Criminal Justice Reform (Dullah Omar Institute, University of the Western Cape), African Policing Civilian Oversight Forum, Ashraf Mahomed, Centre for Human Rights (University of Pretoria), Lawyers for Human Rights, National Association of Democratic Lawyers, Sonke Gender Justice, and U-Turn.

¹⁵³ Nicholson G “Crisis can be building block for better care for street people” *Daily Maverick* 3 April 2020 available at <https://www.dailymaverick.co.za/article/2020-04-03-crisis-can-be-building-block-for-better-care-for-street-people/#gsc.tab=0>; Broughton T “Covid-19 lockdown bridges social divide for Durban’s homeless” *GroundUp* 24 April 2020 available at <https://www.groundup.org.za/article/covid-19-lockdown-bridges-social-divide-durbans-homeless/> (accessed 1 July 2020).

¹⁵⁴ Goba T “Durban has plans for permanent solution for its homeless, says Deputy Mayor” *Highway Mail* 15 May 2020 available at <https://highwaymail.co.za/409645/durban-has-plans-for-permanent-solution-for-its-homeless-says-deputy-mayor/> (accessed 1 July 2020).

¹⁵⁵ Bhengu L “Covid-19 speeds up creation of ‘safe open spaces’ for Durban’s homeless” *Times Live* 9 April 2020 available at <https://www.timeslive.co.za/news/south-africa/2020-04-09-covid-19-speeds-up-creation-of-safe-open-spaces-for-durbans-homeless/> (accessed 1 July 2020).

interests and circumstances of the occupier and [the court must] pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result”.¹⁵⁶ Where homeless persons are arrested or detained, or even simply “warned”, the interference with their abode, unstructured as it is, does not have similar protections by a court. The eThekweni Municipality’s Standard Operating Procedure does elucidate that there are graded levels of intervention by the metro police when enforcing the by-laws: verbal warning, written warning, and then an official contravention requiring appearance before the court (the actual criminalisation) . However, the basis on which such a discretion is exercised is not clear, and could arguably depend on the official involved.

The eThekweni Municipality must scrap its unreasonable and discriminatory by-laws and street-sweep tactics, and instead draft and then satisfactorily implement a properly funded policy that ensures that basic services are met and appropriate referrals are made for other needs of all marginalised persons, beyond its humanitarian approach during COVID-19. In eThekweni and other urban centres, the provision of adequate shelters and the regulation of private shelters are imperative. Similarly, the creation of programmes that address the causes of homelessness, and of course proper city planning that provides low cost housing for those who require it – are needed. Political will for policy development and its effective implementation often depends on perceptions of who is considered “legitimately” needy – or in this case, legitimately homeless and therefore “deserving”.¹⁵⁷

By-laws that perpetuate discrimination against persons who are homeless (or migrant or from other vulnerable groups) are not constitutionally compliant. Local governments have the power to craft, within their executive and legislative powers, by-laws that are transformative, but not divisive. Anti-vagrancy by-laws have to be scrapped. Referring to the City of Tshwane’s policy on homelessness, Kriel et al call for “practical ways of limiting, even eradicating, the neglect, abuse and stigmatisation that people who are homeless are subject to on a daily basis”¹⁵⁸.

Not only do municipalities have a duty toward marginalised groups, but communities also have the potential to be social change agents. The narrative of the social ills of homelessness and other categories, such as, refugee and sex worker status, has to change. People do not choose to live without a roof over their head, in abject poverty, or deserve to be denied their right to dignity. That narrative, I argue, includes urban businesses and urban and suburban families, as well as ratepayers’ associations that often bemoan the criminal element of “vagrants” – seeking to remove these undesirable elements from their neighbourhoods and business precincts. In true NIMBY (not in my backyard) fashion, we cannot continue to “move along” homeless persons.¹⁵⁹

¹⁵⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 36.

¹⁵⁷ Kriel I “Engaging with homelessness in the City of Tshwane: ethical and practical considerations” (2017) 34(4) *Development South Africa* 468 at 470.

¹⁵⁸ Kriel et al (2017) at 437.

¹⁵⁹ Luiz JM & Rycroft J “Homelessness, social relations and institutional logics: property rights without property?” (2018) *Socio-Economic Review* 1 at 7.

The media conspires in perpetuating this narrative by linking “vagrancy” with crime and “filth” – even in instances where business owners seek better solutions, such as work-creation for the unemployed and homeless persons through recycling schemes: “[T]he City had seemingly failed to uphold a host of promises to deal with vagrants, crime and filth from the CBD.”¹⁶⁰ Instead, affording all who live within the limits of the city the dignity to which they are entitled under the Constitution, will require a fundamental shift in policy and law. It will also require developing an acute awareness on the part of city officials, including the police, and the public, that the right to the city extends to all those who live in it, bearing in mind, as Thomas Coggin and Marius Pieterse state, that

“while the working class is the right to the city’s main agent, the right extends to all who seek inclusion, habitation, appropriation or participation and, as such, is claimed also by non-working-class malcontents and marginalized groups or, indeed, by anyone who participates in the struggle over the city’s form and meaning”.¹⁶¹

Lest we forget, the colonial project appears to be perpetuated in by-laws that criminalise poverty in anti-vagrancy provisions.¹⁶² Killander traces the historical adoption of vagrancy laws in South Africa through legislation in the former colonies, Boer Republics, the Union and the apartheid government, and concludes that these laws were aimed at social control of poor persons, particularly with a defined racist implementation.¹⁶³ Lurie et al call for society to re-examine laws that criminalise homelessness, similar to the social rejection of “laws that discriminatorily target many

¹⁶⁰ Pillay K “Business has Plan to Help Vagrants” *The Witness* 20 February 2018 available at <https://Www.News24.Com/Southafrica/News/Business-Has-Plan-To-Help-Vagrants-20180219> (accessed 1 December 2018) (Regarding The Msunduzi Municipality).

¹⁶¹ See Coggin & Pieterse (2012) at 260.

¹⁶² See, for example, Keese A “Slow Abolition Within the Colonial Mind: British and French Debates about ‘Vagrancy’, ‘African Laziness’, And Forced Labour In West Central And South Central Africa, 1945-1965” (2014) 59(3) *International Review Of Social History* 377 (argues that re-organisation of forced labour by colonisers continued in different ways such as through anti-vagrant measures perpetuated by post-colonial societies); Chambliss Wj “The State and Criminal Law” in Chambliss WJ & Mankoff M (Eds) *Whose Law? What Order? A Conflict Approach To Criminology* New York: John Wiley And Sons (1976) 68 (Considers vagrancy laws in medieval England and the colonies of East Africa under British rule); Beier Al & Ocobock P *Cast Out: Vagrancy And Homelessness In Global And Historical Perspective* Athens, Ohio: Centre For International Studies, Ohio University (2008). Elbourne E “Freedom at Issue: Vagrancy Legislation and the Meaning of Freedom in Britain and Cape Colony 1799-1942” (1994) 15(2) *Slavery And Abolition* 114. On the Vagrancy Act 1934 Proposed in the Cape Colony, See O’Malley P “1834 Vagrancy Act” available at <https://Omalley.Nelsonmandela.Org/Omalley/Index.Php/Site/Q/03lv01538/04lv01646/05lv01663.Htm> (Accessed 1 December 2018); Sa History “Vagrancy – British Colonists Bathurst And Eventually Pass Laws” (Undated) Available At <https://Www.Sahistory.Org.Za/Article/Pass-Laws-South-Africa-1800-1994> (accessed 1 December 2018).

¹⁶³ Killander (2019) at 78.

of these same marginalized groups” – referring to LGBTIQ, veterans, mental disability and particular racial groups in the US context.¹⁶⁴

Formulation of planning and development, as well as the drafting of by-laws, must take into consideration the socio-economic needs of those who live in the city – regular workers and commuters as well as informal traders, migrants and the homeless. It is time that homeless persons, specifically, are afforded the dignity that the Constitution promises.

SERI has analysed the impact of by-laws on informal traders and has suggested a framework of criteria that should ensure that legal requirements for by-laws, as well as attendant issues, such as, service provision and enforcement and compliance, are adhered to.¹⁶⁵ SERI argues that municipal by-laws should be based on a better “understanding of the nature and causes of homelessness and the needs of homeless persons”¹⁶⁶. This, the writer fully supports. The eThekweni by-laws do not currently evince this understanding. The HSRC report will hopefully provide the Municipality with some context in the light of which the by-laws can be re-drafted and guidelines developed for the discretion that the metropolitan police should exercise when enforcing the by-laws. Strategies to address homelessness should enhance the social, economic¹⁶⁷ and political participation of homeless people in society – in accordance with their right to the city, and should not hinder it. Meerkotter advises that such litigation strategies should carefully consider which offences are most egregious violations of human rights, rather than seeking to abolish laws wholesale, which may be more difficult to achieve.¹⁶⁸ The Special Rapporteur on Extreme Poverty and Human Rights recommends that nothing less than repeal of the by-laws that “specifically target the particular behaviours and actions of persons living in poverty” and “amount to discrimination on the basis of economic and social status” is needed.¹⁶⁹

The eThekweni Municipality’s general approach to homelessness during the COVID-19 crisis has altered the landscape temporarily, but whether the pendulum will swing towards decriminalising homelessness once the humanitarian and health response is over is too soon to say, and unlikely without careful strategic litigation and continued advocacy.

¹⁶⁴ Lurie *et al* (2015) at 51.

¹⁶⁵ SERI & SALGA (2018) at 2-3.

¹⁶⁶ SERI & SALGA (2018) at 22.

¹⁶⁷ Mangayi LC “Not just numbers! Homeless people as potential economic contributors in Tshwane” (2017) 34(4) *Development Southern Africa* 450.

¹⁶⁸ Meerkotter A “Litigating to protect the rights of poor and marginalized groups in urban spaces” (2020) 74 *University of Miami Law Review Caveat* (2020) 1 at 30.

¹⁶⁹ UNOCHR (2011) at para 82(f).

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