

UNIVERSITY OF THE WESTERN CAPE



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of Cape Town, Obligations

Plagiarism declaration

I, Francesca Visagé, do hereby declare that *An analysis of the City of Cape Town's response to street homelessness* is my original work, that it has not been submitted before for any degree or examination in any other university or other institution of higher learning. I further declare that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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Abstract

There has been a significant increase in urban homelessness and metropolitan municipalities, including the City of Cape Town, are struggling to manage this challenge. This paper examined the City of Cape Town's response to urban homelessness against local government's service delivery, developmental, and human rights mandate. It established that, while the City has made notable progress in addressing the needs and concerns of its homeless population, there remains significant room for improvement to ensure that its response is fully aligned with its human rights obligations. The paper recommends, among other things, that the City should refrain from criminalising homelessness.

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1 CHAPTER 1: INTRODUCTION

1.1 Problem statement

On 15 August 2024, law enforcement officials from the City of Cape Town Metropolitan Municipality (hereafter referred to as “the City” or “the City of Cape Town”) arrived at seven sites across the inner city where they removed homeless persons who resided at the sites and loaded their belongings into trucks.¹ Two months prior, the City – in *City of Cape Town v Various Occupiers and Another* (“*Various Occupiers*”) – was granted an eviction order allowing it to remove over a hundred homeless persons who had erected shelter structures at the sites.² As part of the eviction process the City had offered alternative accommodation at one of its Safe Spaces, a transitional housing programme adopted by the City in 2018. Yet, many of the affected homeless persons were hesitant to take up the offer to relocate to a Safe Space and were concerned about losing their personal belongings in the removal process, including their identity documents and mattresses.³ This one incident serves as an example of the challenges faced by homeless persons but also of the challenges that municipalities experience in addressing homelessness in South Africa.

Homeless persons are typically defined as those who do not have access to proper shelter.⁴ Their circumstances broadly fall into three categories namely informal settlement dwellers, temporary overnight sleepers, and detached homeless persons.⁵

¹ Hirsch M ‘Homeless people removed from Cape Town’s city centre’ *GroundUp* 15 August 2024 available at: <https://groundup.org.za/article/large-convoy-of-officers-remove-homeless-people-living-in-cape-towns-city-centre-on-thursday/> (accessed 28 November 2024); Hirsch M ‘Pre-dawn operation moves homeless people off Cape Town’s streets’ *GroundUp* 16 August 2024 available at: <https://groundup.org.za/article/pre-dawn-operation-moves-homeless-people-off-cape-towns-streets/> (accessed 28 November 2024).

² 2024 (5) SA 407 (WCC).

³ Hirsch (2024).

⁴ Naidoo V ‘Government responses to street homelessness in South Africa’ (2010) 27 *DSA* 129.

⁵ Du Toit JL ‘Local metropolitan government responses to homelessness in South Africa’ (2010) 27 *DSA* 112.

The last two categories are also collectively referred to as ‘street homeless persons’ and form part of urban homelessness.⁶ There is also some disagreement between non-governmental organisations (“NGOs”) and government entities on the prevalence of homelessness in Cape Town. In 2020, before the COVID-19 pandemic, non-profit organisations estimated that between 12,300 and 22,500 people were living on Cape Town’s streets.⁷ They have since indicated that COVID-19 and the subsequent economic downturn have resulted in the number increasing exponentially.⁸ On the other hand, in 2022, the national census found that there were approximately 55,719 homeless persons in South Africa with 74 percent of all homeless persons living in metropolitan areas.⁹ Cape Town had the third largest homeless population among the metropolitan municipalities, with 11.9 percent (approximately 6,200) of the recorded homeless persons.¹⁰ Nevertheless, the City of Cape Town has admitted that it does not have accurate and up-to-date data on how many people in the City are homeless.¹¹

The causes of homelessness are complex and include issues such as economic injustice, poverty, landlessness, and migration.¹² It then makes sense that the solutions thereto would also be complex and require input from different stakeholders including civil society and national, provincial, and local governments. There is no

⁶ Du Toit (2010) 112.

⁷ Hopkins J, Reaper J, Vos S & Brough G *The Cost of Homelessness in Cape Town* (2020) 25.

⁸ Killander M ‘Criminalising homelessness and survival strategies through municipal by-laws: colonial legacy and constitutionality.’ (2019) 35 *SAJHR* 77; Herron B ‘Cape Town is becoming a tent city’ *News24 Opinion* 16 July 2022 available at: <https://www.news24.com/news24/columnists/guestcolumn/brett-herron-cape-town-is-becoming-a-tent-city-20220716> (accessed 20 July 2022).

⁹ Stats SA *Statistical Release – Census 2022* (10 October 2023) 62.

¹⁰ Stats SA (2023) 63.

¹¹ City of Cape Town Metropolitan Municipality ‘Draft City of Cape Town Strategy to Reduce Rough Sleeping’ (11 March 2024).

¹² Mashau TD ‘Unshackling the chains of homelessness in the City of Tshwane: A critical appraisal of the current policy in the light of national and local policies and strategies’ (2017) 34 *DSA* 415.

national or provincial policy to address homelessness in South Africa.¹³ In the absence of such a policy or strategy, municipalities have developed their own policies and by-laws that regulate the city environment where homeless persons often seek shelter as well as programmes to assist homeless persons. Yet, these initiatives remain fragmented and unclear with little coordination across all of the sector departments that should be involved in addressing the needs of homeless persons.¹⁴

Furthermore, many of the measures that cities introduce only serve to criminalise homeless persons.¹⁵ Municipal by-laws aimed at creating sanitised public spaces in the interest of security prohibit essential activities of homeless persons such as begging and erecting shelters in public areas.¹⁶ The enforcement of these by-laws only results in further marginalisation of homeless persons.

The problem of street homelessness in Cape Town is significant for several reasons. Firstly, in recent years, the number of people who seek shelter on the streets of Cape Town has increased to the extent that Cape Town is often referred to as the “tent city”.¹⁷ This means that many more people are in an increasingly vulnerable position, and it is vital that the City address this problem. Secondly, the Constitution guarantees a number of rights to everyone, irrespective of whether they are on the streets or not.¹⁸ It is then important that the City’s responses are informed by these rights.

¹³ Desmond C, Timol F, Groenewald C & Sausi K *Towards the development of a contextualised homelessness policy: A Durban case study* (2017) Human Sciences Research Council Policy Brief.

¹⁴ Rossouw M & Davids L (eds.) *The Inkathalo Conversations: Phase one comprehensive report* (2021) 89-92.

¹⁵ Killander (2019) 71.

¹⁶ Cogger J & Louw D ‘Criminalisation will not resolve Cape Town’s broken housing system and the plight of the homeless’ *Daily Maverick Op-Ed* 27 October available at: <https://www.dailymaverick.co.za/article/2021-10-27-criminalisation-will-not-resolve-cape-towns-broken-housing-system-and-the-plight-of-the-homeless/> (accessed 20 July 2022).

¹⁷ Herron (2022).

¹⁸ The Constitution of the Republic of South Africa, 1996 (hereafter referred to as “the Constitution”).

1.2 Research question

The study seeks to answer the following question: How is the City of Cape Town Metropolitan Municipality meeting its legal obligations towards its street homeless population? This question will be answered with reference to the current situation in the City, the legal obligations of the City, how it is delivering on its obligations as well as other measures the City must consider in addressing this challenge.

1.3 Argument

It is argued that the City has certain obligations towards homeless persons. These obligations include refraining from infringing on the constitutional rights of homeless persons such as the right to human dignity and the right to freedom of movement. The City also has the obligation to progressively give effect to the socio-economic rights of homeless persons, in accordance with its local government mandate. In examining the responses of the City, it is argued that many of its legislative and policy initiatives do not give full effect to the rights of homeless persons.

1.4 Literature review

Significant research has been done on urban homelessness in South Africa. The literature has explored the causes of homelessness as well as the programmes that metropolitan municipalities have implemented to address homelessness. Cross and Seager have researched the specific causes of homelessness in South Africa and found that it goes further than just a lack of adequate and affordable housing.¹⁹ They established that many homeless persons left their homes due to societal and family changes and that this is exasperated by unemployment and high living costs. Notably,

¹⁹ Cross & Seager (2010) 143; Cross C, Seager J, Erasmus J, Ward C & O'Donovan M 'Skeletons at the feast: A review of street homelessness in South Africa and other world regions' (2010) 27 *DSA* 5.

they found that many government services and social safety net measures remain inaccessible for many homeless persons.²⁰

Naidoo and Du Toit undertook separate investigations on government responses to homelessness and the effectiveness of these measures.²¹ Naidoo took a broader approach by looking at the actions of the Housing and Social Welfare sectors and he concluded that greater coordination and cooperation across departments are needed.²² On the other hand, Du Toit focussed on what metropolitan municipalities are doing to address homelessness. He found that how municipalities view homelessness informs their responses. He argues that responses to homelessness should be informed by the primary causes of homelessness such as lack of affordable housing and employment.²³ His conclusion on the main causes of homelessness contradicts that of Cross and Seager and this serves to highlight the difficulties in establishing how people become homeless.

Another aspect that has received attention from scholars is the criminalisation of homelessness through municipal by-laws. Holness has observed that the eThekweni Municipality's Nuisances and Behaviour in Public Places By-law as well as its Beaches By-law unfairly discriminate against and effectively criminalise homelessness.²⁴ In 2019, Killander undertook a broader examination of the by-laws of Johannesburg, Tshwane, Cape Town as well as eThekweni.²⁵ In doing so, he showed that their by-laws criminalise essential survival strategies of homeless persons. This is complemented by Sadiki and Steyn's finding of the vulnerability of homeless persons

²⁰ Cross & Seager (2010) 154.

²¹ Du Toit (2010) 111; Naidoo (2010) 129.

²² Naidoo (2010) 139.

²³ Du Toit (2010) 17.

²⁴ Holness W 'eThekweni's discriminatory by-laws: criminalising homelessness' (2020) 4 *LDD* 469.

²⁵ Killander (2019) 70.

to crime and the failures of government institutions to protect homeless persons from further victimisation.²⁶ Hopkins, Laitinen, and Skinner also found that the City of Cape Town primarily employs a punitive approach to homelessness which they conclude is not adequate in assisting people to exit homelessness.²⁷

There is extensive research on homelessness in the City of Tshwane. Mashau, for example, examined the national and local policy framework on homelessness in Tshwane.²⁸ He recommends that the municipality should refrain from criminalising homelessness and that the interests of asylum seekers and refugees should not be neglected.²⁹ Homeless persons in Tshwane face many practical challenges and their right to dignity is often affected.³⁰ On the side of solutions, De Beer makes it clear that homeless persons may have different causes and solutions but it remains a housing issue and any potential solution must make provision for adequate and appropriate housing.³¹ Mangayi shows the potential contributions that homeless persons could make to the Tshwane local economy if they are provided with the opportunity to do so.³² In 2014, the Tshwane Homelessness Forum, the Tshwane Metropolitan Municipality, homeless persons from Tshwane and researchers from the Universities of Pretoria and South Africa undertook a comprehensive study to identify sustainable pathways out of street homelessness in Tshwane.³³ The study concluded in 2020 and

²⁶ Sadiki L & Steyn F 'Destitute and vulnerable: Fear of crime and victimisation among the homelessness in urban and rural settings in South Africa' (2021) 43 *Strategic Review* 71.

²⁷ Hopkins J, Laitinen J & Skinner D 'Understanding the Population of People Experiencing Homelessness in Cape Town and their Service Use' (2024) 4 *IJOH* 14-5

²⁸ Mashau (2017).

²⁹ Mashau (2017) 225.

³⁰ Kriel I, Tembe MJPT & Mashava VR 'Homelessness in Pretoria: Exploring the survival challenges of the homeless and their right to the city' (2017) 34 *DSA* 437.

³¹ De Beer S 'Homelessness IS a housing issue: Responding to different faces of homelessness. A City of Tshwane Case Study' (2020) 51 *SARS* 56.

³² Mangayi LC "'Not just numbers!' Homeless persons as potential economic contributors in Tshwane' (2017) 34 *DSA* 465.

³³ De Beer S & Vally R 'Fostering pathways out of homelessness: Choreographies of change-making in the City of Tshwane' (2020) 51 *SARS* 78.

was broadened to also look at the impact of COVID-19. They established that homelessness is solvable and that COVID-19 has heightened the need for assistance for homeless persons.³⁴ While the literature provides a very valuable overview of the issue of homelessness in metropolitan municipalities, it is mostly limited to the City of Tshwane. Furthermore, there is no scholarly research which examines the legal obligations of municipalities to homeless persons.

There is growing literature on homeless persons' right to the city. According to Kamga, the right to the city is a composite right consisting of various political and socio-economic rights which enables the well-being of a city's inhabitants.³⁵ To that end, Kamga as well as Coggin and Pieterse argues that a right to the city provides a useful framework through which one can advocate for the rights of vulnerable residents of a city.³⁶ What this right entails for the homeless in the City of Cape Town, however, remains under researched. *Inkathalo Conversations* examined the effectiveness and impact of the City of Cape Town's 2013 Street People Policy.³⁷ The findings of the *Inkathalo Conversations* are also complemented by the Coalition to End Homelessness's determination of the cost of homelessness to the City.³⁸ In addition, Hopkins, Laitinen, and Skinner, investigated the experience of Cape Town-based homeless persons and their access to social services.³⁹ These three studies provide an insightful overview of the City's approach to homelessness and its effectiveness.

³⁴ De Beer & Vally (2020) 93; Renkin W 'Fostering integrated, collaborative approaches to end street homelessness: A Covid-19 perspective' (2020) 51 *SARS* 52.

³⁵ Kamga SG 'The Right to the City and South African Jurisprudence' in Home R (ed) *Land Issues for Urban Governance in Sub-Saharan Africa* (2021).

³⁶ Kamga (2021); Coggin T & Pieterse M 'Rights and the City: An Exploration of the Interaction Between Socio-economic Rights and the City' (2012) 23 *Urban Forum* 259.

³⁷ Rossouw & Davids (2021); City of Cape Town Metropolitan Municipality 'Street People Policy' (2013) *Policy number 12398B C24/12/13*.

³⁸ Hopkins, Reaper, Vos & Brough (2020).

³⁹ Hopkins, Laitinen & Skinner (2024).

Yet, they also do not examine the legal obligations of the City as they arise from the Constitution, legislation, and its own policies.

As stated above, thus while significant research has been done on the causes of homelessness and what metropolitan municipalities are doing about it, not much has been written on what is required from them. Additionally, most of the research was done before or during the earlier stages of the COVID-19 pandemic. As such, it does not account for the significant surge of people who are homeless after 2020 and the increased challenge this poses to cities. This research will complement the existing literature by looking at how the City of Cape Town has responded to the challenges posed by street homelessness against the City's constitutional and legislative obligations.

1.5 Methodology

To address the abovementioned research question, a desktop analysis of primary and secondary sources will be conducted. Primary sources such as the Constitution,⁴⁰ relevant national and provincial legislation, including the Housing Act,⁴¹ as well as Cape Town's by-laws and policies⁴² will be examined. Additionally, secondary sources such as journal articles, reports and news articles will also be consulted. These sources will be instrumental in determining how scholars, civil society, and other stakeholders have analysed how municipalities, such as the City of Cape Town, are

⁴⁰ The Constitution of the Republic of South Africa, 1996.

⁴¹ The Housing Act 107 of 1997.

⁴² City of Cape Town Metropolitan Municipality 'By-laws Relating to Streets, Public Places and the Prevention of Noise Nuisances' (28 September 2007) *Western Cape Provincial Gazette* 6469; City of Cape Town Metropolitan Municipality 'City of Cape Town: Unlawful Occupation By-law' (14 February 2022) *Western Cape Provincial Gazette* 8551; City of Cape Town Metropolitan Municipality 'City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law, 2021' (14 February 2022) *Western Cape Provincial Gazette* 8551; City of Cape Town Metropolitan Municipality 'Street People Policy' (2013).

responding to street homelessness. Cape Town will be the focus of this study as it faces a significant increase in homelessness and there is a lack of recent research done on the extent of the challenge in Cape Town.

1.6 Chapter outline

This study consists of four chapters. Chapter One introduces the problem of street homelessness and provides the research question, argument, literature review, chapter outline and the methodology of the study. Chapter Two sets out the legal obligations of local government towards homeless persons. The obligations will be determined in terms of international human rights law, the Constitution, relevant legislation, and case law as well as policies of the national and provincial governments. Chapter Three examines the City of Cape Town's response to street homelessness against the City's legal obligations as discussed in Chapter Two. Chapter Four concludes by providing the key findings of the study as well as recommendations.

2 CHAPTER 2: OBLIGATIONS OF LOCAL GOVERNMENT TOWARDS URBAN STREET HOMELESS PERSONS

2.1 Introduction

The South African Constitution calls upon all spheres of government to address the injustices of our past and to build a better South Africa for all. Chapter One showed that street homeless persons represent a particularly vulnerable group in South Africa and as such, the South African government is all the more obliged to protect and promote their rights. However, the Constitution demands more than just a bureaucratic and law-based approach to homelessness. Instead, the Constitution, and other sources explored in this Chapter, call upon municipalities to recognise the shared humanity between all of their communities and to treat their homeless population with dignity and respect for their rights.

This Chapter examines the legal obligations of local government towards homeless persons. It will do so by explaining the developmental mandate of local government and how it calls upon local government to realise the rights of local communities. Secondly, the rights of homeless persons and how they translate into specific municipal obligations is explored. A discussion then follows on the substantive rights of homeless persons, including the rights of access to housing, water and sanitation, and their resulting obligations. Finally, the procedural rights of homeless persons and the manner in which they should inform the measures local government uses to realise their substantive rights, are discussed.

2.2 Developmental and service delivery mandate of local government

The nature and mandate of local government in South Africa are strongly informed by South Africa's apartheid history. Under the apartheid system, municipalities were mere

administrative bodies that operated under strict control of the national and provincial governments. The powers and functions of local government were limited to what the provincial and national governments delegated to it.⁴³ Local government was further based on a system of racial separation where different population groups had distinct types of local authorities. The distinct types of local authorities had varying access to resources they needed to provide municipal services to their communities and as such, access to basic services such as water, sanitation, and housing was further divided along racial lines.⁴⁴

The advent of a new constitutional dispensation introduced a new role for local government. No longer were municipalities mere creatures of statute, rather, they became constitutionally recognised as a separate and autonomous sphere of government.⁴⁵ Local government, as the sphere of government closest to the people, was entrusted with a service delivery and developmental mandate. This mandate was set out in the Constitution and further developed by the *White Paper on Local Government* (“*White Paper*”) in 1998.⁴⁶ Since then, several pieces of legislation and policies have been adopted to give effect to this mandate.

This section introduces the service delivery and developmental mandate of local government and the manner in which it informs the obligations of local government towards vulnerable groups, including its homeless population. The discussion starts with municipalities’ international human rights obligations and then turns to the role

⁴³ Fuo ON *Local Government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* (LLD thesis, North-West University, 2014) 80; Steytler N & De Visser J “The powers of local government” in Steytler N & De Visser J (eds) *Local Government Law of South Africa* (OS 13 2020) para 3.

⁴⁴ Fuo (2014) 82; Section A *White Paper* (GN 423 in GG 18739 of 9 March 1998).

⁴⁵ *City of Cape Town and Other v Robertson and Other* 2005 (2) SA 323 (CC) para 60; S 152 & 153(1) Constitution.

⁴⁶ The Constitution; The *White Paper* (1998).

and obligations of local government as provided for in the Constitution. Thereafter, the *White Paper* and its elaboration on how municipalities should give effect to their service delivery and developmental mandate is examined.

2.2.1. The international human rights obligations

All spheres of government, including local government, in South Africa, have an obligation to observe and give effect to South Africa's international obligations. As such, the international human rights obligations as set out in documents such as the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Economic, Social and Cultural Rights ("ICESCR") and the African Charter on Human and People's Rights should inform the way that local government exercises its powers and undertake its functions.⁴⁷ These documents recognise important substantial rights including the right to property and the right to an adequate standard of living.

Various special rapporteurs of the United Nations Human Rights Council ("UNHRC") have adopted reports that give more content to the rights set out in the UDHR and ICESCR. Several of these reports – including the *Guidelines for the Implementation of the Right to Adequate Housing* and *Breaking the cycle: Ending the criminalization of homelessness and poverty* ("Breaking the cycle"), published in 2020 and 2024, respectively – recognises that homelessness is a *prima facie* violation of several human rights including the right to housing, health, water and sanitation, security,

⁴⁷ Ferreira G & Ferreira-Snyman A 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *PELJ* 1490-1; UN General Assembly, *Universal Declaration of Human Rights*, 217 A (III), 10 December 1948; UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 2200 A (XXI), 16 December 1966; Organization of African Unity, *African Charter on Human and Peoples' Rights*, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), 27 June 1981.

privacy, and dignity.⁴⁸ Both reports recognise that homeless persons are a particularly vulnerable group who is often subject to harassment and discrimination. States' response to homelessness often only encompasses the criminalisation of many of the life-sustaining activities – including sleeping, bathing, and begging – that homeless persons have no choice but to perform in public spaces, usually in the name of improving public safety and order.

The reports provide several reasons why states should not criminalise people living in homelessness.⁴⁹ First, criminalisation efforts violate the human rights of homeless persons and perpetuates structural discrimination and inequality. Secondly, criminalisation is a costly and inefficient approach to reduce homelessness. Thirdly, considering the significant resultant infringement on homeless persons' rights and the lack of evidence of the crime prevention value of criminalisation, such measures are not rational nor proportionate strategies to improve public safety.⁵⁰

Instead, the UNHRC calls on states to employ a rights-based, or developmental, approach, in working towards eliminating homelessness.⁵¹ This should include legal reform to decriminalise homelessness and the promotion of equal access to public spaces for all. Additionally, states should adopt proactive measures to prevent homelessness, and they should adopt housing-led programmes where housing is

⁴⁸ UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context *Guidelines for the Implementation of the Right to Adequate Housing* (2020) 7 (hereafter referred to as “the UN Special Rapporteur on adequate housing”); UN Special Rapporteur on extreme poverty and human rights *Breaking the cycle: Ending the criminalization of homelessness and poverty* (2024) 3 (hereafter referred to as “the UN Special Rapporteur on extreme poverty”).

⁴⁹ UN Special Rapporteur on extreme poverty (2024) 4-13.

⁵⁰ UN Special Rapporteur on extreme poverty (2024) 4-13.

⁵¹ UN Special Rapporteur on adequate housing (2020) 7; UN Special Rapporteur on extreme poverty (2024) 18.

prioritised above other interventions. This is also supported by the *Principles on the Decriminalisation of Petty Offences in Africa* (“*Principles on Decriminalisation*”) published by the African Commission on Human and People’s Rights Commission (“ACHPR”) which provides guidelines for states to decriminalise petty offences and advocates for states to shift their focus to addressing the root causes of poverty and marginalisation, thereby give effect to their human rights obligations.⁵²

South Africa’s international human rights obligations call upon all spheres of government, including local government, to move away from a criminalisation approach to homelessness, which violates the rights of homeless persons and exasperate ongoing rights abuses. Instead, municipalities should adopt a developmental and rights-based approach which would respect and progress the rights of homeless persons and ensure the promotion of an inclusive municipality.

2.2.2. Constitutional conceptualisation of local government’s mandate

The Constitution recognises that all three spheres of government – local, provincial, and national government – are distinct, interrelated, and interdependent.⁵³ Local government shares in the government’s responsibility to uphold and give effect to the provisions of the Constitution.⁵⁴ It has a particular role in doing so and a significant portion of the Constitution is dedicated to defining the distinct objects, mandate, and powers of local government. This section focusses on the constitutional mandate of local government and how it informs the powers granted to local government.

⁵² ACHPR *Principles on Decriminalisation* (2017) 16-7.

⁵³ Ss 40-1 Constitution.

⁵⁴ Fuo (2014) 83.

2.2.2.1. Local government's mandate

Municipalities' mandate is derived, *inter alia*, from the objects of local government, as provided in the Constitution. Specifically, Section 152 provides that the objects of local government are to:

- provide democratic and accountable government for local communities;
- ensure the provision of services in a sustainable manner;
- promote social and economic development;
- promote a safe and healthy environment; and,
- encourage the involvement of communities in local government matters.⁵⁵

These objects can be summarised to a service delivery mandate – to provide basic services such as water, sanitation, and electricity, in a sustainable manner – and a developmental mandate – to promote sustainable socio-economic development and the progressive realisation of their communities' rights.⁵⁶

Section 153 of the Constitution further expands on the developmental mandate of local government. It specifies that municipalities must prioritise the basic needs and promote the social and economic development of their communities through every aspect of the municipalities' operation. This includes how they structure their administrations, how they conduct their planning processes, and how they utilise their budget.⁵⁷ Additionally, municipalities are required to partake in national and provincial governments' development programmes.⁵⁸

⁵⁵ S 152 Constitution.

⁵⁶ Steytler & De Visser (2020) para 1.6.

⁵⁷ S 153(a) Constitution.

⁵⁸ S 153(b) Constitution.

2.2.2.2. Powers of local government

The process of constitutionalising local government in South Africa entailed entrusting local government with the powers needed to give effect to its constitutional mandate. The Constitution makes provision for three types of local government powers – original powers, assigned powers, and incidental powers.

Original powers are derived directly from Sections 156(1) and (2) of the Constitution. Section 156(1) indicates that municipalities have executive power over the functional areas of local government, as set out in Part B of Schedules 4 and 5 of the Constitution. Section 156(2) provides that municipalities have legislative power to pass by-laws for the effective administration over those functional areas. Local government's original powers are a fundamental feature of their institutional nature and can only be amended through an amendment of the Constitution itself.

Assigned powers are originally vested in other spheres of government but are subsequently assigned to municipalities through legislation.⁵⁹ National or provincial government may assign these powers to all or specific municipalities.⁶⁰ The Constitution provides that the powers related to the functions listed in Schedules 4A and 5A of the Constitution must be assigned to municipalities, if they are best placed to administer it locally.⁶¹ Such assignment allows municipalities to pass their own by-laws on the particular functional area and to specify the manner in which they plan to give effect to a particular power or function. Notably, municipalities are obliged to give effect to the provisions of their own by-laws and as such, by-laws are important sources of municipalities' responsibilities.

⁵⁹ S 156(1)(b) Constitution.

⁶⁰ Ss 44(1)(a)(iii) and 104(1)(c) Constitution.

⁶¹ S 156(4) Constitution.

Incidental powers are powers that municipalities may require to effectively perform its existing functions.⁶² An example this was illustrated in *Mazibuko and Others v City of Johannesburg and Others*, which determined that municipalities have the power to install water meters as they would require such a power in order to exercise their function of providing water services to its communities.⁶³ Incidental powers do not constitute an expansion of local government's functional areas.⁶⁴ However, they indicate that municipalities have the power to assume responsibility for local matters or issues that interfere with the exercise of its by-laws, even if such powers are not explicitly provided for in the Constitution or in legislation.

2.2.2.3. Municipal funding

Municipalities can only effectively exercise their duties if they have adequate revenue to do so. The Constitution is cognisant of this and provides a number of revenue sources for municipalities, the most relevant of which are their own sources of revenue and their equitable share of nationally raised revenue annually. Municipalities are empowered to raise their own revenue through taxes, surcharges, licenses, fees, and levies.⁶⁵ This is meant to serve as the primary source of revenue which municipalities can use to independently fund its functions.⁶⁶ Municipalities are also entitled to an equitable share of nationally raised revenue in each financial year. The equitable share is meant to fund the delivery of basic services to the poor.⁶⁷ Municipalities have the autonomy and responsibility to set up a budget which clearly indicates their sources

⁶² S 156(5) Constitution.

⁶³ 2010 (4) SA 1 (CC).

⁶⁴ Schedules 4 and 5 Constitution.

⁶⁵ S 229(1) Constitution; Khumalo B, Dawood B & Mahabir J "South Africa's Intergovernmental Fiscal Relations System" in Steytler N & Ghai Y (eds) *Devolution in Kenya and South Africa* (2015) 203.

⁶⁶ Khumalo, Dawood & Mahabir (2015) 208.

⁶⁷ S 227(1) Constitution; Khumalo, Dawood & Mahabir (2015) 211.

of revenue and allocates them towards the effective and sustainable exercise of their functions.⁶⁸

2.2.2.4. Municipalities in a cooperative government

Chapter 3 of the Constitution introduced a system of cooperative governance where each sphere of government – including local government – have distinct powers, and functions.⁶⁹ The spheres also operate in an interrelated and interdependent manner. All three spheres also have a duty to cooperate with one another in good faith by supporting one another, keeping each other informed on matters of common interest and by coordinating their actions and legislation.⁷⁰

The national and provincial spheres of government are expected to contribute to effective local government performance by regulating the exercise of local government's executive powers through the passing of relevant legislation.⁷¹ However, they are limited to a regulatory role; they cannot prescribe a specific way that local government must implement the law nor can they administer or implement the laws themselves.⁷² On the other hand, municipalities are required to implement national and provincial laws and policies to ensure the realisation of national and provincial goals on a local level. As such, the Constitution prevents national and provincial government from usurping or interfering with the functions of local government but still ensure that municipalities give effect to policy positions of the other levels of government.

⁶⁸ S 215 Constitution.

⁶⁹ Chapter 3 Constitution.

⁷⁰ S 41(1)(h) Constitution.

⁷¹ Ss 154(1); 155(6)-(7) and 156(3) Constitution.

⁷² S 151(4) Constitution; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others*; *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC) para 22.

The discussion above shows that the Constitution imposes a demanding mandate on municipalities but equips them with specific powers and resources to deliver on this mandate. As such, the Constitution strengthens the autonomy of local government by providing and protecting the resources and powers that municipalities would require to give effect to this mandate. It also reinforces the idea that municipalities have responsibilities which they cannot shy away from and where provincial and national government cannot interfere.

2.2.3. *White Paper's* elaboration on local government's mandate

The *White Paper* builds on the provisions of the Constitution to provide a more comprehensive picture of what municipalities' developmental and service delivery mandates entail. While the service delivery mandate was not new, the *White Paper* dedicated an entire section to expanding on the new developmental mandate of municipalities.⁷³ The *White Paper* defines developmental local government as '*a local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic, and material needs and improve the quality of their lives.*'⁷⁴ This mandate is born from the inability of pre-1994 local government to meet the needs of the most vulnerable in our society.

The *White Paper* notes that local government is called to overcome the divisions of the past and to improve the quality of life of its most marginalised and excluded communities. As such, the *White Paper* provides that the "*creation of a liveable [and] integrated cities*" should serve as a key developmental outcome prioritised by municipalities. Further, the aim of integration should be an efficient and equitable

⁷³ Section B *White Paper* (1998).

⁷⁴ Section B *White Paper* (1998).

municipality where *'the poor are not locationally disadvantaged or socially excluded'*.⁷⁵ However, the *White Paper* is not blind to the enormity of this task ahead of local government. As such, it indicates that government is only required to take reasonable steps, within its available resources, to ensure that South Africans have access to the socio-economic rights provided in the Constitution.⁷⁶

2.3 Substantive obligations of local government towards street homeless persons

Municipalities must respect, protect, promote, and fulfil the rights set out in the Bill of Rights.⁷⁷ This imposes positive and negative obligations on municipalities: a positive obligation to progressively realise its communities' rights and a negative obligation not to interfere, through its by-laws or conduct, in their communities' enjoyment of their rights.⁷⁸ These obligations are also closely aligned with municipalities' developmental and service delivery mandate. Their mandate should also continue to inform the manner in which municipalities meet their obligations. This section explores the substantive obligations of local government towards its homeless population

2.3.1. Positive obligations of local government towards street homeless persons

The Constitution and legislation call upon municipalities to take certain positive steps to bring about the realisation of their communities' rights. Specifically, the municipal obligations in terms of its homeless population's right of access to adequate housing and their right of access to sanitation and water, mandates municipalities to provide

⁷⁵ Section B and Glossary *White Paper* (1998).

⁷⁶ Section B *White Paper* (1998).

⁷⁷ S 7(2) Constitution.

⁷⁸ Van Wyk 'Local Government' in *Law of South Africa* vol 27 3 ed (2018) para 8.

emergency housing, and other municipal services, as well as access to relevant social services. These three positive obligations are expanded upon below.

2.3.1.1. Obligation to provide access to emergency housing

The Constitution guarantees everyone access to adequate housing.⁷⁹ Housing is classified as a concurrent legislative competence of national and provincial government. Both spheres have since adopted a number of laws and policies, including the Housing Act, which allocate responsibilities to municipalities.⁸⁰ This discussion will be limited to municipalities' obligation to provide emergency housing.

National policies and court cases direct municipalities to provide accommodation to those who find themselves in emergency situations. The National Housing Code ("the Code") defines such individuals as those who *'live in conditions that pose immediate threats to life, health and safety and require emergency assistance'*.⁸¹ *Government of the Republic of South Africa and Others v Grootboom and Others* further found that municipalities are constitutionally obliged to provide accommodation to those with *'no access to land, no roof over their heads, and who live in intolerable conditions'*.⁸² The provision of emergency housing is often discussed where people face imminent homelessness due to an environmental disaster or eviction. This also apply in cases where homeless persons are evicted from temporary structures they may have erected as shelter.⁸³ However, those who are homeless, even if residing in such structures, should be regarded as being in an emergency situation already by virtue of lacking a permanent and adequate home.

⁷⁹ Ss 26(1) Constitution.

⁸⁰ Housing Act 107 of 1997.

⁸¹ Department of Human Settlement *National Housing Code* (2009).

⁸² 2001 (1) SA 46 (CC) para 99; *City of Cape Town v Commando and Others* 2023 (4) SA 465 (SCA) paras 4-6.

⁸³ See Paragraph 2.3.2.1.

This is supported by the Code which provides that municipalities' emergency housing programmes should benefit all affected persons who are not able to address their housing emergency.⁸⁴ The Code also allows municipalities to apply for provincial funding to provide emergency housing assistance. However, a lack of provincial funding would not be sufficient for a municipality to skirt its obligation to provide emergency accommodation. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* confirmed that municipalities are entitled and obliged to self-fund emergency housing programmes where this is required.⁸⁵ The court further noted that the Code obliges municipalities to proactively plan and budget for emergency housing situations that may arise and it must determine whether it is able to provide for emergency housing from its own resources before relying on provincial funding.⁸⁶ Therefore, municipalities are expected to prioritise the provision of emergency housing in allocating their resources.

Eviction case law has expanded municipalities' obligation to provide emergency accommodation and as such, these cases are also a useful guide to evaluating what would constitute adequate emergency housing. *Various Occupiers*, a case discussed in more detail in Chapter Three⁸⁷, provided four considerations for this evaluation.⁸⁸ First, the emergency housing's adequacy relies on its physical attributes as well as a range of other factors including its accessibility, location, and security of tenure.⁸⁹ Secondly, emergency housing, which is meant to be temporary, should be

⁸⁴ Department of Human Settlement *National Housing Code* (2009).

⁸⁵ 2012 (2) SA 104 (CC).

⁸⁶ *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (2012) para 66.

⁸⁷ Specifically, in Paragraph 3.3.

⁸⁸ (2024) paras 140-7.

⁸⁹ *Various Occupiers* (2024) paras 141.

differentiated from permanent accommodation.⁹⁰ *Dladla and Another v City of Johannesburg and Others* (“*Dladla*”) noted that emergency housing will “invariably fall short of the standards reasonably expected of permanent housing”.⁹¹ Thirdly, the emergency housing need not meet every requirement of the intended recipients.⁹² The nature and conditions of the accommodation should be informed by the needs of its intended recipients, in line with municipalities’ public participation obligations.⁹³ However, municipalities are not required to address every objection made against the accommodation. This is especially true where municipalities have reasonable grounds for imposing certain limitations at the provided accommodation, for example, banning illegal substances to protect the safety and health of its residents. Lastly, there is no universal standard for what constitutes adequacy, and it would depend on the circumstances and needs of the intended recipients.⁹⁴ This includes considering current circumstances of the recipients and whether the provided emergency accommodation would constitute an improvement. These considerations should guide municipalities to employ a developmental and rights-based approach to aiding homeless persons, or those facing imminent homelessness. Yet, municipalities still retain the necessary discretion to provide emergency housing in different forms – including through space in a shelter or through the provision of a house – according to the municipality’s own policy priorities and available resources.

2.3.1.2. Obligation to facilitate and provide access to basic and social services

In line with their service delivery and developmental mandate, municipalities have an obligation to provide certain services to their communities. Additionally, municipalities

⁹⁰ *Various Occupiers* (2024) paras 142.

⁹¹ 2018 (2) SA 327 (CC) para 20.

⁹² *Various Occupiers* (2024) paras 143

⁹³ Discussed in more detail in Paragraph 3.2.

⁹⁴ *Various Occupiers* (2024) paras 144-7.

should facilitate and support homeless persons' access to the services provided by NGOs and – in the spirit of cooperative governance – by the other spheres of government. This section focusses on water and sanitation services which municipalities should provide to their homeless population. Thereafter, municipalities' obligation to support and facilitate homeless persons' access to social services provided by NGOs and the other spheres of government, is discussed.

a) Providing water and sanitation facilities

Homeless persons often have no choice but to engage in certain behaviour – such as urinating, defecating, and bathing – in public.⁹⁵ As such, one of their most desperate needs is that of water and sanitation facilities.⁹⁶ Sections 27(1) of the Constitution provides for the right of access to health services and sufficient water. The Constitution does not explicitly provide for the right of access to sanitation services, however, it is provided for under the Water Services Act and it can also be inferred from the right of access to housing and the right to a healthy environment.⁹⁷ Schedule 4 of the Constitution classifies water and sanitation services as within the regulatory scope of national and provincial governments but notes that they are local government matters. Subsequent legislation have further specified the obligations of local government to provide water and sanitation services to its communities.⁹⁸ Municipalities ordinarily provide these services in relation to the organised dwellings where residents reside.

⁹⁵ Ndifuna Ukwazi *Comment on the City of Cape Town's Draft Amendment to the Streets, Public Places and the Preventions of Noice Nuisances By-law* (2021) 4.

⁹⁶ De Beer S & Vally R *Facing Homelessness: Finding inclusionary collaborative solutions* (2021) 84.

⁹⁷ S 27(1) Constitution; Dugard J 'The right to sanitation in South Africa' in *Socio-economic Rights – Progressive realisation?* (2016) 270; Algotsson E & Murombo T *Water Supply and Sanitation in South Africa - Environmental Rights and Municipal Accountability* (2009) 13.

⁹⁸ Water Services Act 108 of 1997.

Nevertheless, as this section will argue, municipalities are still obligated to provide such services to their homeless population, despite their lack of a permanent dwelling.

In line with the local government's constitutional service delivery mandate, section 73(1)(c) of the Municipal Systems Act obligates municipalities to ensure that all members of the local community have access to at least the minimal level of basic services. Section 73(2)(a) further notes that such provision should be equitable and accessible.⁹⁹ The Regulations to the Water Services Act expands to indicate that the minimum standard for basic water provision is 25 litres of potable water while basic sanitation is a safe and reliable private toilet which ensures privacy.¹⁰⁰ Municipalities are obligated to provide these services to all of their communities, particularly the poor and most marginalised.

South Africa has a number of policies aimed at providing free basic services to the indigent population. Since 2000, the South African Government have adopted a number of national policies and plans for the implementation of a Free Basic Services ("FBS") policy.¹⁰¹ These policies address minimum water and sanitation services which should be provided and also require these services to be provided to informal settlements.¹⁰² These policies are usually framed around the provision of these basic services to poor households with permanent dwellings and municipalities have formulated their responding indigent policies with this in mind. Nevertheless, considering the poverty alleviation purpose of these measures, it is submitted that the

⁹⁹ S 73(2)(a) Municipal Systems Act 32 of 2000.

¹⁰⁰ Reg 2 and 3 GN 509 GG 22355 of 8 June 2001.

¹⁰¹ Fuo ON (2014) 382.

¹⁰² Socio-economic Rights Institute *Targeting the Poor? An Analysis of Free Basic Services (FBS) and Municipal Indigent Policies in South Africa* (2013) 15.

national strategies and policies should not be read to exclude homeless persons who lack a permanent dwelling.

Municipalities have the discretion to provide municipal services in whichever way they believe is best. Accordingly, municipalities already adjusted the typical approach of providing these services to individual dwellings by, for example, providing communal water and sanitation facilities in informal settlements.¹⁰³ As such, providing these facilities to homeless persons can be as simple as providing more public restrooms in key areas and ensuring that they are accessible for 24 hours a day.¹⁰⁴

b) Facilitating access to social welfare interventions

Social services such as access to healthcare and job opportunities can address many of the root causes of homelessness, as revealed in Chapter One. Municipalities' developmental and service delivery mandate, demand that they prioritise the wellbeing of their vulnerable communities, including homeless persons, and this calls upon them to facilitate homeless persons access to such social services.

Many of these social interventions are provided by the national and provincial governments or NGOs.¹⁰⁵ Per section 153(b) of the Constitution, municipalities are called upon to participate in development programmes of the other spheres of government and, given their position as the government closest to the people, they should support these programmes. This is also in line with the principles of cooperative governance. Indeed, the *White Paper* noted that '*local government is increasingly being seen as a point of integration and coordination for the programmes of other*

¹⁰³ Muanda C, Goldin J & Haldenwang R 'Factors and impacts of informal settlements residents' sanitation practices on access and sustainability of sanitation services in the policy context of Free Basic Sanitation', *WaSHDev* 238.

¹⁰⁴ Hopkins, Reaper, Vos & Brough (2020) 24; De Beer & Vally (2021) 84-5.

¹⁰⁵ Schedules 4 and 5 Constitution.

spheres of government'.¹⁰⁶ Municipalities are often well placed to identify those in need of social welfare interventions and to refer them to the services that are available to them. As such, even where municipalities are not obliged to provide certain social interventions, they should support those interventions and assist vulnerable groups, such as homeless persons, to access those services.

2.3.2. Negative obligations of local government towards street homeless persons

Municipalities' duty to respect the rights of its communities obliges them not to unduly infringe upon their rights. This section explores the rights of homeless persons which are most often infringed upon, and which municipalities have a duty not to infringe. They include the right to life, access to adequate housing and property as well as the freedom of movement.

2.3.2.1. Municipalities may not arbitrarily evict homeless persons

Section 26 of the Constitution guarantees the right of access to housing and prohibits arbitrary evictions. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act") expanded the protection against arbitrary evictions.¹⁰⁷ Section 6 of the PIE Act deals with evictions sought by an organ of state, including municipalities, and requires that a court determine whether the eviction would be just and equitable and issue a judgment to that effect, before an eviction can be actioned.¹⁰⁸

The often-rudimentary nature of the structures that homeless persons construct in order to seek shelter has led to some debate in recent judgments on what type of

¹⁰⁶ Section C *White Paper* (1998).

¹⁰⁷ De Beer & Vally (2021) 100.

¹⁰⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

structure would constitute a home for purposes of the PIE Act. It can be illustrative to discuss two recent judgments to glean some guidance for this determination. In *Various Occupiers*, the High Court found that the occupiers had constructed various structures, including tents, which constituted a home for purposes of the PIE Act.¹⁰⁹ As such, their removal would constitute an eviction, and it was thus appropriate to apply the eviction process as set out in the PIE Act. In contrast, in *Ngomane and Others v City of Johannesburg Metropolitan Municipality and Another* (“*Ngomane*”), several individuals had taken residence on a traffic circle in Johannesburg.¹¹⁰ The individuals kept materials with which they constructed shelters every evening, but every morning they broke down the structures. For this reason, the court found that the circle and the materials stored thereon did not constitute a home for purposes of the PIE Act and as such, the removal of the materials did not constitute an eviction. Notably, while law enforcement did not have to follow an eviction process in *Ngomane*, the removal still affected the individuals’ property rights, as will be discussed in the next section.

Where the removal of homeless persons and their belongings constitutes an eviction, municipalities must follow the process prescribed in the PIE Act and obtain a court order before actioning an eviction. As noted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* (“*Olivia Road*”), the municipality must engage meaningfully with the occupiers it

¹⁰⁹ *Various Occupiers* (2024) paras 92-94.

¹¹⁰ 2020 (1) SA 52 (SCA).

intends to evict with the purpose of finding an alternative to the eviction, such as securing suitable alternative accommodation,¹¹¹ for the occupiers.¹¹²

2.3.2.2. Municipalities may not arbitrarily deprive homeless persons of their property

Given their lack of a permanent dwelling, homeless persons are limited in the belongings that they are able to possess. Yet, these belongings – including shelter material, identity documents, medication, and food – are often of vital importance to the expression of homeless persons' right to shelter, food, and health. Additionally, homeless persons' possessions remain under the protection of several constitutional provisions including section 14 and 25, as confirmed in *Ngomane*.¹¹³

Ngomane dealt with situation whereby a number of people had been living under a bridge in Johannesburg for over two years and kept their possessions and sleeping materials stored under the bridge during the day.¹¹⁴ The City of Johannesburg, citing complaints made by various businesses and members of the public, conducted a 'clean-up' operation whereby several Johannesburg Metropolitan Police officers confiscated the homeless persons' possessions without prior notice. The court made it clear that such measures constituted a breach of the homeless persons' property rights and their right to privacy – which includes the right not to have their possessions seized.¹¹⁵ As such, municipalities should not only not legalise nor action the arbitrary confiscation and destruction of homeless' persons property but should rather take steps to protect their property rights.

¹¹¹ This alternative accommodation often takes the form of emergency housing which is discussed in more detail in Paragraph 2.3.1.1.

¹¹² 2008 (3) SA 208 (CC).

¹¹³ (2020).

¹¹⁴ (2020).

¹¹⁵ *Ngomane* (2020) para 21.

2.3.2.3. Municipalities may not arbitrarily detain, arrest, or restrict homeless persons from public spaces

Sections 12 and 21 of the Constitution provide for the right to freedom and security, and the right to freedom of movement, respectively. In *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others* (“V&A Waterfront”), the court had to determine whether two persons who had harassed patrons of the Waterfront could be permanently interdicted from entering the premises.¹¹⁶ The court found that the Waterfront, while privately-owned, functioned as a quasi-public space and effectively a suburb of Cape Town. Desaj J observed that, especially given South Africa’s history of denying millions of people access to public places, the practice of excluding certain people from public spaces could not pass constitutional scrutiny.¹¹⁷

Where municipal by-laws unduly target homeless persons, it may also lead to arbitrary arrests of homeless persons. Such by-laws, read with section 40(1)(a) of the Criminal Procedure Act – which grants police officers the discretionary power to arrest a person who commits or attempts to commit an offence in their presence – would allow law enforcement officers to use their own discretion to determine whether a homeless person is committing an offence and then arrest them.¹¹⁸ Further, in *Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another*, the Constitutional Court noted that the fundamental purpose of an arrest is to prosecute the suspect before a court of law.¹¹⁹ However, as Killander observes, arrests of homeless persons in terms of overzealous municipal by-laws are often for purpose of intimidation instead

¹¹⁶ [2004] 1 All SA 579 (C).

¹¹⁷ *V&A Waterfront* (2004).

¹¹⁸ Criminal Procedure Act 51 of 1977.

¹¹⁹ 2002 (4) SA 613 (CC).

of prosecution.¹²⁰ As such, municipalities should not adopt policies, by-laws, or any other measure that unduly excludes homeless persons from public places nor should they allow for the arbitrary arrest of homeless persons.

As noted in Chapter One, the municipalities' interventions to homelessness often only encompasses criminalising homelessness and many of the survival strategies that homeless persons engage in. This section has shown that municipalities should refrain from doing so. Indeed, *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*, when speaking on a person whose home were to be sold to settle debts they were unable to repay, highlighted that the '*underlying problem...is not greed, wickedness or carelessness, but poverty.*'¹²¹ As such, criminalising the very nature of homeless persons' existence can and should not be tolerated.

2.4 Procedural obligations of local government towards street homeless persons

This section sets out how municipalities should give effect to the obligations identified in Paragraph 2.3. In particular, this section shows that municipalities should ensure that they encourage and facilitate the participation of homeless persons in their planning and legislative processes; that their policies and by-laws speak to the needs of the most vulnerable, including homeless persons; and, that they maintain a rights-based approach to drafting, implementing, and enforcing their by-laws and policies.

2.4.1. Public participation in planning and law-making

Section 152(1)(e) of the Constitution calls upon municipalities to adopt a consultative approach to drafting by-laws and policies and when undertaking its planning

¹²⁰ Killander (2019) 87.

¹²¹ 2005 (2) SA 140 (CC).

processes.¹²² Chapter 4 of the Municipal Systems Act provides a framework for the facilitation of public participation in municipal processes.¹²³ In summary, this requires a two-pronged approach. First, municipalities communicate all relevant information to its communities, including what matters are under deliberation, the available methods of participation, and the rights and duties of the communities.¹²⁴ Secondly, municipalities must establish appropriate mechanisms and processes for all community members to participate. In particular, municipalities must take care not to exclude any disadvantaged groups – such as homeless persons – and must ensure that their processes are truly accessible for all affected persons.¹²⁵

Municipalities should actively empower marginalised groups and encourage them to participate in municipal processes.¹²⁶ The court in *Olivia Road* urged municipalities not to view disadvantaged groups as a ‘disempowered mass’ but rather encourage such persons to be pro-actively participate in municipal processes.¹²⁷ By including affected persons in the planning process, municipalities can ensure that the plans they adopt have a higher chance of being effective as, through consultation, municipalities can ensure that their projects will truly address the needs of the community they seeks to support.¹²⁸ As such, including homeless persons in its decision-making processes will increase the effectiveness of the plans – which reduces unnecessary resources spent on less effective plans – and they will also be implemented with more ease and all

¹²² S 152(1)(e) Constitution; *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) para 106.

¹²³ Municipal Systems Act 32 of 2000.

¹²⁴ Ss 17(2) and 18 Municipal Systems Act 32 of 2000; Fuo (2014) 242.

¹²⁵ Ss 17 Municipal Systems Act 32 of 2000; Fuo (2014) 242.

¹²⁶ Section B *White Paper* (1998).

¹²⁷ (2008) para 20.

¹²⁸ Fuo (2014) 125.

affected persons, including homeless persons, will be more likely to buy-in to the policy.¹²⁹

As such, in order to fulfil their public participatory obligations towards their homeless communities, municipalities should include homeless persons and community groups in their decision-making processes. This is in line with municipalities' constitutional mandate but also increases the efficacy of its resultant by-laws, policies, and plans.

2.4.2. Developmental laws and policies that speak to the needs of the vulnerable

Municipalities must take an integrated and human rights-based approach to realising their substantive obligations. First, they must review their existing laws and policies to ensure that they do not infringe on the rights of homeless persons, particularly those provided in Paragraph 2.3.2. Second, they must address the rights of vulnerable groups, such as homeless persons, in the drafting of their by-laws, policies, IDPs, and budgets, particularly the needs of homeless persons.

As noted earlier,¹³⁰ the criminalisation of homelessness is contrary to the developmental mandate of municipalities and results in the violation of homeless persons' rights. Municipalities must ensure that their future policies and by-laws align with their developmental mandate and respect the rights of vulnerable groups as provided for in the Constitution, national and provincial legislation, as well as international law.¹³¹

The *White Paper* mandates municipalities to exercise their powers in a way that maximises social development and to prioritise the needs of the poor.¹³² Additionally,

¹²⁹ Maphazi N, Raga K, Taylor JD & Mayekiso T 'Public participation: A South African local government perspective' (2013) 6 *AJPA* 59.

¹³⁰ See Paragraphs 2.2.1 and 2.3.2.

¹³¹ Constitution; UN Special Rapporteur on extreme poverty (2024).

¹³² Section B *White Paper* (1998).

section 153(a) of the Constitution demands that municipalities prioritise the needs of its local community in its planning and budgeting purposes. As such, municipalities should adopt by-laws, policies, and plans which facilitate the realisation of human rights, including those of homeless persons.

2.4.3. Rights-based approach to enforcement and implementation

Municipalities must be cognisant of their developmental mandate when implementing and enforcing their by-laws, policies, and strategies. They should do this by refraining from granting wide discretion to law enforcement officials which could result in human right violations. Municipalities should also ensure that they have adequate accountability measures to prevent rights violations. The ACHPR's *Principles on Decriminalisation* provides guidance on how states can give effect to the African Charter's right to liberty, freedom and the security of person by decriminalising of petty crimes.¹³³ Specifically, the report notes that the enactment and enforcement of petty offences should comply with the rule of law. Such wide discretion can lead to such laws being applied in an arbitrary and discriminatory way.¹³⁴

In turn, the UNHCR's *Breaking the cycle* stipulates that municipalities should be proactive in preventing human rights violations by adopting sufficient accountability measures.¹³⁵ Municipalities should ensure that there are adequate oversight and accountability measures in place when granting officials powers which could potentially infringe on people's rights.¹³⁶ This is supported by section 152(1)(a) of the

¹³³ ACHPR (2017) 15.

¹³⁴ ACHPR (2017) 15-6.

¹³⁵ UN Special Rapporteur on extreme poverty (2024).

¹³⁶ UN Special Rapporteur on extreme poverty (2024) 16;19-20

Constitution which indicates municipalities should provide an accountable government to local communities.

In summary, municipalities should refrain from granting wide discretionary powers to law enforcement officials which could result in arbitrary and discriminatory enforcement of the municipal by-laws. Additionally, municipalities should adopt adequate accountability mechanisms where the enforcement of their by-laws lead to the violation of homeless persons' rights. In practice, municipalities should also be transparent to the general public on the available accountability mechanisms.

2.5 Conclusion

This Chapter explored the obligations of municipalities towards their homeless population. These are not mere legal obligations, rather, they call upon municipalities to recognise the shared humanity with those who are homeless and to treat them with dignity and consideration of their rights as human beings. As such, when evaluating the mandate of municipalities, it is clear that municipalities are obliged to adopt a developmental and human rights-based approach to protect, fulfil, and advance the rights of vulnerable groups', including homeless persons.

3 CHAPTER 3: EVALUATION OF THE CITY OF CAPE TOWN'S STREET HOMELESSNESS INTERVENTIONS

3.1 Introduction

As noted in Chapter One, the number of homeless persons in the City of Cape Town has increased significantly in recent years partially due to the COVID-19 pandemic and the subsequent economic downturn. Chapter Two demonstrated that municipalities, including the City of Cape Town, have a number of obligations towards their communities, including those that find themselves homeless. These obligations are primarily based on the municipalities' human rights obligations, as well as from their service delivery and developmental mandate. Against this background, this Chapter evaluates the interventions adopted by the City of Cape Town in response to homelessness to determine whether they are in line with these City's obligations. Notably, the City has adopted numerous interventions to address homelessness, including the establishment of a designated council committee that specifically focussed on issues of homeless persons in Cape Town, the Homeless Agency Committee, between 2018 and 2021.¹³⁷ However, the discussion in this Chapter will be limited to the City's approach to homelessness in terms of its by-laws, selected policies, and other strategies, as well as the City's approach to implementing and enforcing these measures.

The Chapter discusses the policies adopted by the City to address homelessness and its transitional housing programme, Safe Spaces. This is followed by a discussion of the City's by-laws, and their enforcement, as well as the City's emergency housing

¹³⁷ City of Cape Town Social Development and Early Development Department *Minutes of Inaugural Meeting* (7 February 2022).

programmes. Through this discussion, it will become clear that, while the City of Cape Town has adopted numerous measures which seek to uplift homeless persons, its by-laws and approach to evictions, among other things, have not always aligned with its human rights, service delivery, and developmental obligations.

3.2 Street People Policy

In 2013, the City of Cape Town adopted its first policy – the Street People Policy – on its approach to homelessness in the City.¹³⁸ The Policy prioritises the prevention of homelessness as well as the reduction of homelessness by reintegrating homeless persons into society. Following its adoption, the Street People Programme Unit (“SPPU”) was created to implement the policy.¹³⁹ This represented a positive step in the City adopting a social development focus in its response to homelessness. This section will discuss both the content of the policy as well as its implementation through the SPPU.

3.2.1. Policy provisions

The Street People Policy has three main objectives: to provide developmental assistance to Cape Town’s street homeless population; to define the roles and responsibilities of all stakeholders in assisting street homeless persons; and, to establish local networks of care (“LNOC”). LNOC refer to community-based networks of organisations and volunteers who assist in preventing vulnerable persons from becoming homeless and to assist street persons with reintegration into society.¹⁴⁰ The policy specifically provides for the identification of homeless persons, the assessment

¹³⁸ City of Cape Town Metropolitan Municipality ‘Street People Policy’ (2013).

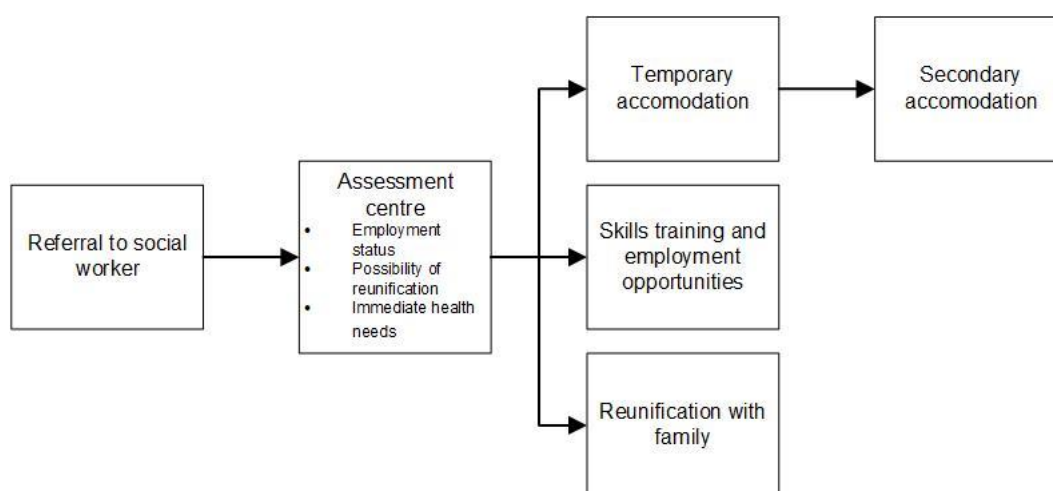
¹³⁹ City of Cape Town Metropolitan Municipality ‘Budget for the financial period 2014/15 to 2016/17’ (May 2014) 132.

¹⁴⁰ City of Cape Town Metropolitan Municipality ‘Street People Policy’ (2013) 4.

of homeless persons by a social worker, the provision of temporary and secondary housing, skills training, the establishment of local networks of care and awareness campaigns.¹⁴¹

The Street People Policy has seven key policy directives, through which it aims to give effect to its objectives and serves as a step-by-step guide, as shown in Figure 1 below, as to how the City plans to aid street homeless persons.¹⁴²

Figure 1 - Assistance provided to homeless persons in terms of Street People Policy



Firstly, the Policy provides a process to be followed upon identifying a homeless individual. The individual is to be referred to a social worker who would open a case file on the individual. The individual would also undergo an assessment to determine whether they have any immediate health needs, whether they are ready to be employed and whether reunification with their family would be possible. Thereafter, the individual is referred to temporary accommodation whereafter they may be referred to secondary accommodation which they may utilise until they are able to secure their own housing. Following the assessment, a homeless person is also provided access to various skills training and employment opportunities. These are primarily offered in

¹⁴¹ City of Cape Town Metropolitan Municipality 'Street People Policy' (2013).

¹⁴² City of Cape Town Metropolitan Municipality 'Street People Policy' (2013) 9-10.

partnership with local NGOs as well as the Extended Public Works Programme (“EPWP”), a government programme providing temporary employment opportunities. Additionally, the Policy provided that LNOCs would monitor the street homeless population in its area and assist with the reintegration of those individuals.

The Policy also noted that donations provided by the public to street homeless individuals are not always very effective in addressing their needs. As such, it provided for an awareness raising campaign whereby the general public would be informed of the avenues of assistance made available to street homeless persons and how they may contribute to these initiatives.

The Street People Policy notes that it aims to align with the City’s IDP and Social Development Strategy, a strategy document adopted by the City in 2013 and which sets out the City’s role in promoting social development.¹⁴³ The Street Policy represents a positive step in the City’s response to homelessness as it recognised their vulnerability and provides a plan to assist them to exit homelessness. This plan provides for homeless persons to be directed to available support programmes, including shelters, by municipal officials. This is in line with the City’s obligation to facilitate access to support programmes offered by NGOs and other government entities as mentioned in Chapter Two.¹⁴⁴

The Street People Policy also indicates that it is to be reviewed every two years, in order to ensure that it remains cognisant of the developing issues surrounding homelessness. However, the policy was not reviewed until 2020 when the City of Cape

¹⁴³ City of Cape Town Metropolitan Municipality ‘Street People Policy’ (2013) 5.

¹⁴⁴ See Paragraph 2.3.1.2. b).

Town embarked on a process to draft a new policy.¹⁴⁵ As such, the Policy is outdated and not aligned with the City's IDPs and by-laws adopted after 2013. Further, it does not fully give effect to the City's developmental and human rights obligations towards its homeless population, as set out in Chapter Two.

3.2.2. Implementation of policy by the Street People Programme Unit

Since 2014, the City has largely consolidated its practical interventions to street homelessness – primarily in terms of the Street People Policy – under the SPPU.¹⁴⁶ As such, the SPPU is the primary unit through which the City gives effect to its developmental obligations towards homeless persons. The SPPU forms part of the City's Social Development and Early Childhood Development Directorate ("SDECD") and its overall mandate is specifically to reduce the amount of street people in the City by reintegrating them into the community.¹⁴⁷

The SPPU provides a number of services including awareness raising and advocacy to the public; facilitating access to social development programmes such as substance abuse support programmes and health services; relocation to Safe Spaces¹⁴⁸ in the City, as well as reunification with families; and weekly social outreaches at key locations in the City.¹⁴⁹ This also includes the City's Winter Readiness Programme through which the City assists NGOs operating shelters to increase their bed capacity during the winter season, between April and October.¹⁵⁰ The SPPU delivers monthly

¹⁴⁵ City of Cape Town Metropolitan Municipality 'Street People Policy' (2013) 11; Dellacroce T, Huftalen C, Lira C & Raden E *Evaluating the Impacts of the Cape Town Street People Policy on Street People* (2019) 1.

¹⁴⁶ City of Cape Town Metropolitan Municipality 'Budget for the financial period 2014/15 to 2016/17' (May 2014) 132.

¹⁴⁷ *Various Occupiers* (2024) para 35.

¹⁴⁸ Discussed in detail in Paragraph 3.3.

¹⁴⁹ City of Cape Town SDECD *Street People Programme Unit Monthly Activity Report* (January 2024) 2.

¹⁵⁰ City of Cape Town SDECD *Community Services and Health – SD&ECD: Street People Programme* (February 2022) 12.

reports on its activities to the City's Community Services and Health Portfolio Committee. The establishment of the Unit is commendable and may suggest that the City is taking the plight of its homeless community seriously. Additionally, the SPPU's efforts to facilitate access to health services provided by other spheres of government is also encouraging given the health risks associated with homeless persons.¹⁵¹

In November 2024, the SDECD reported that the SPPU has 45 staff members.¹⁵² At the time, the SDECD indicated that their staff count has not increased in 10 years, and they requested for a budgetary increase of R 10 million to appoint 25 more staff members. Notably, the SDECD noted that the SPPU would require 50 more staff members to address the current demand, however, due to the City's limited resources, the SDECD limited its request for additional staff.¹⁵³

Despite the outdated nature of the Street People Policy, the SPPU has continued to expand its operations to include new initiatives, including the Safe Spaces Programme. However, as noted by the SDECD, the SPPU lacks sufficient resources to adequately address the demand in the City. The establishment of the SPPU is commendable. However, the City has not provided it with adequate resources in order to give effect to the City's developmental and human rights obligations, as identified in Chapter Two.

3.3 Safe Spaces Programme

The discussion in Chapter Two¹⁵⁴ revealed that municipalities have an obligation to provide shelter to communities in emergency situations such as homeless persons or

¹⁵¹ Hopkins, Laitinen & Skinner (2024) 9.

¹⁵² City of Cape Town SDECD *Presentation on the OPEX Operational Review: 2025/2026 MTREF: Street People/ Rough Sleepers* (November 2024).

¹⁵³ City of Cape Town SDECD (2024).

¹⁵⁴ See Paragraph 2.3.1.1.

people at risk of becoming homeless. The City of Cape Town provides such emergency housing to those who are already homeless through its Safe Spaces Programme, which is discussed in this section. Notably, the City also operates an emergency housing programme – discussed in detail in Paragraph 3.7 below – where it provides accommodation to individuals and communities who are at risk of becoming homeless.

The Safe Space Programme, launched in 2017, consists of transitional shelter facilities, referred to as “Safe Spaces”, to homeless persons in the City.¹⁵⁵ The project started by establishing a transitional shelter facility under a road bridge in Culemborg with space to accommodate up to 230 homeless persons. The City has since opened several more facilities in the inner city, Bellville, and Durbanville.¹⁵⁶ The Safe Spaces consist of dormitory-style accommodation with beds and some limited storage space for their inhabitants’ belongings. The Safe Spaces also offer shared ablution facilities, two daily meals, and access to various social services, likely through the SPPU, including access to job opportunities under the expanded public works programme, substance abuse rehabilitation programmes, and trauma therapy programmes.¹⁵⁷ The Safe Spaces have a number of rules their inhabitants must abide with. This includes that the shelters are weapon free, drug free, and alcohol free; and the residents are encouraged to leave the Safe Spaces during the day. The accommodations are largely separated by gender, however, there are limited couples’ accommodation available.

¹⁵⁵ City of Cape Town Metropolitan Municipality *Integrated Annual Report 2017/18* (2019) 142; De Beer & Vally (2021) 85.

¹⁵⁶ City of Cape Town Metropolitan Municipality (2019) 142.

¹⁵⁷ *Various Occupiers* (2024) paras 37-8; Rossouw & Davids (2021) 125.

The Safe Space also ordinarily houses its inhabitants for a maximum period of six months.¹⁵⁸

Recently, the *Various Occupiers* scrutinised various aspects of the City's Safe Spaces.¹⁵⁹ In this case, the City of Cape Town sought a court order, in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE Act"), to evict over 110 homeless persons who occupied seven City-owned sites across the inner city.¹⁶⁰ As noted in Chapter Two,¹⁶¹ where persons will be rendered homeless due to an eviction – even if, as in this case, the occupiers are already homeless, the relevant municipality is obligated to provide alternative accommodation. To this end, the City offered alternative accommodation in one of its Safe Spaces as part of its eviction application in *Various Occupiers*.¹⁶² However, the respondents raised concerns over the Safe Spaces' rules. The respondents were specifically concerned over the limited time frame for which the accommodation would be available, the then-lack of accommodation for couples, and the then-rules requiring its inhabitants to leave the Safe Space during the day.

During the course of the legal proceedings associated with *Various Occupiers*, the City amended several of the rules associated with the Safe Spaces to accommodate these concerns. Given that the respondents were offered places at the Safe Spaces as alternative accommodation in an eviction instead of voluntarily going to a Safe Space, as its other residents would, the City also committed to make certain concessions for the applicants including waiving the six month-rule.¹⁶³ The Court in *Various Occupiers*

¹⁵⁸ *Various Occupiers* (2024) para 41.

¹⁵⁹ (2024) paras 174-185.

¹⁶⁰ *Various Occupiers* (2024) paras 16-7; 50.

¹⁶¹ See Paragraph 2.3.1.1.

¹⁶² *Various Occupiers* (2024) para 7.

¹⁶³ *Various Occupiers* (2024) para 174-185.

commended the City's willingness to engage with and, as far as they were able, address the concerns of the respondents. Following the City's amendment of the Safe Spaces rules for the respondents, the City concluded that the alternative accommodation offered at the Safe Space was adequate for the eviction order sought by the City.¹⁶⁴

Notably, the court in *Various Occupiers* acknowledged that it did not consider the physical conditions of the Safe Space in its investigation of the Safe Space's adequacy as alternative accommodation, as it was not raised as a concern by the respondents.¹⁶⁵ Subsequent news reporting found that the Culemborg Safe Space was infested by rats, lice, and fleas.¹⁶⁶ News reports also raised concerns over the lack of adequate protection from wind and rain which is notable considering the harsh winter conditions in Cape Town. The residents of the Safe Space highlighted that the conditions led to significant health concerns. Chapter Two, in reference to *Dladla*, noted that emergency housing by its very nature would fall short of the standards of permanent housing.¹⁶⁷ However, it cannot be acceptable for the City to provide transitional accommodation that poses a further health-risk to homeless persons and thereby undermines their dignity and right to a health environment. The provision of such housing would also go against the City's purported aim of providing homeless persons with a better alternative than living on the streets.

¹⁶⁴ *Various Occupiers* (2024) paras 186-190

¹⁶⁵ *Various Occupiers* (2024) 150-6.

¹⁶⁶ Fraser A 'Rats, lice and fleas... The truth about City of Cape Town's 'Safe Space One' shelter' 18 July 2024 available at: <https://www.ewn.co.za/2024/07/18/rats-lice-and-fleas-the-truth-about-the-citys-safe-space-one> (accessed 1 December 2024); Metelerkamp T 'A travesty of human rights' — Cape Town shelter occupants tell of degrading conditions' 14 July 2024 available at: <https://www.dailymaverick.co.za/article/2024-07-14-a-travesty-of-human-rights-cape-town-shelter-occupants-tell-of-degrading-conditions/> (accessed 1 December 2024).

¹⁶⁷ See Paragraph 2.3.1.1.

As mentioned, since 2018, the City established three further Safe Spaces in Bellville, Durbanville, and another one in Culemborg.¹⁶⁸ In its 2020/21 Annual Report, the City indicated that it will allocate R 142 million towards expanding the Safe Spaces initiative over the subsequent three years.¹⁶⁹ In its 2022/23 Annual Report, the City emphasised the role of the Safe Spaces Initiative in providing dignified shelter at two locations in Cape Town and Bellville to homeless persons.¹⁷⁰ It further indicated that it plans to spend R 230 million over the next three years to operate and expand the programme, including an additional shelter in Green Point.¹⁷¹ This represents a significant investment in an initiative that provides an essential need to the City's homeless population. It is also an encouraging indication that the City prioritises its obligations. However, it is important that the City ensures that the Safe Spaces provide a safe and healthy alternative for its street homeless population.

3.4 Strategy to Reduce Rough Sleeping

In December 2024, the City of Cape Town's council adopted the Strategy to Reduce Rough Sleeping ("Strategy").¹⁷² It was initially published for public commentary in March 2024, a process which ended in May 2024.¹⁷³ The Strategy follows a review of the existing Street People Policy initiated by the SDECD in 2020 and will replace the Policy.¹⁷⁴ With the Strategy, the City of Cape Town expanded its scope to refer to rough sleepers which it defines as people without accommodation who typically sleep

¹⁶⁸ Swart M 'Cape Town opens another new Safe Space homeless shelter' *Cape{Town} Etc* 4 April 2024 available at: <https://www.capetownetc.com/news/cape-town-opens-new-safe-space/> (accessed 12 October 2024); *Various Occupiers* (2024) para 36.

¹⁶⁹ City of Cape Town Metropolitan Municipality *Integrated Annual Report 2021/22* (2023) 117.

¹⁷⁰ City of Cape Town Metropolitan Municipality *Integrated Annual Report 2022/23* (2024) 114.

¹⁷¹ City of Cape Town Metropolitan Municipality (2024) 114-5.

¹⁷² City of Cape Town Council *Minutes of the Ordinary Meeting of the Council of the City of Cape Town held on Thursday 5 December 2024* (5 December 2024).

¹⁷³ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024).

¹⁷⁴ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 2.

in public spaces, makeshift structures, or temporary accommodation – this would include street persons. This section will the Strategy to determine whether it is in line with the City's obligations towards its homeless population.

3.4.1. Strategy directives

The Strategy recognises that homelessness is not a crime and seeks to promote a public health approach to homelessness. It is based on three strategic focus areas: the prevention of rough sleeping; intervention with the aim of reintegration; and, collaboration with non-city actors. The Strategy acknowledges that there are a number of initiatives through which the City can prevent persons from becoming homeless. It notes that in order to prevent rough sleeping, the City has to understand the drivers behind homelessness. As such, the Strategy further notes that the City should undertake research into the root causes of homelessness and advocate for programmes and initiatives that would alleviate these issues.¹⁷⁵ The City should also review its existing social programmes in terms of their impact and cost. This should allow the City to ensure that its funds are allocated as efficiently as possible.

The second focus area of the Strategy is aimed at reducing the amount of street homeless persons by facilitating their reintegration to society. This include assisting homeless persons to access employment opportunities, housing, as well as healthcare.¹⁷⁶ To this end, the Strategy provides for the creation of a family reintegration programme.¹⁷⁷ This programme will enable the City to determine the root causes of homelessness and to identify safe and practical ways in which the City can help different categories of homeless persons to be rehomed. The Strategy also

¹⁷⁵ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 33.

¹⁷⁶ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 25.

¹⁷⁷ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 40.

specifically mentions and supports the City's use of the EPWP to offer employment opportunities.

Historically, NGOs have provided essential social services to homeless persons in Cape Town including managing shelters and providing food, clothes, and assistance to obtain identity documents. The City of Cape Town has provided various forms of support to NGOs in the City, including the provision of grant funding. Since at least 2008, the City has also offered special rate rebates and tariffs to homeless shelters for municipal services.¹⁷⁸ The Strategy acknowledges that such collaboration with various government and non-government stakeholders is essential in making progress with the first two focus areas. This would include other government agencies such as the provincial government and various government departments, NGOs, community leaders as well as persons who have experienced homelessness.¹⁷⁹

It is encouraging that the Strategy promotes a public health approach to homelessness which recognises and address various social needs of homeless persons. The Strategy's focus areas also appear to expand on the scope of the Street People Policy by providing for more targeted research and data collection to inform the City's resource allocation. It further recognises the need and opportunity for collaboration with other entities, in particular NGOs. This is in line with the City's obligation to facilitate homeless persons' access to services provided by other entities as set out in Chapter Two.¹⁸⁰

¹⁷⁸ City of Cape Town Metropolitan Municipality 'Budget for the financial period 2014/15 Annexure 5 – Rates Policy 2014/15' (May 2014).

¹⁷⁹ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 2.

¹⁸⁰ See Paragraph 2.3.1.2. b).

3.4.2. National and provincial policy framework on homelessness

The Strategy recognises that there is insufficient and incoherent policy guidance on the issue of homelessness across the national and provincial government levels. This, along with other bureaucratic constraints, undermine the efficiency of all levels of government in assisting homeless persons. For this reason, the Strategy recommends continued advocacy from the City for improved policy alignment across all levels of government.¹⁸¹

Notably, South Africa has never had a national policy framework addressing homelessness specifically, nor has the Western Cape Provincial Government. This is particularly concerning since, as noted in Chapter One, a multi-level governmental approach would be required to effectively address homelessness in South Africa.¹⁸²

The national Department of Social Development has commissioned the Human Science Research Council to develop a green paper on homelessness, a process which is still underway.¹⁸³ The development of a national green paper, even if it is still in process, is encouraging as it would provide more overall guidance to how the different spheres of government should cooperate in addressing homelessness. Nevertheless, it is also the duty of the City to proactively cooperate with the national and provincial governments on their initiatives which would assist homeless persons.

The Strategy appears to be a positive development in the City's approach to homelessness in several ways. The Strategy contains a number of principles including

¹⁸¹ City of Cape Town Metropolitan Municipality 'Draft Strategy to Reduce Rough Sleeping' (2024) 42.

¹⁸² See also De Beer & Vally (2021) 129.

¹⁸³ Mesquita C 'The Government of National Unity is tasked with homeless policy discussion paper' 22 June 2024 available at: <https://www.iol.co.za/capeargus/the-dignity-project/the-government-of-national-unity-is-tasked-with-homeless-policy-discussion-paper-39eef238-e9ab-4c79-837f-f5592774da1b> (accessed 25 November 2024); Human Science Research Council 'Human Science Research Council' 17 March 2024 <https://hsrc.ac.za/news/latest-news/join-us-to-develop-a-green-paper-on-homelessness-in-south-africa/> (accessed 25 November 2024).

those that acknowledged that being homeless is not a crime and that all residents should have access to public spaces. However, the Strategy still endorses the enforcement of City by-laws that continue to criminalise homelessness as shown in the discussion in Paragraphs 3.5 and 3.6 below. It also lacks a proactive approach to cooperating and collaborating with other spheres of government on the issue of homelessness, as it is required to do in terms of its developmental mandate and the principles of cooperative government.

3.5 Municipal by-laws Affecting Homeless Persons

Municipalities in South Africa exercise their legislative powers – as granted by the Constitution and the Municipal Systems Act – by adopting by-laws. As shown in Chapter Two,¹⁸⁴ municipalities are obligated to adopt developmental and rights-based by-laws and to ensure that their by-laws facilitate rather than diminish or prevent the rights of their communities. This section assesses two of Cape Town’s by-laws which has the most direct impact on the lives of its street homeless population, namely: the By-law Relating to Streets, Public Places and the Prevention of Noise Nuisances (“Streets By-law”), and the City of Cape Town: Unlawful Occupation By-law (“Unlawful Occupation By-law”). The Unlawful Occupation By-law was adopted in 2021 while the Streets By-law was adopted in 2007 and amended by the City of Cape Town: Streets, Public Places and the Prevention of Noise Nuisances Amendment By-law (“Streets Amendment By-law”) in 2021.¹⁸⁵

¹⁸⁴ See Paragraphs 2.4.2.

¹⁸⁵ City of Cape Town Metropolitan Municipality ‘Streets By-law’ (2007); City of Cape Town Metropolitan Municipality ‘Unlawful Occupation By-law’ (2022); City of Cape Town Metropolitan Municipality ‘Streets Amendment By-law’ (2022).

3.5.1. Offences stipulated in by-laws

The Streets By-law and the Unlawful Occupation By-law provides for a number of offences, including sleeping overnight in a public place and the unlawful occupation of land. The By-laws' classification of these actions as offences can have an adverse and discriminatory impact on the enjoyment of homeless persons' rights. This section discusses this disproportionate impact with reference to both By-laws.

The Streets By-law is largely aimed at maintaining sanitary and hygienic conditions in the City's public spaces. To this end, Section 2 of the Streets By-law set out a number of behaviours that are prohibited in public places. This includes sleeping overnight, erecting a shelter, bathing, and starting or keeping a fire.¹⁸⁶ As shown in Chapter Two,¹⁸⁷ in the absence of a permanent residence and suitable facilities, homeless persons often have no choice but to engage in many of these activities in public spaces. As such, these provisions disproportionately impact on homeless people.

This was illustrated in 2019 when Carin Gelderbloem ("Gelderbloem") and ten other homeless individuals based in Cape Town challenged the constitutionality of the City's by-laws.¹⁸⁸ They claimed that the City's by-laws – particularly the Streets By-law and the Integrated Waste Management By-law adopted in 2009 – criminalised homelessness as it classified certain life-sustaining activities as criminal offences. This case, while still ongoing, focussed more attention on the offences contained in the

¹⁸⁶ S 2 City of Cape Town Metropolitan Municipality 'Streets By-law' (2007).

¹⁸⁷ See Paragraph 2.3.1.2. a).

¹⁸⁸ Ndifuna Ukwazi 'Eleven people who are homeless go to court to challenge Cape Town's discriminatory by-laws' 7 April 2021 available at: https://nu.org.za/wp-content/uploads/2021/12/NU_press_release_2021_04_07.pdf (accessed 25 November 2024); Shoba S 'Meet the homeless woman who's taken Cape Town to court for fining her' 13 December 2019 available at: <https://www.dailymaverick.co.za/article/2019-12-13-meet-the-homeless-woman-whos-taken-cape-town-to-court-for-fining-her/> (accessed 25 November 2024); Ndifuna Ukwazi 'NU Law Centre - Ndifuna Ukwazi' available at: <https://nu.org.za/work/nu-law-centre/#1697625152000-524f5209-2f13> (accessed 25 November 2024).

City's by-laws and the disproportionate impact they have on homeless persons. The City responded to the proceedings by amending the Streets By-law in 2021 and repealing Section 2(2) which prohibited begging in public places, however, the majority of the original offences remain in place.¹⁸⁹ The applicants subsequently amended their application to address the remaining aspects of the By-law which they argue is unconstitutional.¹⁹⁰ The case highlights the practical impact of classifying these activities, such as erecting shelters, sleeping, and bathing in public places, as offences.

The Unlawful Occupation By-law aims to prevent land invasions in the City and as such, it designates certain actions – including the unlawful occupation of land, the organisation of an unlawful occupation, and transportation of personal belongings and building material with the purpose of unlawful occupation – as offences.¹⁹¹ South Africa has a long history of criminalising land invasions, particularly during the apartheid era. Following the advent of the new democratic dispensation and a commitment to developing the rights of marginalised and vulnerable groups, the South African government introduced the PIE Act which decriminalised land occupations and introduced a procedure that must be followed to evict unlawful occupiers. However, the provisions of the Unlawful Occupation By-law appear to classify land occupations as a crime once more without due consideration for the vulnerability of the occupiers.¹⁹²

¹⁸⁹ City of Cape Town Metropolitan Municipality 'Streets Amendment By-law' (2022).

¹⁹⁰ Ndifuna Ukwazi 'NU Law Centre - Ndifuna Ukwazi'.

¹⁹¹ S 11 City of Cape Town Metropolitan Municipality 'City of Cape Town: Unlawful Occupation By-law' (2022).

¹⁹² Ndifuna Ukwazi (2021) 30-1.

The Streets By-law and the Unlawful Occupation By-law have legitimate purposes. However, several of the actions they classify as offences are essential elements of the homeless experience and as such, they serve to criminalise homelessness. Criminalising homelessness means that homeless persons risk facing criminal sanctions for their actions instead of social measures that would assist their vulnerable position. As such, as shown in Paragraph 3.5.2 below, the offences introduced by the Streets By-law and the Unlawful Occupation By-law are contrary to the City's developmental and human rights obligations as set out in Chapter Two.

3.5.2. Enforcement powers granted to municipal officials

Both the Streets Amendment By-law and the Unlawful Occupation By-law empowers an *“authorised official”* to take certain actions when they encounter persons who contravene the provisions of the By-laws. This authorised official is defined as *an “employee of the City responsible for carrying out any duty or function or exercising any power in terms of th[e] By-law”* and includes a member of the South African Police Force, the City's Metropolitan Police Department, a traffic officer, and *“any other employee delegated or person authorised to carry out or exercise the duty, function, or power”*.¹⁹³ Notably, the latter part of the definition is arguably broad and vague as it grants these enforcement powers to a wide range of individuals.¹⁹⁴ This is particularly concerning considering the significant powers that are granted to such officials, which are examined below.

¹⁹³ S 1 City of Cape Town Metropolitan Municipality 'Unlawful Occupation By-law' (2022); S 1 City of Cape Town Metropolitan Municipality 'Streets Amendment By-law' (2022).

¹⁹⁴ Ndifuna Ukwazi Ndifuna Ukwazi's *Submission on the City of Cape Town's Draft Unlawful Occupation By-law* (2021) 18.

3.5.2.1. Power to remove persons from public places

Section 22A (1)(iii) of the Streets Amendment By-law allows an authorised official to direct a person they deem to be in contravention of the By-law to “*leave and remain out of a specified public place*”.¹⁹⁵ This provision does not impose any limitations on this power such as how long the persons should remain out of a specified public space. As such, the provision appears to grant authorised officials broad powers to remove people from public places for a potentially indefinite time period. This is not only a clear violation of the right to freedom of movement as stipulated in section 21 of the Constitution, and discussed in Chapter Two,¹⁹⁶ but also goes against the court judgment in *V&A Waterfront*.¹⁹⁷ *V&A Waterfront* specifically found that it is a constitutional violation to permanently exclude a person from a public space.¹⁹⁸ Additionally, the provision allows City officials to evict homeless persons from the shelters they may have assembled in public places, as discussed below.

3.5.2.2. Power to dismantle and remove shelter structures from public places

The Streets Amendment By-law and the Unlawful Occupation By-law allow for the removal and dismantling of shelter structures erected in public places. This has the potential to result in a violation of homeless persons’ right not to be arbitrarily evicted as provided for in the Constitution.¹⁹⁹ This section evaluates these provisions in terms of the City’s obligation to protect its homeless population from arbitrary evictions.

Section 22A (1)(ii) of the Streets Amendment By-law allows an authorised official to remove anything that obstructs the safe or free passage of a pedestrian or motor

¹⁹⁵ City of Cape Town Metropolitan Municipality ‘Streets Amendment By-law’ (2022).

¹⁹⁶ See Paragraph 2.3.2.3.

¹⁹⁷ Constitution; *V&A Waterfront* (2004); Ndifuna Ukwazi (2021) 8.

¹⁹⁸ *V&A Waterfront* (2004) para 450.

¹⁹⁹ S 26 Constitution.

vehicle.²⁰⁰ The By-law further includes the removal of “*any other thing which blocks or likely to block traffic flow*” as part of its definition of an ‘obstruction’.²⁰¹ Considering that many street homeless persons make their shelters or keep their belongings on pavements or similar locations, this provision grants wide discretion to city officials to remove homeless persons, their shelters, and belongings from locations where they are deemed to have the potential to block traffic. Section 22A (1)(iii) of the Streets Amendment By-law also allows an authorised official to direct a person they deem to be in contravention of the By-law to “*leave and remain out of a specified public place*” which can also amount to an eviction.²⁰²

Section 9(2)(b) of the Unlawful Occupation By-law allows for an authorised official, if they deem a person to be an unlawful occupier of the City’s land, to dismantle their shelter and impound associated building materials. Section 9(3) then states that, if the structure is “*capable of constituting a home,*” the City must initiate eviction proceedings in terms of the PIE Act. As such, the By-laws leaves it within the discretion of the City’s officials to determine whether the individual’s shelter constitutes a home. Such broad discretion, if not exercised rationally, may result in the infringement of human rights of homeless persons. This was seen in practice in *City of Cape Town v South African Human Rights Commission and Others* (“SAHRC”), which is discussed in detail in Paragraph 3.6.2.²⁰³

This section shows that the aforementioned by-laws enable the arbitrary removal of homeless persons’ shelter structures. This, as shown in Chapter Two,²⁰⁴ constitute the

²⁰⁰ City of Cape Town Metropolitan Municipality ‘Streets Amendment By-law’ (2022).

²⁰¹ S 1 City of Cape Town Metropolitan Municipality ‘Streets By-law’ (2007).

²⁰² City of Cape Town Metropolitan Municipality ‘Streets Amendment By-law’ (2022).

²⁰³ 2024 (5) SA 368 (SCA); *South African Human Rights Commission and Others v City of Cape Town and Others* 2022 (6) SA 508 (WCC).

²⁰⁴ See Paragraph 2.3.2.1.

arbitrary eviction of the homeless persons utilising the structures and violates the rights of homeless persons not to be arbitrarily evicted.

3.5.2.3. Power to arrest individuals deemed to have contravened by-laws

The Streets Amendment By-law empowers authorised officials to arrest individuals who commit an offence in terms of the By-law. In particular, an authorised official is empowered to arrest an individual if they have contravened section 2(3)(m), which prohibits a person from sleeping overnight or erecting a shelter in an area which is not designated for this purpose and have refused to accept an offer of alternative shelter. This section evaluates this provision in light of national law on arrests.

In the City of Cape Town Safety and Security Committee's Report on the draft Streets Amendment By-law, the City noted that the amendments were partly informed by the extended powers granted to municipal law enforcement officers through a declaration by the Ministry of Justice and Constitutional Development in 2018.²⁰⁵ The power to make arrests without a warrant, in terms of section 40 of the Criminal Procedure Act, was originally reserved for a peace officer which the Act defined as "*any magistrate, justice, police official, correctional official as defined in section 1 of the Correctional Services Act, 1959 (Act 8 of 1959)*".²⁰⁶ The 2018 declaration expanded the powers of municipal law enforcement officials including allowing them to make arrests without a warrant in certain instances.²⁰⁷ As such, two of the groups included in the By-laws' definition of an authorised official are permitted by national law to make arrests without a warrant.

²⁰⁵ City of Cape Town Metropolitan Municipality *Support to Proceed with a Public Participation Process to Obtain Comments on the City Streets, Public Places and the Prevention of Noise Nuisances Amendment By-Law, 2021* (12 May 2021) 2; GN 1114 GG 41982 of 19 October 2018.

²⁰⁶ Ss 1 and 40 Criminal Procedure Act 51 of 1977.

²⁰⁷ GN 1114 (2018); Criminal Procedure Act 51 of 1977.

However, it is argued that other individuals defined as an “*authorised official*” – particularly, traffic officers and “*any other employee delegated, or person authorised to carry out or exercise the duty, function power*” – are not empowered by national legislation to carry out arrests without a warrant. Therefore, the provisions of the By-law which empowers authorised officials to arrest individuals who contravene the Act without a warrant appear to go beyond what was envisioned by the Criminal Procedure Act and arguably is an overreach by the City of Cape Town.

Notably, section 42 of the Criminal Procedure Act allows for private persons to make an arrest without a warrant in certain circumstances – including where a person commits a crime in their presence. However, as the By-laws seek to confer a power to officials appointed by the municipality, these officials should arguably not rely on a power conferred upon private persons in the Criminal Procedure Act. Section 22A(1)(d) itself relies on the powers granted in section 40 of the Criminal Procedures Act and the City specifically references the 2018 declaration made in relation to municipal law enforcement officials. It does not appear that the City was relying on section 42 in order to further confer the power to arrest without a warrant to authorised officials.²⁰⁸

Chapter Two²⁰⁹ showed that the City has an obligation, in terms of international law, to review and develop its By-laws to ensure that they do not have the effect of criminalising poor and vulnerable members of its community, including homeless persons. It is encouraging that the City has taken steps to decriminalise certain aspects of homelessness in the Streets Amendment By-law, as discussed in

²⁰⁸ City of Cape Town Metropolitan Municipality ‘Streets Amendment By-law’ (2022); City of Cape Town Metropolitan Municipality (2021) 2.

²⁰⁹ See Paragraphs 2.2.1 and 2.4.3.

Paragraph 3.5.1. However, many life-sustaining activities – such as bathing and sleeping overnight in public places – are still classified as a crime under the Streets By-law and the Unlawful Occupation By-law. Further, the City has also broadened the scope of powers granted to municipal officials to enforce these by-laws. These efforts further contribute to the criminalisation of homelessness in the City of Cape Town which undermines the rights of homeless persons and is contrary to the City’s developmental mandate.

3.6 Enforcement of by-laws

Beyond adopting developmental by-laws which promotes the rights of its communities – as noted in Chapter Two – the City is also obligated to enforce these by-laws in a manner that is consistent with the constitutional obligations. The City created two specialised units that primarily focus on the enforcement of the Streets By-law and the Unlawful Occupation By-law: the Displaced People Unit (“DPU”) and the Anti-Land-Invasion Unit (“ALIU”). This section analyses the law enforcement approach of the DPU and ALIU towards homeless persons.

The DPU, formerly known as the Vagrancy Unit, was established in 1998, and its specific mandate is to “*address anti-social behaviour as and when it is seen in street people*”.²¹⁰ In particular, the DPU focusses on the enforcement of the Streets By-law.²¹¹ As at August 2024, 30 law enforcement officials formed part of the DPU.²¹² On the other hand, the ALIU was established in 2008 with the sole purpose of protecting

²¹⁰ City of Cape Town Metropolitan Municipality ‘Street People Policy’ (2013) 7.

²¹¹ *Sinazo Jordan and Others v City of Cape Town and Others* (WCC) unreported case no 5809/2020 (6 October 2020) para 42; Displaced People Unit *Displaced People Unit (DPU)* (September 2019) p 6.

²¹² City of Cape Town Safety & Security Directorate *Quarterly Report for the Period 1 April 2024 - 30 June 2024 on the Functioning of Specialised and Law Enforcement Services for the City of Cape Town* (August 2024) 7.

the property of the City from unlawful invasion.²¹³ Initially, the ALIU primarily relied on the defence of counter spoliation to counter invasions of the City's properties, however, the ALIU now also rely on the provisions of the Unlawful Occupation By-law.²¹⁴ As at August 2024, 134 law enforcement officials formed part of the ALIU.²¹⁵

Beyond the DPU and ALIU, there are a number of other law enforcement agencies present and active in Cape Town who interact with homeless persons including the South African Police Service and the Cape Town Metropolitan Police Department. Oftentimes, the general public, including homeless persons, are not able to distinguish between the various law enforcement agencies. As such, while this section primarily focusses on the DPU and ALIU, several aspects of the discussion— particularly pertaining the arrest of homeless persons – apply to all of the aforementioned law enforcement agencies to a varying extent.

3.6.1. Arrests of and fines issued to homeless persons

In July 2019, *News24* reported that numerous homeless persons in the City had been issued fines of between R 200 and R 1,500 for various contraventions of the City's by-laws.²¹⁶ This included constructing a shelter structure, sleeping in public spaces, lighting fires, and the storing of belongings in public places.²¹⁷ Several homeless

²¹³ *South African Human Rights Commission and Others v City of Cape Town and Others* 2022 (6) SA 508 (WCC) para 102.

²¹⁴ *South African Human Rights Commission and Others v City of Cape Town and Others* (2022) paras 102-3; City of Cape Town Safety & Security Directorate *Quarterly Report for the Period 1 April 2024 - 30 June 2024 on the Functioning of Specialised and Law Enforcement Services for the City of Cape Town* (August 2024) 22.

²¹⁵ City of Cape Town Safety & Security Directorate (2024) 7.

²¹⁶ Etheridge J 'Hefty fines for homeless people for obstructing pavements in Cape Town' 1 July 2019 available at: <https://www.news24.com/News24/hefty-fines-for-homeless-people-for-obstructing-pavements-in-cape-town-20190701> (accessed 23 November 2024); Karim AA & Shoba S 'Cape Town's mean streets: Fining homeless people is not the solution' 7 July 2019 available at: <https://www.dailymaverick.co.za/article/2019-07-07-cape-towns-mean-streets-fining-homeless-people-is-not-the-solution/> (accessed on 23 November 2024).

²¹⁷ Etheridge (2019); Karim & Shoba (2019).

person were quoted in the news reports indicating that they could not afford the fines.²¹⁸ These events showcase the detrimental impact of by-laws being implemented through arrests and fines.

Following the events of 2019, the South Africa Human Rights Commission (“SAHRC”) released a statement wherein it criticised the City’s enforcement of its by-laws and noted that it violated the rights of homeless persons.²¹⁹ At the time, officials from the City of Cape Town indicated that they had primarily adopted a social development approach to homelessness in the prior four years whereby they largely issued warnings to homeless persons for by-law contraventions. However, officials noted that in the months leading up to July 2019, the number of complaints from local residents about homeless persons contravening by-laws had increased significantly.²²⁰ Hence, they had to change their approach in order to respond to the complaints, thereby further criminalising homeless persons.

Homelessness is deemed a crime in the City, as shown by the by-laws that criminalise aspects of homelessness²²¹ and confirmed by a 2020 report by the Coalition to End Homelessness (“CEH”). CEH, a collection of NGOs focusing on issues of homelessness, found that homeless individuals in Cape Town have a 33 percent chance of being arrested, which is eleven times more than the rest of the general population.²²² The CEH reached this figure after interviewing approximately 350 street homeless persons and noted that these arrests were primarily based on minor

²¹⁸ Etheridge (2019); Karim & Shoba (2019).

²¹⁹ SAHRC ‘CT’s by-law on fines for homeless violates rights, says SAHRC’ 8 July 2019 available at: <https://www.sahrc.org.za/index.php/sahrc-media/news/item/2024-ct-s-by-law-on-fines-for-homeless-violates-rights-says-sahrc> (accessed on 23 November 2024).

²²⁰ Karim & Shoba (2019).

²²¹ See Paragraph 3.5.1.

²²² Hopkins, Reaper, Vos & Brough (2020) 25.

offences including by-law infringements, drug possession or antisocial behaviours.²²³ In 2024, another study which focused 350 homeless persons revealed that 54 percent of them had been arrested while homeless.²²⁴ These arrests usually result in court appearances, fines, or imprisonment.

As noted in Chapter Two,²²⁵ increased arrests of homeless persons would not succeed in addressing homelessness. Homeless persons are already at a heightened risk of being arrested for petty crimes and they often struggle to access the social services that are available to them.²²⁶ As such, focussing on arresting these individuals instead of prioritising their access to the social services only serves to turn them into criminals instead of addressing the underlying challenges that caused them to be homeless.²²⁷ This is contrary to municipalities' developmental and human rights obligations which demand that they prioritise the wellbeing of their vulnerable communities, including those that are homeless.

3.6.2. Demolitions of shelters and evictions of homeless persons

The unlawful occupation of land and erection of illegal structures on public land are a regular occurrence in most South African cities and the City of Cape Town is no exception. The City, as a landowner, is empowered to protect its property from such illegal land invasions and it has done so through the adoption of the Unlawful Occupation By-law and the creation of specialised law enforcement units, among other ways. However, as Chapter Two has shown, the City's actions in doing so should not unduly infringe upon the rights of the occupiers. The DPU and ALIU play an essential

²²³ Hopkins, Reaper, Vos & Brough (2020) 11 & 25.

²²⁴ Hopkins, Laitinen & Skinner (2024) 8.

²²⁵ See Paragraph 2.3.2.

²²⁶ Hopkins, Laitinen & Skinner (2024) 14.

²²⁷ Ndifuna Ukwazi (2021) 12.

role in safeguarding the City's land from unlawful land invasions, and their track record in doing so is discussed in this section with particular reference to two court cases: *SAHRC*²²⁸ and *Sinazo Jordan and Others v City of Cape Town and Others* ("Sinazo Jordan").²²⁹

In *SAHRC*, the SAHRC challenged the ALIU's demolition of over 1,400 shelter structures at five sites across the City of Cape Town and argued that the ALIU's actions constituted unlawful evictions.²³⁰ The ALIU also destroyed the occupiers' belongings that were inside the structures while injuring some of their occupants. In this case, the ALIU did not rely on City's by-laws to remove the occupiers but instead relied on the defence of counter spoliation.²³¹ In order to rely on this defence, the ALIU had to show that the occupiers were both not in effective physical control of the sites and did not have the intention to derive any benefit from the control.²³² The ALIU argued that the occupiers had not yet completed or occupied the shelter structures on the sites and as such, they did not yet have physical control of the site. Further, the ALIU indicated that it used its discretion to determine that the structures were unoccupied.²³³

The High Court rejected the ALIU's argument and noted that by the City's own admission, there were completed structures present at the sites, some even containing furniture, which suggests that the occupiers had taken physical control of the sites and intended to derive some benefit from the occupation.²³⁴ The City appealed the

²²⁸ 2024 (5) SA 368 (SCA); *South African Human Rights Commission and Others v City of Cape Town and Others* 2022 (6) SA 508 (WCC).

²²⁹ (WCC) unreported case no 5809/2020 (6 October 2020).

²³⁰ *SAHRC* (2024).

²³¹ *SAHRC* (2022) paras 2-3.

²³² *SAHRC* (2024) para 11.

²³³ *SAHRC* (2024) para 19.

²³⁴ *SAHRC* (2022).

decision, however, the SCA also found in SAHRC's favour and concluded that the removals were unlawful and undermined the dignity and human rights of the occupiers.²³⁵ Both the High Court and SCA also strongly criticised the inhumane treatment of the occupiers by the ALIU in implementing the removals.²³⁶

Similarly, in *Sinazo Jordan*, the DPU's attempted removal of approximately 30 occupiers from a site they had occupied since 2019 after being evicted from a nearby building was challenged.²³⁷ In this case, the DPU had visited the site on several occasions over the period of approximately two months and indicated to the occupiers that their occupation of the site was in contravention of the Streets By-law.²³⁸ The DPU also issued compliance notices to the occupiers which contained a fine of R 300 or alternatively required them to appear in court.²³⁹ The DPU claimed that it was simply enforcing the City's by-laws in issuing notices of violations. However, the applicants challenged the DPU's actions and claimed that, by demanding that the applicants leave the site to comply with the Streets By-law, the DPU attempted to evict the applicants without a court order, as is required by the PIE Act.²⁴⁰

The court agreed with the applicants and found that the manner in which the DPU interacted with the occupiers constituted an attempted eviction. In this case, the court was particularly concerned about the manner in which the DPU sought to evict the applicants as it would have bypassed the City's obligation to provide alternative

²³⁵ SAHRC (2024).

²³⁶ SAHRC (2022); SAHRC (2024).

²³⁷ (2020).

²³⁸ *Sinazo Jordan* (2020) paras 8-20.

²³⁹ *Sinazo Jordan* (2020) para 52.

²⁴⁰ *Sinazo Jordan* (2020) para 68.

accommodation, as required under the PIE Act.²⁴¹ In the end, the court ordered the City to refrain from harassing or evicting the applicants.²⁴²

In both *SAHRC* and *Sinazo Jordan*, the court found that the ALIU and DPU can legally enforce the national law as well as the City's by-laws, however, they can only do so within the confines of the law and with respect to the rights of people they interact with. The cases indicate a concerning track record of law enforcement officials seeking to evict persons without obtaining a court order, as they are required to do in terms of the PIE Act and in terms of the City's obligations as discussed in Chapter Two.²⁴³ Nevertheless, recent events have shown that the City now acknowledges that it has to obtain a court order before seeking to evict individuals from its land. This was most evident in *Various Occupiers* where the court commended the City's approach in terms of the PIE Act and its clear efforts to engage with occupiers prior to evicting them.²⁴⁴

3.6.3. Confiscation of homeless persons' belongings

Chapter Two²⁴⁵ discussed the City's obligation not to arbitrarily deprive homeless persons of their personal belongings and that doing so would violate their property rights. Nevertheless, numerous news reports suggests that the City's law enforcement officials often confiscate homeless persons' belongings, including identity documents.²⁴⁶ This was also the case in *Ruwayda Davids and 42 Others v City of Cape Town* ("*Ruwayda Davids*").²⁴⁷ This section explores the impact of these

²⁴¹ *Sinazo Jordan* (2020) para 71.

²⁴² *Sinazo Jordan* (2020) para 78.

²⁴³ See Paragraph 2.3.2.1.

²⁴⁴ *Various Occupiers* (2024) paras 92; 129.

²⁴⁵ See Paragraph 2.3.2.2.

²⁴⁶ Hirsch M 'Castle of no hope for Cape Town's homeless' *Mail & Guardian* 15 June 2022 available at: <https://mg.co.za/news/2022-06-15-castle-of-no-hope-for-cape-towns-homeless/> (accessed 24 June 2022); Chiguvare B 'Homeless in city ask society to change its ways' 27 July 2016 available at: <https://groundup.org.za/article/homeless-city-ask-society-change-its-ways/> (accessed on 23 November 2024); De Beer & Vally (2021) 70.

²⁴⁷ Unreported case no 16372/2021 (7 October 2021).

confiscations and their implication for the City's obligations towards its homeless population.

In *Ruwayda Davids*, law enforcement officials from the City dismantled shelters of over 40 occupiers at a site in the inner city and confiscated their personal belongings. This included identity documents, driver's licences, blankets, clothes, food, and the material used to construct the shelters.²⁴⁸ The confiscation of such belongings are devastating to a homeless person who, without identity documents, would struggle to access social grants or health care facilities and who may lose his or her only clothes and means to build shelter in such confiscations.²⁴⁹ As such, the arbitrary confiscation of homeless persons belongings has a detrimental impact on the human rights of homeless persons and may lead to further hardship.

At the time when officials were confiscating the applicants' belongings, many of the applicants were not present at the site. Further, while the officials issued notices of impoundment to some of the applicants, many – including those who were not at the site at the time – were not issued a notice. The notices further indicated that the applicants had contravened the Streets By-law and were liable to pay a fine of R300.²⁵⁰ The City argued that it was justified in removing the shelters as it had done so in order to enforce its by-laws. The court did not accept this argument and found that, while the City is permitted to enforce its by-laws, it cannot rely on them to justify the removal and confiscation of the applicants' belongings without following due process.²⁵¹ As

²⁴⁸ *Ruwayda Davids and 42 Others v City of Cape Town* (2021) para 8.

²⁴⁹ *De Beer & Vally* (2021) 70-4.

²⁵⁰ *Ruwayda Davids and 42 Others v City of Cape Town* (2021) para 9.

²⁵¹ *Ruwayda Davids and 42 Others v City of Cape Town* (2021) para 152.

such, the court concluded that the City's actions were unlawful and ordered the City to return the applicant's confiscated property.²⁵²

Ruwayda Davids shows the detrimental impact that the arbitrary confiscation of homeless persons' personal belongings can have on their human rights. This is contrary to the developmental mandate of the City has, discussed in Chapter Two. As such, City officials cannot justify the severe impact of arbitrary confiscations on homeless persons by claiming that it is in the interest of enforcing by-laws.

In summary, the City relies on various law enforcement agencies – including the ALIU and DPU – to enforce its by-laws. These by-laws have legitimate purposes such as promoting a healthy environment, ensuring the safety of public spaces, and protecting the City from unlawful land occupations. However, law enforcement officials must still adopt a human rights-based approach when enforcing these by-laws and ensure that they do so in adherence to the Constitution as well as national laws. The City of Cape Town's law enforcement officials have not always respected the rights of homeless persons when arresting them, dismantling their shelters, and confiscating their belongings. Nevertheless, recent case law – such as *Various Occupiers* – show that the City have made an effort to adopt a more rights-based approach to evictions.

3.7 Provision of Emergency Housing

As noted in Chapter Two, municipalities are obligated to provide emergency housing where people are unable to address their own housing emergencies. This includes where people will be rendered homeless due to disasters or evictions and where people are already homeless. As mentioned in Paragraph 3.3 above, the court in *Various Occupiers*, approved the City's use of one of its Safe Spaces to provide

²⁵² *Ruwayda Davids and 42 Others v City of Cape Town* (2021) para 1.

emergency accommodation for individuals who were already homeless.²⁵³ Nevertheless, the City primarily provides emergency housing through the creation of incremental development areas (“IDAs”) and temporary relocation areas (“TRAs”) for individuals who are at risk of becoming homeless.²⁵⁴ IDAs are intended to be gradually upgraded to ultimately serve as permanent housing while TRAs are meant to serve as a temporary accommodation until people are able to move on to more permanent housing. This section discusses the adequacy of IDAs and TRAs as emergency housing measures with reference to several court cases that addressed the issue.

The TRAs and IDAs are often located far from the Cape Town City centre as well as the original site where individuals previously resided, and this distance from the inner city has been criticised by several NGOs.²⁵⁵ For example, in 2021, Ndifuna Ukwazi published a report wherein it called for transitional housing in the inner city as opposed to those located far from economic centres.²⁵⁶ This was also a key issue in *City of Cape Town v Commando and Others* (“*Commando*”) where the applicants challenged the City of Cape Town’s decision not to develop TRAs and IDAs in the inner city.²⁵⁷ In *Commando* a group of approximately 25 individuals were due to be evicted from premises in the Cape Town inner city and as the eviction would have rendered them homeless, the City of Cape Town offered them alternative accommodation in one of its TRAs located 30 kilometres away from the premises where they resided. The applicants challenged this decision as the area where the TRA was lacked schools, health facilities, and job opportunities. They further argued that the distance from the

²⁵³ (2024).

²⁵⁴ *City of Cape Town v Commando and Others* (2023) para 39.

²⁵⁵ Housing Development Agency *Implementation of emergency housing* (2012) 69; Ndifuna Ukwazi / *used to live there – A call for Transitional Housing for Evictees in Cape Town* (2017) 30-3.

²⁵⁶ Ndifuna Ukwazi (2021).

²⁵⁷ (2023); *Commando and Others v Woodstock Hub (Pty) Ltd and Another* [2021] 4 All SA 408 (WCC) (6 September 2021).

inner City would impede their ability to travel to their current schools and workplaces.²⁵⁸ The City subsequently offered accommodation in a different TRA located 15 kilometres away from their current premises which the applicants also rejected. In 2021, the Western Cape High Court found in the applicants' favour and concluded that the City's emergency housing programme was unconstitutional insofar it did not provide for a TRA or IDA in the City centre.²⁵⁹

In 2022, the City of Cape Town appealed this decision to the Supreme Court of Appeal ("SCA"). In addressing the applicant's concerns, the City acknowledged that it has no TRAs or IDAs in the inner city and that it does not plan to develop any due to a number of complex issues. Specifically, it indicated that there is a scarcity of land available in the inner city for such a programme and that the high rates on such properties as well as the cost of such development in the inner city would be prohibitive.²⁶⁰ The City has also acknowledged these constraints in its Human Settlements Strategy which it adopted in 2021.²⁶¹ This was accepted by the SCA which upheld the appeal and declared the City's emergency programme to be reasonable.²⁶² The SCA noted that the City should treat the applicants with care and dignity when determining the appropriate site for their alternative accommodation. The City should also take into consideration the location of relevant amenities such as the applicants' schools, workplaces, and healthcare facilities.²⁶³ However, the SCA noted that there is no legal obligation on the City to accommodate the applicants on the specific site of their choosing and that it is up to the City to make the final decision of where to

²⁵⁸ *Commando and Others v Woodstock Hub (Pty) Ltd and Another* (2021) paras 23-4.

²⁵⁹ *Commando and Others v Woodstock Hub (Pty) Ltd and Another* (2021).

²⁶⁰ *City of Cape Town v Commando and Others* (2023) para 44.

²⁶¹ City of Cape Town Metropolitan Municipality 'Human Settlements Strategy' (May 2021).

²⁶² *City of Cape Town v Commando and Others* (2023).

²⁶³ *City of Cape Town v Commando and Others* (2023) paras 72-3.

accommodate the applicants. The applicants in *Commando* have since appealed the SCA's decision to the Constitutional Court.²⁶⁴ Nevertheless, it is notable that the court in at least two prior cases approved the use of TRAs for alternative accommodation, despite similar arguments made against the distance of the TRA from the original premises where individuals who were due to be evicted resided.²⁶⁵

The discussion in Chapter Two revealed that emergency housing would inevitably fall short of the standards of permanent housing and that municipalities are not obliged to address every concern raised against the alternative accommodation it offers. As with other cities in South Africa, the City of Cape Town has limited resources with which it must give effect to its emergency housing programmes, both in terms of costs as well as available land. It is then forced to make difficult decisions on where to develop its TRAs and IDAs and is arguably unable to address every objection. These challenges were also recognised in the court cases where the use of TRAs and IDAs were deemed as suitable alternative accommodation. Nevertheless, its TRAs and IDAs has been subject to valid criticism for their distance from the city's economic centres, their inadequate amenities, and the impact these factors have on the already vulnerable communities who have no choice but to take up residence there. In keeping with its developmental and rights-based obligations, the City should continue taking heed of these concerns and prioritise addressing them, as far as possible.

²⁶⁴ 'Charnelle Commando and Others v City of Cape Town and Another' *Constitutional Court* available at: <https://collections.concourt.org.za/handle/20.500.12144/38325?show=full> (accessed 28 October 2024).

²⁶⁵ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC); *Baron and Others v Claytile (Pty) Limited and Another* 2017 (5) SA 329 (CC).

3.8 Conclusion

Chapter Two established that the City of Cape Town has an obligation to base its responses to homelessness on its developmental and human rights obligations. This Chapter evaluated the interventions introduced by the City of Cape Town to address homelessness. The City appears to have a conflicting approach to homelessness. On the one end, the City has adopted by-laws which criminalise various key aspects of homelessness such as occupying land and sleeping and bathing in public. These by-laws have also granted increased discretion to the City officials to enforce the law with little guardrails to prevent the infringement of homeless persons rights. Additionally, City's law enforcement officials maintain a heavy-handed approach to enforcing its by-laws by, among other ways, arbitrarily removing homeless persons' shelters, confiscating their belongings, and arresting them at a rate which is much higher than the average member of the public. Nevertheless, there are indications that the City is increasingly becoming aware of its developmental and human rights obligations towards homeless persons through its Safe Spaces and emergency housing programmes, among other measures.

4 CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

4.1 Introduction

The significant increase in homelessness has become a complex challenge for municipalities to address. Chapter One noted that NGOs estimated the number of homeless persons in the City of Cape Town (“the City”) to be between 12,300 and 22,500 before the COVID-19 pandemic and this number is likely to have increased given the effects of the pandemic. In light of this challenge, this study was driven by two related objectives. First, the study sought to determine the nature of obligations which municipalities have towards homeless persons. Secondly, the study sought to evaluate the measures adopted by the City of Cape Town to address homelessness in terms of these obligations. This Chapter provides the key findings, recommendations and conclusion of this study. It begins by providing the key findings followed by recommendations through which the City can bring its overall approach closer to its developmental, service delivery, and human rights obligations. The conclusion is provided last.

4.2 Key findings

Chapter Two showed that municipalities, including the City of Cape Town, have certain legal obligations towards homeless persons. The Constitution – in conjunction with the Municipal Systems Act – and the White Paper on Local government impose a developmental and service delivery mandate on municipalities.²⁶⁶ The Bill of Rights and international law further direct municipalities to respect, protect and promote the

²⁶⁶ Constitution; The *White Paper*; Municipal Systems Act 32 of 2000.

rights of its communities and residents, including their homeless population.²⁶⁷ This section discusses the major findings of this study, against this background.

4.2.1. Obligations of municipalities

It was established that municipalities have a developmental and human rights mandate with obligations towards homeless persons. First, municipalities have positive obligations to progressively realise human rights in their communities, including the homeless community, such as the right of access to emergency housing; water and sanitation facilities; and social welfare interventions. Secondly, municipalities have a negative obligation not to arbitrarily infringe on the human rights of the homeless persons. These include the rights to property and dignity as well as freedom of movement. Lastly, municipalities should also give effect to these obligations in a rights-based and participatory manner. Specifically, municipalities should proactively include homeless persons in their planning and legislative processes. Municipalities should also adopt a rights-based approach to the enforcement and implementation of their by-laws and policies. They should, for instance, refrain from granting wide discretionary powers to law enforcement officials and adopt adequate accountability mechanisms where the enforcement of its by-laws can infringe on the rights of homeless persons.

4.2.2. Criminalisation of homelessness

The City's by-laws as well its general approach to law enforcement have the overall effect of criminalising homelessness. For instance, the City's Streets By-law and Unlawful Occupation By-law classifies several behaviours closely associated with homelessness, such as bathing and sleeping in public spaces, as offences. Further,

²⁶⁷ The Constitution; UN Special Rapporteur on extreme poverty (2024).

broad powers and discretion are granted to City officials to enforce the By-laws which can lead to rights abuses. In practice, law enforcement officials in the City have not always acted in a way which respects the human rights of the homeless. There is a history of violent removal of homeless persons from public spaces and confiscation of their personal belongings without following due process. Instead of being “classified as criminals”, homeless persons are a vulnerable group in need of assistance.

4.2.3. Developmental policies and initiatives

It was also established that the City have adopted a number of developmental measures to address homelessness. Most notably, in 2013, the City adopted its Street People Policy which facilitated the creation of its SPPU. The SPPU facilitates access to various social services to homeless persons and also provides funding to NGOs operating in the City. In December 2024, the City adopted the Strategy to Reduce Rough Sleeping which expands upon, and replaces, the now-outdated Street People Policy. The Strategy provides for increased cooperation with NGOs and more targeted research and data collection on homelessness and initiatives that assist homeless persons in the city. However, the Strategy does not provide detailed information on how the City will address the complex needs of homeless persons. Additionally, the SPPU operates with limited staff which is inadequate to address the needs of the homeless in Cape Town. As such, while the City has adopted several developmental initiatives and policies, there is still a long way to go to ensure that its response address the needs of or its developmental obligations towards its homeless population.

4.2.4. Emergency housing programmes

In line with its obligation to provide emergency housing, the City provides alternative accommodation – at IDAs and TRAs – to those who will be rendered homeless by

disasters or evictions. The City also provides accommodation to those who are already homeless in its Safe Spaces. It is encouraging that the City is providing emergency housing and is actively seeking to expand its emergency housing programme. However, the TRAs and IDAs are often located far away from the City's economic centres which limits their residents' economic opportunities. As stated in the previous Chapter, it has also been reported that the Safe Spaces are characterised by unhealthy and unsafe conditions. This puts the dignity, health, and livelihood of their residents in jeopardy.

4.2.5. Lack of intergovernmental cooperation and coordination

Through the study of the City's response to homelessness, it was also established that South Africa lacks national or provincial policies or strategies on homelessness. As such, the different spheres of government's approaches to homelessness are uncoordinated. There is also a lack of support among them on various interventions and programmes which addresses homelessness. This results in an ineffective approach to homelessness which works against the principles of cooperative governance, but also the City's obligation to approach homelessness in a developmental way.

4.3 Research question

This study sought to answer the following research question: 'How is the City of Cape Town Metropolitan Municipality meeting its legal obligations towards its street homeless population?' The study has established that the City has adopted several commendable programmes which seek to address the needs of the homeless. However, there is significant room for improvement, particularly in challenges such as

the criminalisation of homelessness, the under resourcing of developmental initiatives for the homelessness, and the lack of effective intergovernmental cooperation.

4.4 Recommendations

This study established that, while the City is increasingly appreciating its developmental and human rights obligations towards the homeless, there remains room for improvement in how it is responding to street homelessness. This section provides recommendations which may assist the City in meeting its legal obligations towards its homeless population. The recommendations are mainly based on the premise that the criminalisation of homelessness is not a sustainable solution.

4.4.1. Review of the City of Cape Town's existing by-laws, strategies, and policies

The UNHCR's *Breaking the cycle: Ending the criminalization of homelessness and poverty* report notes that policies and by-laws which appear to be neutral and have a legitimate purpose, could still have a disproportionately negative impact on vulnerable groups, including homeless persons.²⁶⁸ It is thus recommended that the City undertake a comprehensive review of its existing policies and by-laws to identify where these instruments may, (un)intentionally, have a disproportionate impact on homeless persons. It is also advised that the City proactively seek to consult and include homeless persons as well as relevant NGOs in this review process.

4.4.2. Coordinated response to homelessness

In order to ensure that the City follows an overall developmental approach to homelessness which aligns with its legal obligations, it is necessary for the City to

²⁶⁸ UN Special Rapporteur on extreme poverty (2024) 3.

adopt a coordinated approach to homelessness. This will ensure that a consistent, rights-based approach is employed in all of the City's various measures to address homelessness, including its legislative, policy-making, planning, implementation, and enforcement measures. A coordinated approach further ensures that the City adopts an effective approach where resources are allocated in the most efficient manner to various departments to support the municipality's overall goal to reduce homelessness.

4.4.3. Adequate oversight and accountability measures

In the interest of a transparent, accountability, and developmental local government, the City is encouraged to adopt adequate oversight of municipal officials who performs law enforcement responsibilities – such as evictions – so that they can perform their duties in a way which protects and promotes the rights of homeless persons. Homeless persons as well as the general public should also be informed of how they can hold these officials accountable if their actions do violate the rights of homeless persons.

4.4.4. Increased resources to developmental initiatives

While the City's initiatives for homeless may suggest that the challenge of homeless has not escaped its attention, it is concerning that the SPPU Unit only has 45 staff members given the large size of the homeless community which it must cater for. As such, it is recommended that the City provides more resources to the SPPU to enable the employment of additional employees, among other priorities.

4.4.5. Improved quality of Safe Spaces accommodation

The City's Safe Spaces initiative may be indicative of the City's increased awareness of its legal obligations towards the homeless. However, it is recommended that the

City prioritises the safety, health, and dignity of homeless persons by improving the conditions at Safe Spaces and ensuring that they present an improvement from living on the streets.

4.5 Future research

There remains a long road ahead for the South African government to identify, adopt and implement a strategy which would effectively adequately address street homelessness. This study had a limited scope into the legal obligations of municipalities towards homeless persons, using the City of Cape Town as a case study. As such, there is a need for comprehensive research on street homelessness, including its causes and the obligations of all three spheres of government – local, provincial, and national – towards homeless persons and how the spheres may cooperate to address homelessness in South Africa.

4.6 Conclusion

South Africa, and the City of Cape Town specifically, have experienced a significant increase in street homelessness in recent years. How municipalities respond to this challenge matters. This thesis made a case for a developmental and human rights-based approach. At minimum, this means that municipalities should respect, promote and fulfil the rights of homeless persons. Further, they should refrain from infringing on their human rights, including their right to dignity, property, and a healthy environment. Fortunately, many municipalities, including the City of Cape Town have willingly taken up the challenge of addressing homelessness within their respective communities. The City has adopted several measures such as the Safe Spaces and emergency housing programmes to cater for its homeless community. However, the City still maintains by-laws which criminalises homelessness. Further, the City law

enforcement units have not always acted in a way which respects the human rights of the homeless. Thus, there remains room for City to reform its approach to addressing the challenge of street homelessness.

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