IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case number: **CCT 22/15**

In the matter between:

NTHOME STEVE MATHALE	**Applicant**
and	
JULY ANSON ZENZELE LINDA	**First Respondent**
EKURHULENI METROPOLITAN MUNICIPALITY	**Second Respondent**

WRITTEN SUBMISSIONS ON BEHALF OF THE APPLICANT

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A. Introduction, background and chronology

1. This matter raises the question whether the applicant and his family may be evicted from his home of 20 years, while litigation and political and administrative contestation about his right to remain in his home is on-going, where his eviction would render him homeless and the dispute about his rights to his home arose from mal-administration by an organ of state.

2. It also raises the important question of law, whether orders in terms of section 78 of the Magistrates' Court Act 32 of 1944 ('the Magistrates' Court Act') for interim execution of eviction orders pending appeal against those eviction orders ('interim execution orders'), are susceptible to appeal.

3. The applicant moved onto the stand in Winnie Mandela Park upon which his home is situated (now known as stand 8702) in 1994, at the time as an adult member of his father's household.[1] He has lived there uninterruptedly since then, from 2000 when his father moved away as the head of the household, apart from a brief interruption in 2004 through an illegal eviction by the second respondent.[2]

4. From the late 1990s onwards the second respondent commenced a process of formalisation of Winnie Mandela Park, including servicing of existing stands and formal allocation of stands to persons living in Winnie Mandela Park.[3]

5. In terms of this allocation process, stand 8702, on which the applicant has his home, was allocated to the first respondent in July 2000.[4] The stand on which the first respondent had been living was allocated to someone else.[5]

6. The second respondent commenced efforts to get the applicant to vacate his home. In 2004 the second respondent offered the applicant a stand in Esselen

[1] I use the following convention to refer to the record - Volume 1 – 'R1', page 1 – 'p1', paragraph 1 – 'para 1'. R1, p62, para 5.
[2] R1, p62, para 5.
[3] R1, p62, para 7.
[4] R1, pA7, para 12.
[5] R1, pA7, para 11.

Park, some distance 10km away, but he refused to move there.[6] Subsequently, in 2004 the second respondent illegally evicted him and demolished his home. The applicant was restored to his home pursuant to a court order.[7]

7. In September 2011, the first respondent commenced proceedings to evict the applicant, to take occupation of stand 8702. He obtained an order for the applicant's eviction from the Magistrates' Court on 10 February 2012.[8]

8. The applicant timeously lodged an appeal to the High Court, but the appeal could not proceed as a portion of the record of proceedings before the Magistrates' Court was missing.[9] This appeal is currently still pending.

9. On 18 June 2013 the first respondent obtained an order from the Tembisa Magistrates' Court in terms of section 78 of the Magistrates' Court Act for the eviction order against the applicant to be executed pending the appeal.[10]

10. The applicant appealed against this order to the High Court. The High Court, on 2 October 2014, dismissed the appeal against the interim execution order without reaching its merits, holding in essence that it was not in the interest of justice to regard the interim execution order appealable.[11]

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[6] R1, pA7-A8, para 12.
[7] R1, p63-64, para 12-14.
[8] R2, p114.
[9] R2, p114.
[10] R1, pA1-A2, para 1.
[11] R1, pA9, para 13.

11. The applicant applied for leave to appeal to the Supreme Court of Appeal. This application was dismissed on 20 January 2015 on grounds that the appeal had no reasonable prospects of success.[12]

12. On 29 May 2015, while preparation for the hearing of this appeal was already on-going, 133 residents of Winnie Mandela Park other than the applicant and first respondent herein launched an application against among others the second respondent herein and the MEC for Human Settlements of the Gauteng Provincial Government ('the Thupetji application').[13]

13. The applicants in the Thupetji application have all been allocated stands in Winnie Mandela Park other than those they are living on, but are unable to move onto the stands allocated them because they are occupied by others. Because they do not want to evict those occupying the stands allocated to them, they seek an order that the second respondent herein provide them with permanent housing either on the land on which they currently live or land within a 5km radius of where they currently live.[14]

14. Upon hearing of the Thupetji application the applicant herein, with four other residents of Winnie Mandela Park intended to join the application.[15] However, before this could be done, the parties to the Thupetji application entered into a

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[12] R3, p195.
[13] At the time of filing these submissions, the affidavit filed by the second respondent pursuant to this Court's directions of 14 July had not yet been included in the record, nor had the applicant's answer thereto. The former is referred to as 'Second respondent's affidavit' and the latter as 'Applicant's reply to second respondent's affidavit' and reference the page and paragraph number of these documents. Second respondent's affidavit, p6-7, para 16-17, Annexure A.
[14] Applicant's reply to second respondent's affidavit, p15, para 23.4.
[15] Applicant's reply to second respondent's affidavit, p12, para 22.1.

Memorandum of Understanding ('the MoU') in terms of which the respondents in that matter would, on the basis of a review of the position of the 133 applicants, submit a plan for provision of housing to them by 6 August 2015. In the interim, the application was stayed.[16]

15. Consequently, instead of formally joining the Thupetji application, the attorneys of the applicant herein for now only wrote a letter to the respondents in that application, requesting that the applicant herein and the four other residents who had planned to join the Thupetji application be included in the investigation currently being conducted by them and any consequent programme for provision of permanent housing. At the time of filing these submissions, no response had as yet been received.[17]

16. Against this background, it is submitted that this application raises the following issues, which are addressed below in turn:

- Which constitutional matters are raised by this application.
- Whether leave to appeal should be granted.
- Whether section 78 interim execution orders are in principle appealable.
- If section 78 orders are in principle appealable, whether the section 78 order issued against the applicant in this matter is on the facts appealable.
- If the section 78 order against the applicant is appealable, whether the appeal against that order should succeed.
- The relief sought.

[16] Second respondent's affidavit, p7-8, para 19-20, Annexure B.
[17] Applicant's reply to second respondent's affidavit, p12-13, para 22.2-22.3.

B. Constitutional matters

17. It is trite that any eviction from a home raises a constitutional matter.[18]

18. A constitutional matter arises also in cases where this Court is required to interpret legislation in light of the Bill of Rights.[19] In this matter, this Court is called upon to interpret section 83(b) read with section 78 of the Magistrates' Court Act in light of the constitutional values and rights of human dignity and equality and to give effect to the constitutional rights to have access to adequate housing and not to be evicted arbitrarily from one's home, as well as the right of access to court.

C. Leave to appeal

Prospects of success

19. It is submitted that this appeal has at least reasonable prospects of success, as the High Court, with respect, made a number of errors of law and of fact.

20. This Court has held that, to decide whether it is in the interests of justice to allow an appeal to proceed against an interim execution order granted in the High Court, the primary consideration is whether irreparable harm will result should the order not be held appealable.[20]

21. This Court has further held that the trauma associated with the mere fact of losing one's home pending resolution of litigation about that home constitutes

[18] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 7; 13-14.
[19] *S v Shaik & Others* 2008 (2) SA 208 (CC) para 83; *Mankayi v Anglogold Ashanti Limited* 2011 (3) SA 237 (CC) paras 13-19.
[20] *Machele & Others v Mailula & Others* 2010 (2) SA 257 (CC) (*Machele*) para 24.

irreparable harm, whether or not the person evicted has access to alternative accommodation.[21]

22. The High Court concluded that the applicant would suffer no irreparable harm should the appeal not be allowed to proceed, in order to hold that it is not in the interest of justice for the section 78 order to be appealable.[22]

23. In concluding thus, the High Court, with respect, considered irrelevant factors, in particular that stand 8702 had been allocated to the first respondent; that the applicant had refused the second respondent's 2004 offer of another stand; and that the applicant's occupation of stand 8702 was unlawful as he had no consent from the owner or person in charge.[23]

24. The High Court's conclusion that the applicant would not suffer irreparable harm should the order not be held appealable clearly is in conflict with this Court's prior holding that the mere fact of losing one's home pending resolution of litigation about that home constitutes irreparable harm.[24]

25. In this respect the High Court also erred in failing to take proper account of the disputed nature of the first respondent's claim to stand 8702 and in particular the length of the applicant's residence on stand 8702 and the extent to which he had become settled on that stand as his home, as factors increasing the severity of harm that loss of his home would occasion.

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[21] *Machele* para 29-30.
[22] R1, pA7, para 10; pA9, para 19.
[23] R1, pA8-A9, para 13-16.
[24] *Machele* para 29-30.

26. The High Court further erred on the facts in holding both that the first respondent would suffer irreparable harm at all should the section 78 order be held to be appealable and,[25] to the extent that he would suffer harm, that such harm outweighs the irreparable harm suffered by the applicant.[26]

27. There was, with respect, nothing on the record before the High Court to show that, should the order have been held to be appealable, the first respondent would have suffered any other harm than not being able to occupy the stand that had been allocated to him, and having to pay rates and taxes to the second respondent. Such harm is neither irreparable, nor does it outweigh the manifestly irreparable harm of the applicant.

28. Finally, there was nothing on the record before the High Court on the basis of which it could decide that the allocation of stand 8702 to the first respondent was lawful and not irrational.[27] In terms of the generally accepted rules with respect to disputes of fact on application the version of the applicant (respondent before the Magistrates' Court) in this respect should have been accepted above that of the first respondent (applicant before the Magistrates' Court).

Other considerations in favour of leave

[25] R1, pA8, para 14; pA9, para 16.
[26] R1, pA8, para 16.
[27] R1, pA8, para 15.

29. Orders for the execution of eviction orders pending appeal in the High Court have been held to be appealable,[28] while such orders emanating from the Magistrates' Court are still regarded as simple interlocutory orders and as such not appealable.[29] This discrepancy in the law places those whose eviction orders emanate from the Magistrate's Court at a distinct disadvantage, without there being a rational basis for the distinction.

30. The basis upon which an execution order pending appeal in the High Court can be appealable is also currently unclear, as there is little direction as to what the 'interest of justice' test that has so far been applied entails.

31. It is submitted that it is important that this discrepancy and this lack of clarity is dealt with by this Court.

32. It is further submitted that it is in the public interest that this Court deals with this discrepancy in the law, as it adversely affects primarily the poor, who are most likely to face eviction orders and consequent interim execution orders from the Magistrates' Court.

33. The constitutional matters raised by this appeal were raised on affidavit and in argument before the court *a quo* and addressed in the judgment of that court.[30] They were also raised on affidavit before the Magistrates' Court.[31]

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[28] *Philani-Ma-Afrika & Others v Mailula & Others* 2010 (2) SA 573 (SCA) para 20.
[29] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 552.
[30] R1, pA6-A7, para 8-9; pA8, para 13.
[31] R1, p70, para 16.4.

34. It is further submitted that the fact of the large number of eviction orders and consequent interim execution orders that emanate against poor people from the Magistrates' Court indicates that this Court deciding this matter would be of assistance to a large number of other people similarly placed to the applicant and that it is urgent that this Court clears up the discrepancy and lack of clarity that this matter illustrates.

The mootness alleged by the second respondent

35. In the affidavit filed by the second respondent pursuant to this Court's directions of 14 July 2015, the deponent alleges that the process of housing review in Winnie Mandela Park flowing from the Thupetji application and the possible renewed allocation and provision of housing that may result, renders this application moot, as the applicant could obtain alternative accommodation for him and his family through that process.[32]

36. In *Pheko & Others v Ekhuruleni Metropolitan Municipality* (*Pheko*) this Court indeed held that mootness is one factor to take into account in determining whether it is in the interests of justice to grant leave to appeal.[33]

37. In *National Coalition for Gay and Lesbian Equality & Others v Minister of Home Affairs* (*National Coalition*) this Court described a matter as moot if it 'no longer presents an existing or live controversy'.[34]

[32] Second respondent's affidavit, p8, para 22.
[33] 2012 (2) SA 598 (CC) para 31; see also *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 11.
[34] 2000 (2) SA 1 (CC) para 21, fn 18.

38. The dispute in this matter is not whether the second respondent must provide alternative accommodation to the applicant, but whether the first respondent is entitled to evict the applicant from stand 8702, pending resolution of an appeal against the order for his eviction and given the flux in which the housing situation in Winnie Mandela Park currently is.

39. The applicant does not want alternative accommodation from the second respondent – his case is that he is entitled to remain on stand 8702 and he calls on this Court to determine whether that is so.

40. The dispute in this matter, being about the applicant's rights to remain in his home on stand 8702 and resist eviction by the first respondent, is not resolved by the possibility of alternative accommodation that the process ensuing from the Thupetji application offers. That process instead offers the first respondent an easy way to obtain exactly that which the applicant seeks to prevent through this application – an unoccupied stand 8702.

41. Further, even were the applicant to be included in the housing review process, and whether he obtains through that process an alternative stand or is, as he believes he is entitled, allowed to remain on stand 8702, the harm against which he seeks to protect him and his family through his approach to this court remains real and imminent.

42. The first respondent is not a party to the Thupetji application or to the ensuing review and possible housing provision plan. He has in hand an order for the

eviction of the applicant and an order that he may execute on that order. Whatever the outcome of the housing review process for the applicant, the first respondent remains entitled to evict the applicant from stand 8702 if the interim execution order remains in place.

43. On this basis it is submitted that this application has not become moot.

44. In addition, this Court held in *Independent Electoral Commission v Langeberg Municipality* (*Langeberg*) that it retains the discretion to decide a matter on appeal even where it no longer presents an existing or live controversy. This discretion may only be exercised if it can be shown that any order that the Court may make 'will have some practical effect either on the parties or on others'. In exercising the discretion the Court may have regard to, among other factors, 'the nature and extent of the practical effect that any ... order might have, the importance of the issue, its complexity and the fullness or otherwise of argument advanced'.[35]

45. Quite apart from the practical dispute between the applicant and first respondent, if this court should grant the relief sought in the application it would have an immediate practical effect on those who currently face eviction on the basis of section 78 interim execution orders in the Magistrates' Court, as they would potentially be able to appeal against those orders.

46. In addition, the importance of the legal issue raised in this matter, given the large numbers of poor people affected by the discrepancy in the law that it

[35] 2001 (3) SA 925 (CC) para 11.

illustrates, indicates, it is submitted that, should this Court hold the live dispute between the parties to have been disposed of, it should nevertheless exercise its discretion in favour of granting leave to appeal.

D. Are section 78 interim execution orders appealable?

Current law

47. Orders of a Magistrates' Court for execution pending an appeal, as so-called 'simple' interlocutory orders, are currently regarded as not being appealable.[36]

48. This position is based on section 83(b) of the Magistrates' Court Act, in terms of which interlocutory orders such as interim execution orders are appealable only if they qualify as a '...rule or order ... having the effect of a final judgment ...'.

49. Section 83(b) was interpreted in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* (*South Cape*)[37] to mean that interlocutory orders are appealable only if they have a final effect on the principal case.

50. Orders of a High Court for execution pending an appeal have, as a general rule, similarly been regarded as not capable of appeal.[38]

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[36] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 552.
[37] 1977 (3) SA 534 (A) at 549F-551A.
[38] See *Minister of Health and Others v Treatment Action Campaign and Others (No. 1)* 2002 (5) SA 703 (CC) paragraph 5; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 551G-552H; *Tuckers Land and Development Corporation (Pty) Ltd v Soja (Pty) Ltd* 1980 (1) SA 691 (W) at 699C.

51. This position is based on section 20(1) of the Supreme Court Act 59 of 1959 which in turn determines that only decisions constituting 'judgments or orders' are appealable, which was similarly interpreted in *Marsay v Dilley*[39] to be decisions that are final; definitive of the rights of the parties; and dispositive of a substantial portion of the relief claimed in the main matter.

52. However, with respect to High Court interim execution orders, this Court held in *Minister of Health and Others v Treatment Action Campaign and Others (No. 1)* (*TAC*)[40] and *Machele and Others v Mailula and Others* (*Machele*)[41] that, where an attempted appeal against such an order is before it rather than a Full Bench of the High Court or the Supreme Court of Appeal, a different test applies to decide whether it is appealable. In such cases the interim execution order, on the basis that the appeal raises a constitutional matter, is appealable according to the ordinary test applied in applications for leave to appeal in constitutional matters in this Court, that is, if it is in the interest of justice for it to be so.

53. In *Machele* this Court went on to describe the content of the interest of justice test in the context of deciding whether execution orders pending appeal are appealable. This Court held that, where an attempted appeal against an interim execution order raises a constitutional matter, to determine whether it is in the interests of justice for that order to be appealable and for leave to appeal to be granted, '[t]he primary consideration ... is ... whether irreparable harm would result if

[39] 1992 (3) SA 944 (A) at 962.
[40] 2002 (5) SA 703 (CC) para 6 and 8.
[41] 2010 (2) SA 257 (CC) para 24.

leave to appeal is not granted' and further that '[a] court will have regard to the possibility of irreparable harm and the balance of convenience'.[42]

54. The applications for leave to appeal in both *TAC* and *Machele* were urgent direct applications to this Court. It is nevertheless submitted that the same test would apply in this Court in cases such as the present matter, where the applicant did not approach this Court directly from the High Court, but applied first for leave to appeal to the Supreme Court of Appeal.

55. Following these judgments of the Constitutional Court, the Supreme Court of Appeal held in *Philani-Ma-Afrika and Others v Mailula and Others* (*Philani-Ma-Afrika*),[43] a sequel to *Machele*, that High Court execution orders pending appeal are also appealable to both a Full Bench of the High Court and the Supreme Court of Appeal itself and not only directly to the Constitutional Court, on a similarly worded test, being if it is in the interests of justice for them to be so.

56. The Supreme Court of Appeal in *Philani-Ma-Afrika* was not explicit about the content of the interests of justice test it held to apply in that case. It based its decision in part on one of its own earlier decisions, in *S v Western Areas* (*Western Areas*).[44]

57. In *Western Areas*, dealing with an attempted appeal against a dismissal of an objection to an indictment in a criminal trial, the Supreme Court of Appeal held that such an interlocutory order would be appealable if it were in the interests of justice

[42] Para 24.
[43] 2010 (2) SA 573 (SCA) para 20.
[44] 2005 (5) SA 214 (SCA).

for it to be so. Referring to the possible application of this test in civil matters, the Court there only held that 'what the interests of justice require depends on the facts of each particular case'.[45]

Extension of the High Court position to the Magistrates' Court

58. It is respectfully submitted that, whatever the content of the interests of justice test referred to above, this Court should extend the basic holdings in *TAC*, *Machele*, and *Philane-Ma-Afrika*, that High Court interim execution orders are in principle appealable in this Court and before the High Court and Supreme Court of Appeal, to section 78 interim execution orders in the Magistrates' Court.

59. This Court set out the rationale for allowing appeals against interim execution orders in exceptional cases in *Machele*, on the basis of its judgment in *TAC*. Holding that the rationale for not allowing appeals against interim execution orders – to avoid piecemeal appeals and to ensure that the purpose of such orders is not defeated - is 'generally sound', this Court pointed out that there are some cases where the applicant (for leave to appeal) would suffer irreparable harm should leave to appeal not be granted and where that irreparable harm would outweigh any irreparable harm that the respondent (on appeal) would suffer were leave to appeal granted – 'where the injustice that arises falls not on the party in whose favour the interim order or special relief is granted, but on the party who would, in the ordinary course of events, seek to appeal against the interim order'.[46]

[45] Para 28.
[46] Para 23.

60. It is submitted that this Court can take judicial notice of the fact there are at least as many litigants in the Magistrates' Court as in the High Court facing interim execution orders who would suffer irreparable harm should they not be allowed to appeal those orders and whose irreparable harm outweigh any irreparable harm that the party who obtained the order would suffer if an appeal was allowed.

61. In the context of access to housing and eviction matters, it is further submitted that this court can take judicial notice of the fact, given the monetary jurisdiction limits of the Magistrates' Court, that more persons facing interim execution orders with respect to their eviction there are likely to be poor than is the case in the High Court.

62. It is submitted that the current situation, where one's capacity to exercise your right to access to court in order to protect other constitutional rights such as the right to housing depends on the forum within which you find yourself, amounts to inequality before and unequal treatment by the law, without any rational basis. It is respectfully trite that such irrational unequal treatment is unconstitutional and cannot be countenanced in our law.

63. It is further an instance where such inequality before the law has a disproportionate impact on a marginalised and vulnerable group of people – the poor – in a manner that manifestly affects their human dignity adversely by depriving them of the opportunity to protect themselves against the loss of their homes, in a context where the law in a range of ways explicitly require their

enhanced protection.[47] As such this discrepancy between the capacity to appeal against High Court interim execution orders and such Magistrates' Court orders constitutes unfair discrimination on the basis of socio-economic status.

64. It is respectfully submitted that, to correct these constitutional deficiencies in the operation of section 83(b) of the Magistrates' Court Act, which forms the basis for the current exclusion from appeal of section 78 interim execution orders in the Magistrates' Court, this Court should interpret that section to allow such appeals to the extent that they are allowed in the High Court, Supreme Court of Appeal and in this Court.

65. In considering how to do so, it is submitted, two questions arise: first, what exactly the content of the interests of justice test adopted by the Supreme Court of Appeal in *Philani-Ma-Afrika* pursuant to this Court's judgment in *Machele* is; and second, given that litigants in the Magistrates' Court may as of right (ie without having to request leave) appeal against orders that are appealable, how to give effect to that test in the Magistrates' Court.

<u>The content of the interests of justice test</u>

66. This Court in *TAC* and *Machele*, not being bound as the High Court is by section 20 of the Supreme Court Act and with its appeal jurisdiction regulated only by section 167 of the Constitution, applied its ordinary approach to deciding whether to hear an appeal on a constitutional matter to the appeals against interim

[47] I refer here for instance, in the context of urban evictions, to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

execution orders before it. That is, once it had been determined that the appeals raised constitutional matters, the test was whether it was in the interests of justice to grant leave to appeal.

67. In addition to the ordinary factors that this Court has over time held to be relevant to the interest of justice test in the context of applications for leave to appeal to it, this Court held that with respect to appeals against interim execution orders, the primary consideration would be whether the applicant on appeal would suffer irreparable harm should the interim execution order be held not appealable and, if that is the case, that such irreparable harm of the applicant's should outweigh any irreparable harm of the respondent's (on appeal) should the order be held appealable and the appeal succeed.[48]

68. As stated in paragraph 56 and 57 above, the Supreme Court of Appeal in *Philani-Ma-Afrika*, in holding interim execution orders appealable on the basis also of an interests of justice test, did not describe the content of the test as it applies before it and the High Courts.[49] Instead it relied on its on earlier decision in *Western Areas*, where it was only held that what the interests of justice require depends on the circumstances of each case.[50]

69. Given that the test applied by this Court to determine leave to appeal does not apply in the Supreme Court of Appeal or the High Court, this leaves uncertainty about the content of the interests of justice test as it applies in the Supreme Court of Appeal and the High Court.

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[48] *Machele* para 24.
[49] Para 20.
[50] *Western Areas* para 28.

70. It is respectfully submitted that in the High Court and the Supreme Court of Appeal, the interests of justice test should be subjected to a dual threshold requirement, namely that it applies only a) where an appeal against an interim execution order raises a constitutional question, and b) the prospective appellant would suffer irreparable harm if the execution order were held not to be appealable.

71. Once it is held to apply, the court applying the test should determine whether the irreparable harm of the prospective appellant outweighs any irreparable harm that the person who obtained the execution order may suffer should the order be held to be appealable. If it does, the execution order should be held appealable.

72. Although the decision of the Supreme Court of Appeal in *Western Areas* can be read to be wider than the test as proposed here, it is respectfully submitted that a narrower, more tailored test is required to pay due regard to the cogent rationale for the general rule that interim execution orders are not appealable (to avoid piecemeal appeals and to avoid defeating the purpose of interim execution orders), which has been held by this Court in *Machele* to be generally sound,[51] while allowing appeals in those cases such as the instant, where irreparable harm to constitutional rights are at stake.

73. In addition, the test so described would, if not absolutely fit, at least in principle align with the existing basic rules according to which interlocutory decisions are currently held to be appealable in both the High Court and the

[51] Para 24.

Magistrates' Court described in paragraphs 49 to 51 above, in its focus on the severity of the impact of such an order on the rights of a party and the question of finality (a final, irreparable adverse impact).

How to give effect to the interests of justice test in the Magistrates' Court

74. The extension of the in principle appealability of interim execution orders to the Magistrates' Court arena is problematised by the fact that, in terms of section 83 of the Magistrates' Court Act, a party to any civil suit may as of right appeal against any order that is appealable in terms of that section.

75. Should the interests of justice test be applied to attempted appeals against interim execution orders in the Magistrates' Court in the same manner as it is applied in the High Court, Supreme Court of Appeal and this Court, this would, it is submitted, introduce into the Magistrates' Court arena a form of leave to appeal requirement – a threshold requirement that must be met before the appeal can proceed – that seems in conflict with the principle of appeal as of right against orders or judgments.

76. It is submitted that there are broadly two ways in which the High Court approach can be extended to the Magistrates' Court.

77. The first would involve identifying a particular species or category of Magistrates' Court interim execution orders as appealable, with respect to which the appeal as of right would then lie.

78. This option may be formulated widely, such that any interim execution order that would *irreparably harm* the litigant against whom it was issued in her *constitutional rights*, is appealable and may therefore be appealed as of right.

79. Such wide interpretation would suffer the flaw that it is unclear how it would be determined whether constitutional rights will be irreparably harmed should the interim execution order be carried out. After all, often, as is the case in this matter, it might in part be a finding of the Magistrates' Court in question in deciding the application for the execution order that no irreparable harm would be suffered that the prospective appellant would seek to dispute on appeal.

80. In addition such a wide formulation may offend against the basic rationale for the exclusion hitherto of interim execution orders from appeal as it would potentially include to many execution orders in its scope.

81. This first option may also be formulated more narrowly, limiting it to the facts of this matter and other matters that may be similar. Magistrates' Court interim execution orders might be considered appealable and so as of right subject to appeal *only where they involve eviction of a person from her home*.

82. As this Court held in *PE Municipality*[52] and in *Machele*[53] that an eviction from a home is always a constitutional matter; and as this Court further held in *Machele* that an eviction of someone from her home pending resolution of litigation about

[52] Para 17.
[53] Para 26.

her rights to that home always constitutes irreparable harm,[54] this narrower formulation escapes the flaw that it would without more be impossible to determine whether irreparable harm to constitutional rights would ensue from the execution order and so fit the fact that appeal lies of right from the Magistrates' Court.

83. It further has the virtue that it is focussed and tailored to a specific purpose, and so does not offend the rationale for excluding interim execution orders from appeal.

84. However, the narrower formulation suffers the flaw that it leaves no place for the weighing up of the irreparable harm of the prospective appellant and the possible irreparable harm of the reluctant respondent, although this flaw is somewhat mitigated by the fact that the balancing of harm will of course occur in the hearing of the merits of an ensuing appeal, where the court on appeal would have to reconsider the Magistrate Courts findings with respect to balance of convenience or harm.

85. The second option for extending the High Court situation into the Magistrates' Court is to apply the test employed with respect to High Court orders in exactly the same way for Magistrates' Court execution orders - that is, as a threshold question that must be determined before an appeal may be allowed to proceed.

86. This option would have the virtue of tracking the High Court approach exactly and allowing for ventilation, before the appeal may proceed, of not only the

[54] Para 29-30.

question of the prospective appellant's irreparable harm, but also how it weighs up against the intended respondent's.

87. In addition, this option would have the virtue of allowing extension of the test to beyond the context of this case – housing and eviction – also to interim execution orders that irreparably harm other constitutional rights, without falling into the trap of the wider version of the first option, as it allows for a consideration of the relative severity of harm.

88. However, this second option would of course suffer the flaw that it would introduce into the Magistrates' Court arena a requirement that in certain cases a form of leave to appeal must be sought before an appeal would lie, contrary to the general rule of appeal as of right. Apart from the in-principle problem that would entail, it is unclear how and at what stage this 'appealability' inquiry would take place.

89. It is submitted that on balance the narrower formulation of the first option described above is to be preferred, that is, that any interim execution order emanating from the Magistrates' Court is appealable if it involves eviction from a person's home, as it best achieves a balance between respecting the rationale behind exclusion of interim execution orders from appeal and the existence of appeal as of right against appealable decisions of the Magistrates' Court.

E. <u>Is the interim execution order against the applicant appealable?</u>

90. The High Court dismissed the applicant's appeal against the interim execution order without considering its merits, holding instead that it was not in the interests of justice for that order to be regarded as appealable, so that the appeal could not proceed.[55]

91. The High Court did so while assuming without deciding that section 78 interim execution orders are appealable if the interests of justice require.[56]

92. As a consequence, the High Court neither considered, nor decided the merits of the applicant's appeal against the execution order, but only considered whether the execution order was appealable, and held that it was not.[57]

93. The High Court reached this conclusion on the basis that the applicant would not suffer irreparable harm should the interim execution order be held non-appealable.[58]

94. In deciding the matter in this manner and on these bases, the High Court, with respect, on any of the tests proposed above, erred in a number of respects. These are outlined below.

95. The High Court erred first in only assuming without deciding that section 78 interim execution orders are appealable if it is in the interests of justice for them to be so. On the same bases outlined in paragraphs 58 to 65 above in support of the

[55] R1, pA9, para 17.
[56] R1, pA7, para 10.
[57] R1, pA9, para 17.
[58] R1, pA7, para 10.

submission that this Court should decide this issue, the High Court ought, with respect, to have decided it.

96. The High Court erred secondly in concluding that in this matter it is not in the interests of justice for the execution order to be appealable and dismissing the appeal on this basis, on the grounds that follow.

Irreparable harm

97. The High Court concluded that the applicant would not suffer irreparable harm should the order be held non-appealable on the basis that the only harm that the applicant and his family would suffer would be that they would be rendered homeless and that their home on stand 8702 might be altered or damaged should the first respondent take occupation once they vacate in a manner that cannot later be rectified.[59]

98. This Court held in *Machele* that the trauma associated with losing one's home 'in the midst of litigation'[60] in itself constitutes irreparable harm, whether or not alternative accommodation is available and whatever one's socio-economic status.[61] This means, it is submitted, that there is no such thing as a temporary or interim eviction from home: even were an evicted person in future to be returned to her house, the loss of home, of the feeling of sanctuary and the roots that are established there cannot be repaired.

[59] R1, pA8, para 13.
[60] Para 30.
[61] Paras 29-30.

99. In this light the High Court erred in failing to have any regard to the fact that the applicant and his family would lose their home – in the case of the applicant his home of 20 years – should the execution order stand as non-appealable. The High Court ought instead, with respect, to have regarded the trauma and indignity of loss of home in itself as irreparable harm sufficiently egregious to warrant regarding it in the interests of justice for the execution order to be appealable.

Whether the applicant's harm outweighs the first respondent's

100. The High Court held that 'Any harm which the appellant may suffer is ... outweighed by the harm which the first respondent is presently suffering'.[62]

101. The High Court in this respect relied on the fact that the first respondent is currently liable for and is paying the rates and taxes for stand 8702 to the second respondent, weighing this against the fact that the applicant would be homeless upon eviction and that his home might be irreversibly altered should the first respondent occupy stand 8702.

102. The High Court, in balancing the harm of the applicant and respondent erred in failing to take account at all of the harm that the simple loss of home, even absent any other practical harm, would cause the applicant.

103. The failure of the High Court to take account of this factor in its balancing exercise is particularly important given the facts of this case, as there are a number

[62] R1, pA9, para 16.

of reasons why the trauma that the loss of the applicant's home would entail, would in itself be particularly severe.

104. This Court in *Machele* clearly considered the fact that, when someone loses their home pursuant to an interim execution order, they do so while their rights to that home remain contested through pending litigation, as increasing the trauma resulting from the loss of home.

105. In this matter the applicant has resisted attempts to evict him since 2001. His appeal, delayed through no fault of his own,[63] is still pending. These facts should, with respect, have been considered by the High Court as increasing the trauma and indignity and so the severity of irreparable harm that the applicant would suffer if the interim execution order is carried out.

106. In addition to the pending appeal, the housing situation in Winnie Mandela Park has been a contested one and in flux for a considerable period of time. In his answering affidavit in the enforcement application before the Magistrates' Court the applicant details two instances of litigation that has resulted from this in illustration.[64]

107. The current pending litigation and ensuing engagement between 133 residents of Winnie Mandela Park placed before this Court in the affidavit filed by the second respondent pursuant to this Court's directions of 14 July 2015, although obviously not before the High Court when it decided the appeal, after the fact

[63] R2, p127.
[64] R1, p63-66, para 12-18.

further illustrate the general uncertainty and contestation about housing in Winnie Mandela Park.

108. Also this exta-legal uncertainty and disputation, it is submitted, increases the severity of irreparable harm that the applicant and his family would suffer should they be evicted from their home pursuant to the execution order in that it underscores the extent to which the right of the first respondent to evict the applicant and remove him from his home is clearly still uncertain - in short it shows that the applicant and his family will through an eviction be torn from their home while there is every chance that they may in the future be returned to it, they would suffer irreparable harm potentially unnecessarily.

109. In *PE Municipality* this Court relied in part on the extent to which the persons in that case facing eviction had become settled on the land they were living on to deny an order for their eviction.[65]

110. The applicant in this matter has lived in his home on stand 8702 for 20 years, which constitutes his entire adult life. He built the current house (three corrugated iron structures) in which he lives with his family with his own hands. He has established social and economic networks and bonds. His child goes to school in the vicinity.[66] He is as settled on stand 8702 as one can be without formal legal rights to the stand – he is rooted there.

[65] Para 27.
[66] Applicant's reply to second respondent's affidavit, p15-16, para 23.6.

111. Also this, it is submitted, in light of *PE Municipality*, increases the severity of trauma and indignity he would suffer should he now be evicted pending his appeal and should have been considered by the High Court, with respect, in that context.

112. To this must be added the two factors indeed considered by the High Court as harm of the applicant – that he would be homeless if evicted and that his home might be irreparably altered should the first respondent occupy stand 8702 pending appeal.

113. In addition, the harm considered by the High Court as outweighing the harm of the applicant, is, it is submitted, clearly not irreparable.

114. The applicant does not dispute that the first respondent has been held liable for payment of rates and taxes for stand 8702. However, nothing prevents the first respondent from approaching the second respondent to correct that problem or indeed the applicant so that he could pay. This harm, it is submitted, is not irreparable as the High Court held it to be.

115. Also the harm caused by the first respondent's inability to occupy his allocated stand could be addressed in other ways than seeking to evict the applicant. Again, nothing precludes the first respondent from engaging with the second respondent to find alternative recourse to housing given that the plot allocated to him is occupied by the applicant.

116. The extent to which this is possible, it is submitted, is illustrated by the attitude and conduct of the 133 applicants in the Thupetji application, all of whom are in a similar position to the first respondent in that they have been allocated stands by the second respondent that are occupied by others.[67]

117. Instead of moving to evict those occupying their stands, they have engaged with the second respondent in different ways in order to persuade it to fulfil its constitutional obligations with respect to housing to them.[68]

118. Also this harm, it is submitted, is therefore not irreparable.

119. Had the High Court as, with respect, it should have, considered the loss of home in its fullest sense as described above in its balancing exercise, together with the other harm the applicant would suffer upon eviction, and had it correctly in that exercise considered the fact that the first respondent's harm is indeed remediable, it could not properly have held that the first respondent's harm outweighs the applicant's.

Irrelevant factors and factual errors

120. It is further submitted that the High Court in holding that the applicant would not suffer irreparable harm and that it was therefore not in the interests of justice that the execution order be appealable erred by taking account of a range of irrelevant factors.

[67] Applicant's reply to second respondent's affidavit, p14-15, para 23.3.
[68] Applicant's reply to second respondent's affidavit, Annexure SM3.

121. The High Court held that the fact that stand 8702 had been allocated to the first respondent, which is not disputed by the applicant, 'settles the issue' of whether the applicant would suffer irreparable harm should the execution order be held not appealable.[69]

122. It is submitted that the fact that stand 8702 had been allocated to the first respondent, although it might be relevant in other contexts, is irrelevant to the question whether the applicant would suffer irreparable harm and then also to determination of the interests of justice, at least on the High Court's own interpretation of that test. The High Court, with respect, should not have considered it in that context.

123. The High Court also considered the fact that the applicant had been offered an alternative stand by the second respondent but had refused it in coming to the conclusion that the applicant would not suffer irreparable harm if precluded from appealing the execution order.[70]

124. It is, with respect, entirely unclear how this offer and refusal is at all relevant to the question whether the applicant would suffer irreparable harm should the execution order be held not appealable. The fact is that the respondent now faces eviction and the loss of his home without any alternative accommodation being available. That it was a decade ago possible for him to move to another stand and he declined to do so has no bearing upon his current predicament and the harm that might ensue from it.

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[69] R1, pA8, para 15.
[70] R1, pA9, para 16.

125. Finally, the High Court held that the allocation of stand 8702 ‘can never be said to be unlawful’.[71]

126. The lawfulness of the allocation of stand 8702 was in dispute in the eviction application before the Magistrate’s Court;[72] the enforcement application before the Magistrates’ Court;[73] the appeal to the High Court;[74] and is in dispute before this Court.

127. At heart the applicant’s challenge to the lawfulness of the allocation of stand 8702 to the first respondent is that the common cause large scale allocation of stands to people other than those living on them is irrational.[75]

128. Second Respondent, despite ample opportunity to do so, has not until proceedings before this Court and being prompted to do so, participated in this matter and has never placed information on the record to refute this description of the allocation as irrational.

129. As a result, there is nothing on the record on the basis of which the High Court could conclude that the allocation ‘can never be said to be unlawful’, apart from various contrary assertions by the first respondent.

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[71] R1, pA8, para 15.
[72] R1, p13-14.
[73] R2, p118-122.
[74] R1, pA7, para 11.
[75] R3, p140-141, para 10-11.

130. The first respondent having been applicant in the interim enforcement application before the Magistrates' Court that is the underlying subject of this appeal and the applicant having been respondent, the High Court should, with respect, in terms of the ordinary rules with regard to resolution of factual disputes on application, not have accepted the first respondent's version in this respect over the applicant's.

131. On all and any of these bases, it is submitted that the order of the High Court cannot stand and should be overturned by this Court.

F. The appeal against the Magistrates' Court's interim execution order

Whether this Court should decide the appeal against the Magistrates' Court order

132. Because the High Court disposed of the appeal by holding that the interim execution order against the applicant was not appealable, it did not decide or otherwise pronounce upon the merits of the appeal against the Magistrates' Court's order.

133. It is respectfully submitted that this Court should, despite the fact that the merits of the appeal against the Magistrates' Court order were not properly ventilated before the High Court, decide if the Magistrates' Court interim execution order should stand.

134. Although the High Court did not decide the issue, it was properly raised in the papers, in the notice of appeal and in written and oral argument before the High Court.[76]

135. In addition, it has become urgent that this matter be resolved once and for all, rather than that it be referred back to the High Court for decision.

136. The applicant has faced attempts to evict him since 2004. An eviction order has been pending against him since February 2012. The interim execution order of that eviction order has been pending since June 2013.

137. The appeal against the eviction order is still pending and the parties have thus far been unable to reach agreement on a process for reconstruction of the missing parts of the record.

138. The applicant, and for that matter the first respondent, urgently require certainty and finality with respect to their rights to stand 8702 pending resolution of the appeal against the eviction order.

The merits of the appeal against the Magistrates' Court order

139. To decide whether the interim execution order should be granted, the Magistrate applied the test established in *Tuckers Land and Development Corp*

[76] R2, p129-132.

(Pty) Ltd v Soja (Pty) Ltd,[77] namely that the order must be granted if it is just and equitable to so.

140. To determine justice and equitability, the Magistrate considered whether the applicant herein would suffer irreparable harm should the execution order be granted or the first respondent herein irreparable harm if not; the prospects of success on appeal and in particular whether the appeal was noted mala fide; and, where both parties could suffer irreparable should the interim execution order be granted or denied, respectively, the balance of hardship or convenience.[78]

141. The Magistrate held that the Applicant would suffer no irreparable harm should the order be granted, whereas the Respondent could should it not;[79] that, although the appeal was clearly not noted in bad faith,[80] it nevertheless had no prospects of success;[81] and that the balance of hardship or convenience favours the first respondent.[82]

142. It is submitted that the Magistrate erred in coming to these conclusions in a number of respects.

Irreparable harm

143. On the same bases as set out with respect to this aspect of the High Court order in paragraphs 97 to 99 above, it is submitted that the Magistrates' Court erred

[77] 1980 (1) SA 691 (W) 694A.
[78] R2, p115-116.
[79] R2, p117-118.
[80] R2, p127.
[81] R2, p126.
[82] R2, p127.

in not taking account of the fact that the mere fact of the applicants' loss of home that would result from the execution order is irreparable harm in itself, as was held by this Court in *Machele*.[83]

144. This trauma and indignity, with respect, should in line with the jurisprudence of this Court have been held to constitute irreparable harm.

145. It is further submitted that the Magistrates' Court erred in holding that the first respondent would suffer harm that could become irreparable should the enforcement order not be granted.

146. The learned Magistrate should with respect have taken account of the fact that the first respondent could mitigate his harm resulting from payment of rates and taxes for stand 8702 either by approaching the second respondent to make an arrangement, or by approaching the applicant with a request that he pay the rates and taxes, in the same manner as more fully described with respect to the High Court order at paragraphs 114 to 117 above.

Balance of hardship or convenience

147. It is submitted that the Magistrates' Court similarly erred in holding that the balance of convenience or hardship favours the first respondent.

148. Taken with the exacerbating factors described in the context of the High Court order above in paragraphs 104 to 112 (the extent to which the applicant was settled

[83] Para 29-30.

on stand 8702; the extent of legal and extra-legal contestation and resultant uncertainty about the first respondent's and applicant's rights to stand 8702), it is submitted that the Magistrates' Court erred in not taking account at all of the trauma and indignity of loss of home *per se* in its balancing exercise.

149. The Magistrate Court also failed to attach sufficient weight to the severity of the impact the eviction would have on the applicant and his family, given that they are settled on stand 8702 for a considerable period of time and that at the time the Magistrate Court heard and decided the matter, no suitable alternative accommodation was available to the applicant and his family.

150. The Magistrates' Court, with respect, should instead have held that the balance of convenience or hardship favours the applicant.

Prospects of success on appeal

151. Having considered all the points of appeal noted in the appellant's notice of appeal separately, the Magistrate's Court concluded that applicant's appeal against the eviction order has no prospects of success.[84]

152. It is submitted that the Magistrate's Court erred in this respect and that the appeal against the eviction order (the 'eviction appeal') has prospects of success on any of the points discussed below taken alone or together.

[84] R2, p126.

153. In this respect it must be kept in mind that this part of the test to determine whether or not a section 78 interim execution order should be granted is not whether the appeal will succeed, but whether there are prospects of success on appeal, rather than that it has been noted not with a good faith intention of seeking to reverse the judgment but for some ulterior purpose, such as to gain time.[85]

154. The Magistrates' Court approach throughout instead seems to have been rather to ask whether the appeal will be successful.

155. The central dispute in the main eviction application was to whom the plot which appellant currently occupies had been lawfully allocated by the second respondent.

156. This case raises, so runs the applicant's case in the eviction appeal on this point, a classic case of double allocation of a plot – that is, allocation of the same plot to two people.[86]

157. The Magistrate's Court held that there was no prospect that a court on appeal would hold that the applicant rather than the first respondent was the rightful beneficiary of the plot.

158. Given that a court on appeal would be required to consider all the available evidence on this point and exercise its own evaluation of the admissibility and weight thereof (this includes the documentary evidence tendered by the appellant;

[85] Jones & Buckle *The Civil Practice of the Magistrates' Courts of South Africa* 9th edition (RS 17, 2006), Vol 1 at 329-330
[86] R1, p62, para 11.

averments made in founding affidavits, assessed on the rules regulating evidence in application proceedings; and the oral testimony given during the hearing, with respect to which parts of the record is still missing), it is submitted that the Magistrates' Court erred in this respect and that this point of appeal has at least some prospects of success.

159. This point is after the fact underscored by the Thupetji application that has since been brought, in which 133 further residents of Winnie Mandela Park allege similar double allocation.[87] Their allegations have been taken seriously enough by among others the second respondent that a review of their housing situation has since been launched.[88]

160. In his notice of appeal against the eviction order the applicant raises as point of appeal that the Magistrate in that matter erred in exercising his discretion whether to grant the eviction order by over-emphasising the rights of the first respondent (applicant in that matter) and under-emphasising the rights of the applicant (respondent in that matter).[89]

161. The Magistrates' Court in the section 78 execution matter held that this point of appeal had no prospects of success, as, once a court has determined that the occupier against whom an application for eviction is directed occupies unlawfully, section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of

[87] Applicant's answer to Second Respondent's affidavit, Annexure WM3.
[88] Second Respondent's affidavit, p7-8, para 19-20.
[89] R2, p123.

Land Act 19 of 1998 (PIE) precludes the exercise of any discretion by a court whether or not to grant the eviction order.[90]

162. It is submitted that this interpretation of section 4(8) of PIE is incorrect and that this point of appeal has prospects of success.

163. Section 4(8) of PIE determines that, if all the requirements of section 4 have been complied with and no valid defence against eviction exists, it must grant the eviction order.

164. One of the requirements of section 4 that has to be complied with before section 4(8) requires granting of an eviction order is that contained in section 4(7), namely that a court may only grant an eviction order if it has decided that it is just and equitable to do so after considering all relevant circumstances.

165. This section imposes a discretion on a court whether or not to grant an eviction order, precisely where the occupation of the land in question is unlawful (that is, where the occupier has no defence). This discretion must be exercised properly by a court before section 4(8) applies.[91]

166. The Magistrates' Court further held that the applicant's point of appeal that the Magistrate deciding the eviction application erred in granting an order that could

[90] R2, p123-124.
[91] See *PE Municipality* para 25 and 31.

result in the applicant (there the respondent) being homeless had no prospects of success on appeal.[92]

167. In this respect the Magistrate held that, given that it is not the State that seeks the eviction in this matter but a private party, 'there is no principle in our law in terms whereof' the applicant can remain on the plot and the first respondent 'kept at bay' because the second respondent has failed to provide suitable alternative accommodation to the applicant.[93]

168. This holding of the Magistrate's runs counter to this Court's holding in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*[94] to the effect that a private property owner may be required to bear the presence of an unlawful occupier of its property even where it has obtained an eviction order until such time as the State has found and provided alternative accommodation to the occupier.

169. This ground of appeal also, it is submitted, has prospects of success.

170. A final point of appeal raised in the eviction appeal is that the Magistrate in the eviction application erred in holding that it is just and equitable to grant the eviction order.

171. The Magistrates' Court in the section 78 enforcement matter held that this point of appeal also has no prospects of success, as the appellant had not

[92] R2, p124.
[93] 2012 (2) SA 104 (CC).
[94] 2102 (2) SA 104 (CC).

indicated which factors were to be considered by the Magistrate and how the Magistrate's order results in injustice and inequity.

172. The factors relevant to the justice and equity of granting an eviction order are listed in section 4(6) of PIE, which provides a non-exclusive list in this respect. They should, with respect, be well known to the Magistrate.

173. In addition, this Court held in *PE Municipality*[95] that there is in eviction cases a duty on courts to ensure that all the relevant information required to decide whether the eviction would be just and equitable be placed before it, rather than only to rely on the parties to do so.

174. The injustice and inequity that would result from the eviction of the applicant is described by the appellant in his answering affidavit to the section 78 enforcement application.

175. In this light it is respectfully submitted that this point of appeal also shows prospects of success.

176. On all and any of these bases it is submitted that the order of the Magistrates' Court in the section 78 interim execution matter cannot stand and should be overturned by this Court.

G. <u>Relief sought</u>

[95] Para 32.

177. Having regard to all of the above, I respectfully ask that the application for leave to appeal be granted, that the appeal be upheld and that the order of the court *a quo* be set aside and replaced with the following order:

1. It is declared that the order of the Magistrates' Court for the District of Tembisa under case number 1196/2013 [per Magistrate NAJ van Niekerk] delivered on 18 June 2013 is appealable.

2. The appeal is upheld with costs and the order of the Magistrate's Court aforesaid is set aside and replaced with the following order:

   The application for the interim execution of the eviction order is dismissed with costs.

DANIE BRAND

Counsel for the applicant

Pretoria, 30 July 2015

Table of authorities cited

Cases:

Legislation:

Magistrates' Court Act 32 of 1944: 3, 5, 7-8, 16, 22, 25

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: 21, 46, 47

Supreme Court Act 59 of 1959: 16, 22

Authors:

Jones & Buckle *The Civil Practice of the Magistrates' Courts of South Africa* 9th edition (RS 17, 2006), Vol 1: 45

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NUMBER: CCT22/15

In the matter between:

NTHOME STEVE MATHALE ***APPLICANT***

AND

J J Z LINDA ***FISRT RESPONDENT***

EKURHULENI METROPOLITAN MUNICIPALITY ***SECOND RESPONDENT***

FIRST RESPONDENT'S HEADS OF ARGUMENT

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1. *INTRODUCTION*

These heads of argument address both the present application for leave to appeal, and the appeal itself, -i.e. the appeal in respect of the s. 78[1] enforcement orders.

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[1] Section 78 of the Magistrates' Court Act 32 of 1944. This section deals with the execution or suspension magistrates' court judgments or orders. For

2. *FACTUAL BACKGROUND*

2.1. The dispute between the parties pertains to stand number 8207, Extension 24, Winnie Mandela Township, Tembisa, Gauteng *("the Property")*.

2.2. During 1994 the applicant, together with all others, including the first respondent, took occupation of a then vacant piece of land belonging to the second respondent, by invasion. The area became an informal settlement became known as *Winnie Mandela Informal Settlement*.

2.3. In the interim, the occupiers built shacks thereon as a form of shelter, and which they regarded as their homes.

2.4. At some stage thereafter, the second respondent sought to evict the occupiers of this *informal settlement* by force, it would appear, without a court order, and demolishing some

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reasons of convenience, orders in terms of s. 78 will be referred to in these heads as *"enforcement orders"*.

of the shacks of some of the occupiers; including the applicant.

2.5. The affected occupiers obtained relief in the high court, Pretoria, against the second respondent in a form of a *mandamus van spolie*. The dust was somewhat settled.

2.6. In the interim, the second respondent, took a decision to no longer seek to evict the occupiers but instead, to formalize the area and to provide serviced stands; with the intention to provide *RDP* houses to occupiers. It did so by engaging in its internal processes the workings of which are to the parties unknown.

2.7. After that process was complete, formal stands were allocated to each one of the occupiers. Once formalized, the area became known as *Winnie Mandela Park*.

2.8. The property was allocated to the first respondent on 11 June 2000. However, not every person could be allocated a stand at *Winnie Mandela Park* pursuant to the allocation process. As a result, a nearby arear approximately seven (7)

kilometres away from *Winnie Mandela Park*, called *Esselen Park*; was identified to which those of the occupiers who could not been allocated stands in *Winnie Mandela Park* were relocated and allocated stands and/or *RDP* houses there.

2.9. The applicant was one of that group of persons relocated to *Esselen Park*. He was allocated stand number 426 consisting of an *RDP* house in *Esselen Park*; and was issued with a certificate of occupation. However, the applicant declined. As a result, the property was allocated to another applicant on the second respondent's *waiting list* for *RDP* houses.

2.10. In formalising the area the focal point of the process was on the land and not the person occupying it. A stand would be allocated to someone occupying another stand, and the latter would have been allocated a stand occupied by another.

2.11. Therefore, each person had to take occupation of a stand allocated to them. In doing so, each person had to move out of a stand they were occupying prior to the allocation; so that

the person allocated such stand previously occupied by the other, would be able to take occupation accordingly.

2.12. Similarly, all those who had been allocated stands and/or *RDP* houses in *Esselen Park*, had to adhere to the same process.

2.13. The applicant, having declined the *Esselen Park* property, and the property having been allocated to another person, became caught between a rock and a hard place. He could neither move out of the disputed property, nor could he move in any elsewhere. This is the genuine nature of the frustration that the applicant faces, to date. *He caused it himself and must face the consequences of his bad and ill-considered decisions. He simply cannot pick and choose to detriment of others.*

2.14. As a result, first respondent was impeded from taking occupation of the property.

2.15. Consequently, on 18 July 2011 the first respondent instituted eviction proceedings against the applicant in the magistrates'

court, Tembisa. The order was granted on 10 February 2012.[2] The applicant noted an appeal in the high court, Pretoria, against the eviction order.

2.16. During 2013, the first respondent brought an application in terms of s. 78 of the Magistrates' Court Act for the enforcement of the eviction order pending the appeal. This application came before the learned magistrate, *Mr N A J van Niekerk*. The application was granted; notably, with costs.

2.17. The applicant, once again, noted an appeal against the enforcement order in the high court, Pretoria. The appeal was dismissed; once again notably, with costs.

2.18. The applicant approached the Supreme Court of Appeal *(SCA),* for leave to appeal the judgment and order of the high court dismissing the appeal against enforcement order. The *SCA* also dismissed the application for leave to appeal; yet again notably with costs; on the basis of lack of prospects of success.

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[2] Vol. 1, pp. 13 – 17, of the record (Magistrate *A. Mnguni's* judgment dd 10/02/2012).

2.19. The applicant has now launched with this honourable court, an application for leave to appeal, to appeal against the order of the high court dismissing the appeal against the s. 78 enforcement order.

2.20. It is the application for leave to appeal that is before this honourable court for determination.

3. *APPLICANT'S CASE*

Appealability of section 78 enforcement orders and its merits

3.1. The applicant *conceded that the current legal position regarding the appealability of s. 78 enforcement orders is that these orders are not appealable*.[3] [Own emphasis].

3.2. We submit that the applicant's concession puts, and in fact must do so, the matter to rest. On this basis alone it is apparent that the appeal has no merits and, if leave to appeal

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[3] Vol. 1, p. A5, para. [7] & p. A6, paras. [8] & 9, of the record (high court judgment dd 01/10/2014, as per His Honourable Lordship, Mr *Msimeki* J, His Honourable Lordship, Mr *Louw* J concurring).

were granted, the appeal would, foreseeably, not succeed on the basis of lack of prospects of success. Therefore, granting leave to appeal would serve no purpose.

3.3. However, on the other hand, it is the applicant's case that s. 78 enforcement orders *should be regarded as being appealable, or that they be interpreted in such a manner as to be regarded as being appealable*; and that such interpretation would be consistent with the high court's interpretation in terms of which – as per the applicant's contention – the high court high court execution orders are regarded as being appealable courts if it is in the interests of justice to do so. [Own emphasis].

3.4. The basis offered by the applicant for this proposition is that it would be in the interests of justice that this be done in the present case before us. In his endeavours to substantiate the above contention, the applicant relied on certain authorities, some of which are authorities from this Honourable court.[4]

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[4] Vol. 1, p. A6, para. [9], of the record (high court judgment): Minister of Health and Others v Treatment Action Campaign and Others (No. 1) [2002] (5) SA 703 (CC) and Machele and Others 2010 (2) SA 257 (CC).

3.5. It is important to note, however, that the applicant neither asked the high court for a declaratory order to that effect, but argued the appeal based on the merits of his case, nor argued that the high court to grant the same relief that he is now asking for the first time in this court – which is impermissible – i.e. to interpret s. 83 (b) read with s. 78 of the Magistrates' Court Act in such a manner as to be consistent with the *"constitutional values and rights of human dignity and equality"*.[5] In the light of the current legal position that these orders are not appealable, we are unable to see how the high court ought to grant the relief that the applicant was seeking. [Own emphasis].

3.6. Furthermore, the applicant failed to demonstrate *(i)* that it would be in the interests of justice to interpret the enforcement order as appealable; *(ii)* and/or that his constitutional rights would be adversely affected if the enforcement orders is not interpreted as to be appealable in those circumstances, or otherwise, and *(iii)* that the

[5] Para. 18, fourth line, of the F/A.

circumstances are exceptional [6] this being the threshold that the applicant argued would be required in order to interpret the enforcement orders as appealable.

The merits of the appeal - Summary

3.7. The applicant contends that he is the owner of the property and that he derived such ownership, *firstly*, from his father, *Leshabe Jim Mathale*, and *secondly*, from the second respondent.[7]

3.8. In seeking to demonstrate that he acquired such ownership from his father, the applicant placed reliance on two affidavits purportedly deposed to by his father in which his father purportedly bequeathed the property to him when he left for Limpopo.[8]

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[6] See para. 30, fourth line, of the applicant's F/A to his court.

[7] Vol. 2, p. 119, of the record (second & third paras. of *van Niekerk's* judgment dd 18/06/2013).

[8] One of these affidavits is attached as annexure ***"JJZL1"*** to the first respondent's A/A before this honourable court. The other affidavit was excluded purely because it had been deposed to by the applicant himself and not his father.

3.9. In this regard, it is our submission, *firstly*, that the applicant's father was not the owner of the property and could therefore, not dispose of something that he himself did not own. *Secondly*, that the affidavit by his father, in any event, does not *(i)* bequeath the property at all, and, even if it did, *(ii)* to the applicant. This, correctly, *van Niekerk* also picked up.[9]

3.10. In seeking to demonstrate that he acquired ownership over the property from the second respondent and that the second respondent allocated it to him, the applicant placed reliance on a computer generated print-out apparently sourced from the second respondent.[10]

3.11. The print-out does not say anything about the applicant being the owner or ownership of any person, for that matter. In addition, *van Niekerk* was correct in finding that the computer print-out constituted *"...inadmissible hearsay evidence."*[11]

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[9] Vol. 2, p. 119, second para. lines 4 – 7, of the record (*van Niekerk's* judgment).

[10] Vol. 2, pp. 118 & 119, of the record (*van Niekerk's* judgment).

[11] Vol. 2, p. 119, third para, of the record (*van Niekerk's* judgment).

3.12. Furthermore, since there is a contradiction in the applicant's version in that, on the one hand, he concedes that the property was lawfully allocated to the first respondent – although he argues that this allocation was an error, and yet he failed to demonstrate how this was an error in the light of his concession – and, on the other hand, he contends that the property was allocated to him. This means that there was a duplication in the allocation of the property.

3.13. We submit that if there was a duplication, any such duplication would have been picked up in the second respondent's records.

3.14. It is the applicant's further case that even if he is not the owner of the property, he should not be evicted from the property without being afforded an alternative accommodation; otherwise his constitutional rights in terms of s. 26 of the Constitution would be violated.

3.15. It is our submission that the consideration alternative accommodation is not applicable in the present instance for two reasons, *inter alia*, namely: *(i)* the eviction sought is

between two private individuals involving private ownership of property. As such, the first respondent is enforcing his private ownership right to the property; *(ii)* the applicant was allocated the *Esselen Park* property which he declined to the detriment of the first respondent.

3.16. The applicant offered two reasons why he refused to accept the *Esselen Park* property. The *first reason* is that the property was far in that it was seven (7) kilometres away from *Winnie Mandela Park*. The *second reason* is that he had already been allocated the property in *Winnie Mandela Park*, therefore he couldn't be allocated another property.

3.17. It is our submission that both these reasons are not only bad in law, but also disingenuous and with respect, unsound.

3.18. With respect to the second reason, we submit that it is improbable that the applicant could have genuinely believed that the property in dispute had been allocated to him. No reasonable person in his position, could have reasonably probably genuinely believed that the property had been allocated to him or her in those specific circumstances.

3.19. What could be likely is that the applicant could have reasonably genuinely believed, if his version is to be believed, that his father had bequeathed the property to him when he deposed to the affidavit. If he so believed, however, this would entail that such belief existed at the time of the deposition by his father in 2000. Therefore, his subsequent belief that the disputed property had been allocated to him by the second respondent could not materialize; given his former belief that he acquired the property his father. It is virtually impossible that he could have held both beliefs.

3.20. Therefore, this demonstrates that he did not believe that his father bequeathed the property to him in 2000 because if he did, he could not, thereafter, have believed that the property was allocated to him by the second respondent especially as his basis for declining the *Esselen Park* property.

3.21. The applicant's further case is that *van Niekerk* erred in finding that the applicant has no prospects of success.[12] We

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[12] Vol. 2, pp. 118 – 126, of the record (judgment of *van Niekerk* dd 18/06/2013).

are unable to find any error that *van Niekerk* made in this regard; as we are unable to find any, in any other regard.

3.22. The applicant's further case is that *van Niekerk* erred in finding that the applicant would suffer less prejudice than the prejudice to be suffered by the first respondent if the enforcement order was not granted.

3.23. It is true that the first respondent would suffer more prejudice than the applicant. *Van Niekerk* was correct in so finding; especially when regard is had to the fact that *van Niekerk* made this finding not in isolation but in conjunction with and after considering, the fact, and after being satisfied, that the applicant had no prospects of success on appeal. [Owen emphasis added].

Sections 26 and 25 (6) of the Constitution[13]

3.24. Section 26 of the Constitution provides as follows:

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[13] The Constitution of the Republic of South Africa, Act 108 of 1996 (as amended) (hereinafter referred to as *"the Constitution"*).

*"**26. Housing**.–(1) Everyone has the right to have access to adequate housing.*

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No person may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

3.25. It is clear from the abovementioned provisions: *(i)* that the right that everyone enjoys to have adequate housing includes the applicant; *(ii)* that the constitutional imperatives imposed upon the state in terms of s. 26 (2) enjoins the second respondent in the present instance, to do so by providing alternative accommodation – under normal eviction

circumstances; and *(iii)* that the applicant cannot, be evicted from the property arbitrarily.

3.26. However, it is our submission that s. 26 is not applicable to the applicant. Even if it did, when the second respondent allocated the *Esselen Park* property to the applicant, it must be seen to have thereby fully discharged the constitutional imperatives imposed upon it by s. 26 (1) read with s. 26 (2) of the constitution.

3.27. There can be no *nexus* between s. 26 constitutional rights and the enforcement order. It is the eviction order in the main appeal that would, in all probabilities, give doubt as to whether s. 26 has been violated or not. Not the enforcement order itself, by which the eviction order is sought to be enforced. We are unable to see how the applicant's constitutional rights could be violated by granting the enforcement order; the effect of which, we submit would be reversed upon the main appeal against eviction succeeding.

3.28. In regard to s. 26 (3), the applicant's contention is, with respect, absurd and lacks plain logic The first respondent

first obtained an eviction court order issued by a competent court of law, in *the first instance*. In *the second instance*, the property does not qualify as the applicant's *"home"* as envisaged by s. 26 (3) in that the property was allocated to the first respondent. Upon being so allocated, it ceased to be the applicant's home. [Own emphasis].

3.29. In regard to ss. 25 (6); 9 (1) and 34 we submit that the applicant's contention is simply irrelevant and incomprehensibly illogical with reference to the provisions of these sections. In their plain meaning, these sections have no application to the present case.

4. *THE ISSUE UPON WHICH THE CONSTITUTIONAL COURT IS CALLED UPON TO DECIDE AND TEST FOR GRANTING LEAVE TO APPEAL*

4.1. It would appear that the **issue** for determination by this Honourable court, is whether s. 78 enforcement orders are appealable.[14]

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[14] Para. 72 of the A/A.

4.2. However, the issue becomes complex when regard is had to the applicant's case; which is fundamentally contradictory. It is not clear what relief the applicant wants. We make this submission because according to the applicant, as we understand it, the *constitutional issue* for determination by this court is *whether these orders are appealable*;[15] yet it was also the applicant's case at the high court, that it is common cause that these orders are not appealable; and hence the relief sought by the applicant from the high court that these orders be interpreted as though they are appealable since doing so, would be consistent with the high courts approach in high court enforcement orders.

4.3. In our view, the true essential issue is whether the non-appealability of s. 78 enforcement orders constitutes and/or involves a constitutional issue; because the current legal position regarding these orders is that they are interlocutory and do not have the effect of a final judgment and therefore not appealable. This is a clear legal position as it currently is.

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[15] Para. 25 of the F/A.

4.4. If we are correct that this is the correct constitutional issue, and the answer thereto is in the *negative*, the present application for leave to appeal would serve no purpose; and must thus fail.

4.5. We submit that the answer is indeed in the negative on the bases; *inter alia*, *(i)* that the enforcement order currently sought to be appealed against is not and does not involve a constitutional matter as envisaged by s. 167 (7) of the constitution;[16] *(ii)* that even if it were, this was not the applicant's case on appeal; and *(iii)* even if the enforcement order constitutes and/or involves a constitutional matter, and the applicant so pleaded, the applicant still failed to show that it would be in the interest of justice that the order be regarded as appealable, at least with reference to him – and even if the issue was whether or not these orders are appealable, that is not a constitutional issue.[17]

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[16] In terms of s. 167 (7) *"A constitutional matter includes any issue involving the interpretation, protection or enforcement of the* ***Constitution****."* [Own emphasis].

[17] Para. 74 of the A/A.

4.6. On that basis alone, leave to appeal should not be granted.

4.7. **The test** whether this Honourable court should grant leave to appeal is whether it will be in the interests of justice to do so.[18]

4.8. In the light of the above considered with the relevant applicable case law, we submit that this Honourable court may grant leave to appeal only if the applicant demonstrates that it is in the interests of justice to do so but failed to do so.

4.9. Granting leave to appeal would not be justiciable; we submit.

5. *SUBMISSIONS AND MERITS OF THE APPEAL*

The application for leave to appeal

5.1. The test for leave to appeal to this court is: *whether it would be in the interests of justice to grant leave to appeal*.

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[18] National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (6) SA 223 (CC) (OUTA) at para. [25]; Machele & Another v Mailula & Others 2010 SA 257 (CC); President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others intervening: Institute for Democracy in South Africa & Another as *Amicus Curiae*) 2003 (1) SA 472 (CC).

5.2. It is our submission that the answer to the test is in the negative on the basis; primarily and in the main, that the appeal itself has no prospects of success and that the first respondent would suffer irreparable harm if leave to appeal is granted.

5.3. We make this submission on the following bases, *inter alia*:

5.3.1. Even in the applicant's own version, it is trite that s. 78 enforcement orders are, by their nature, interlocutory and therefore not appealable. This is common cause.[19] This fact – that it is common cause – must conclusively demonstrate that the appeal has no prospects of success.

5.3.2. The applicant failed to demonstrate a legal right or some form of entitlement in law, on the basis of which he claims that he should not be evicted from the property.

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[19] Vol. 1, p. A5, para. [7], of the record (high court judgment).

5.3.3. The fact that the applicant was duly allocated *Esselen Park* property but on his own volition, he decided to declined it. This is also common cause.[20]

5.3.4. If the court is with us, whether or not these orders are appealable, any issue as it may pertain to these orders does not constitute a constitutional matter.

5.4. It is important to note that the high court did not make a finding on whether or not s. 78 enforcement orders are appealable. Instead, the court assumed[21] that the applicant the approach contended by the applicant was correct; and found that even if it was to agree with the applicant's contentions, the applicant failed to show that it would be in the interests of justice to find that the enforcement order, specifically, is appealable.

5.5. We therefore submit, that the appeal itself has no merits and that the harm to be suffered by the first respondent, apart

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[20] Vol. 1, p. A7, para. [12], of the record (high court judgment).

[21] Vol. 1, p. A7, para. [10], of the record (high court judgment).

from the grave harm he has already suffered, is irreparable.

5.6. In the premises, we submit that leave to appeal would serve no purpose.

5.7. However, if the court is inclined to grant leave to appeal, we submit that it would be justiciable to grant leave to appeal with such condition[s] as to security as the court may deem appropriate in these circumstances.

The constitutional imperatives in terms of s. 26 of the Constitution

5.8. *Alternatively*, however, in the event that the court finds that the appeal does raise constitutional matters – which we dispute it doesn't – then in that event, and in dealing with the constitutional matters that might be so raised, and in our endeavour to demonstrate lack of prospects in the appeal, the issues set out below pertinently arise.

5.9. The first issue is whether the constitutional imperatives imposed upon the state by s. 26, in particular s. 26 (2) of the

Constitution – such constitutional imperatives being directly imposed upon the second respondent in the present case – do arise in this matter despite:

5.9.1. The fact that the applicant was admittedly allocated the *Esselen Park* property by the second respondent – as land available to him for his relocation –*i.e. shouldn't this property be regarded as the very alternative accommodation that the applicant is claiming* – which we submit it should –; and

5.9.2. The fact that the applicant admittedly declined the *Esselen Park* property allocated to him.

5.10. If the answer to the first issue is in the negative – which we submit it ought to be – we submit that that marks the end of the matter.

5.11. We concede that ordinarily a municipality, would incur the constitutional imperatives imposed upon it by s. 26; given effect to by the provisions of *PIE*.

5.12. However, it is in the peculiar nature of the circumstances of the present case that the constitutional imperatives do not arise; so that the burden that the applicant would be faced with consequential upon him being evicted would have been jettisoned by the s. 26 constitutional imperatives that the second respondent would ordinarily incur.

5.13. We make the above submission on the basis of the applicant's [alternative contention], as we understand it, that even if he should be evicted from the property, he cannot be evicted unless and until the second respondent has provided him with an alternative accommodation to which he is entitled on the basis of s. 26.

5.14. However, on the other hand, if the answer to the first issue is in the affirmative, then in that event the second issue becomes pertinent.

5.15. The second issue is whether the second respondent in allocating the *Esselen Park* property to the applicant, in doing so discharged, and/or such allocation had the effect of discharging, the constitutional imperatives.

5.16. It is our respectful submission that the answer to the second issue must, inevitably, be also in the affirmative. There can be no justification to find otherwise.

5.17. The third issue is whether the applicant has a right or some form of legal entitlement to the property and whether any such right was shown in the high court. Put otherwise, is there a legal basis in law, why the applicant should not be evicted from the property; and allow the first respondent occupation of the property.

5.18. On the basis of the applicant's version of acquisition of the disputed property, we submit he has no right thereto and should, justifiably, be evicted from the property.

5.19. Furthermore, although in referring to unlawful occupiers *PIE* uses a singular form[22], it becomes apparent when regard is

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[22] S. (7): *"If **an unlawful occupier** has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights*

had to the application of a purposive interpretation to the words contained in its purpose provisions,[23] that the ***'alternative land'*** for purposes of relocation as envisaged in s. 4 (7), applies only to evictions of a group of persons or unlawful occupiers who are a group of persons invading land on account of landlessness. [Own emphasis].

Merits of the appeal - Comprehensive

5.20. We submit that granting the applicant leave to appeal would serve no purpose. The appeal itself lacks the fundamental merits to sustain the application for leave to appeal; in particular, when due regard is had to the stark contradictions in the applicant's version and the applicant's grounds of appeal[24] against *Mnguni's* eviction order, *inter alia*.

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and needs of the elderly, children, disabled persons and households headed by women." [Own emphasis].

[23] The purpose of *PIE* is therein recorded as being: *"To provide for prohibition of unlawful eviction; to provide for procedures for the eviction of **unlawful occupiers**; and to repeal the Prevention of Illegal Squatting Act. 1951, and other obsolete laws; and to provide for matters incidental thereto."* This purpose must further be understood in the historical context of the Republic of South Africa; in the main with reference to: *(i)* landlessness; and *(ii)* arbitrary evictions. [Own emphasis].

[24] Vol. 1, pp. 78 – 80, of the record, read with vol. 2, pp. 118 – 126, of the record (*van Niekerk's* judgment).

5.21. The first reason for the above submission is that, the applicant advances different versions which are contradictory and therefore fatally defective. The first contradiction manifests itself in paragraph 23 of the applicant's application for leave to appeal to the *SCA* dealing with his grounds for application for leave to appeal. In this regard the applicant, despite it being admittedly common cause that s. 78 enforcement orders are currently not appealable,[25] records that *"My appeal against the execution order, apart from its merits, raised the question of law whether execution orders in terms of section 78 of the Magistrates' Court Act 32 of 1944, being simple interlocutory orders, are appealable."*

5.22. This gives rise to two contradictory versions; on the one hand, the applicant concedes the current legal position that these orders are not appealable, yet on the other hand, he contends that this is a question of law that the high court ought to decide upon.

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[25] This is was recorded, *inter alia*, in paragraph 4 of the applicant's heads of argument dd 18 July 2014, in the high court.

5.23. The second contradiction is that at the magistrates' court, the applicant contends that the property was allocated to him; relying on the computer generated print-out as proof to this effect. In his founding papers to the *SCA* in paragraph 20 thereof, the applicant expressly concedes, and in writing, under oath, that the property was allocated to the first respondent and that he was not *"... allocated that stand..."*[26] The applicant further conceded that the allocation of the property to the first respondent was *"formally lawfully made..."*[27]

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[26] *"**It must further be emphasised that**, although **the First Respondent** has in terms of an administrative process of the Second Respondent **been allocated the stand on which I reside** and although at the same time **I have not been allocated that stand by the third (sic) respondent and am only the occupier of the stand, without any form of title to it**, First Respondent is not the owner of the stand and in fact holds no legal title to it."* [Own emphasis].

[27] Para. 21 of F/A to the *SCA*: *"I am advised by my legal representatives, which advice I accept, that, given the duration of my occupation of the stand I currently reside on (20 years); the fact that no alternative accommodation is currently available to me and my family should I be evicted so that we will be rendered homeless by the eviction; the fact that the First Respondent, the applicant for my eviction, **holds no legal title to the stand** from which he seeks to evict me; and the fact that the only claim that the First Respondent can lay to the stand from which he seeks to evict me depends on an allocation of that stand to him that, **although formally lawfully made** is patently based on an administrative error, the prospects of success in my pending appeal against the eviction order against me are good."* This in itself is a further contradiction because how can the applicant argue that the first respondent has no legal title to the stand, and simultaneously argue that the allocation of the stand was formally lawfully made. The concession that the property was lawfully allocated to the first respondent is repeated in paragraph 30 of the applicant's founding affidavit to the application for leave to appeal to the SCA. [Own emphasis].

5.24. The second reason is that, the applicant's bases to claim entitlement to the property are invalid in law and therefore legally unenforceable. *The first* is that his father [purportedly] bequeathed the property to him as the eldest child when he left for Limpopo frantically relying upon two affidavits allegedly deposed to by his father.[28] This contention is legally unsustainable. *Firstly*, his father was himself not the owner of the property; he similarly had no legal right or entitlement in law[29] to the property. This was dealt with in some greater detail by *van Niekerk*; page 119, volume 2 of the record. [Own emphasis].

5.25. In addition, it is astounding that the applicant failed to include these affidavits, in the papers that served before the high court; before the *SCA*; and before this court. This omission is quite telling. [Own emphasis].

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[28] Vol. 1, pp. 71 & 72, para. 18.3, of the record.

[29] It is a trite legal position found in the well-established principles of the private law that in order to part with a thing, so that ownership thereof vests in another, -i.e. in order for ownership of such thing to transfer from one person to another person, the person so imparting therewith must either be the owner of the thing imparted with or so transferred, or, if not the owner, hold some form of a real right over such thing.

5.26. *Secondly*, even if the applicant's father could, in law, bequeath the property as contended, the affidavits themselves, do not even suggest anything to that effect.

5.27. *Thirdly*, there is only one affidavit apparently deposed to by the applicant's father; that dated 13 July 2000. The second affidavit dated 03 August 2000 was deposed to by the applicant himself. Therefore, this begs the question whether the applicant is truthful and whether he genuinely believed that the property had been given to him by his father. We submit he clearly didn't.

5.28. *Fourthly*, even if the applicant's version to the above effect was believed, his father could only have done so after the property had already been allocated to the first respondent in any event; because the affidavit relied upon is dated 13 July 2000 by which time the property had already been allocated to the first respondent; on 11 June 2000. Therefore, no effect could be legally given to any subsequent bequest, let alone the fact that there wasn't any.

5.29. The second reason the applicant advances for claiming

entitlement to the property is that the property was allocated to him by the second respondent. We have already addressed this issue elsewhere in these heads; save to add that the applicant similarly failed to incorporate this document in the record that served before any of the high courts, including this court. This is equally telling. [Own emphasis].

5.30. In addition, when the applicant's alleged methods of acquisition of ownership of the property are considered together, it becomes apparent that the applicant's version is mutually irreconcilably destructive because the applicant did not plead them in the alternative.

5.31. If one version is accepted, the other must fall by the way side. If it is to be accepted that his father gave him the property, then he could not have possibly acquired the property from the second respondent through the alleged allocation which occurred after his father had done so.

5.32. The third reason is the fact that it is common cause that when the applicant, together with his father, as well as everyone else, including the first respondent, first took occupation of

the land, *(i)* it was vacant and *(ii)* that such occupation was by way of invasion.[30] [Own emphasis].

5.33. The fourth reason is that, as his ground of appeal,[31] the applicant contends that *van Niekerk* in issuing the s. 78 enforcement order failed to consider the applicant's reasons for declining the *Esselen Park* property. We submit that this contention is bad in law and cannot constitute a ground of appeal because the applicant's reasons for so declining are not legally valid.

5.34. This contention is also factually unsustainable because there is no evidence that *van Niekerk* did indeed fail to consider this aspect, *firstly*. In *Secondly*, it is not a right that an individual person sought to be evicted from a private home of another has, to be afforded alternative accommodation. Instead, it is one of the various factors that a court is required to take into account in making a decision whether or not to

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[30] It is for this very reason that the Pretoria high court on 29 September 2004, granted a spoliation order to the applicant and four others under case number 24943/04, pursuant to an unlawful demolition and attempt to evict, by the second respondent.

[31] Vol. 2, pp. 129 & 130, para. 2, of the record.

grant an eviction order. That there might, as a fact, be no alternative accommodation made available to the person sought to be evicted, does not *per se* constitute a legal impediment for a grant of an eviction order. If this was the case, *PIE* would have expressly made provision to this effect; and expressly imposed an express prohibition on the courts when considering an eviction application to the effect that such an order [shall] not be made unless and until such time that alternative accommodation is provided to the person to be affected by the order. This is not the case. [Own emphasis].

5.35. Apart from the aforegoing, it is our submission that the *grounds of appeal* themselves considered in their totality, do not assist the applicant. For instance, the applicant contends that *van Niekerk* failed to consider the *court orders* granted by the *"North Gauteng High Court"* indicating a dispute regarding allocation of stands in *Winnie Mandela Park*, yet the applicant makes a further submission that *"this may be resolved by way of an application for a declaratory order as*

stated above."[32]

5.36. Firstly, that order is irrelevant. Secondly, that is worrying because it then begs the question: if *"court orders"* were already obtained, why would it be necessary to obtain a *"declaratory order"*? Any relief to be asked of a court requested to grant a declarator would have been incorporated in the relief sought (and probably granted), in the order alleged to have been obtained. This, with respect, is absurd but telling.

5.37. In his *sixth ground of appeal*,[33] the applicant contends that granting the enforcement order *"would vitiate the appeal process." Firstly*, the Magistrates' Court Act permits granting such orders pending an appeal. There could thus be nothing wrong in *van Niekerk* granting the order; in doing so as he was, permissibly, exercising powers endowed upon him by the Magistrates' Court Act. S. 78 grants a magistrates' court wide powers to decide whether to grant an enforcement order, or to direct that it be suspended pending

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[32] Vol. 2, p. 130, para. 3, of the record.
[33] Vol. 2, p. 130, para. 3, of the record.

an appeal.[34]

5.38. *Secondly*, in any event these orders are not appealable. However, in seeking to persuade the high court, the applicant relied on various authorities. We submit that these authorities are irrelevant to the applicant's case and that the applicant simply misconstrued and misunderstood these authorities. [35]

5.39. Furthermore, the applicant makes different assertions founded on grounds of appeal that are, yet again, mutually irreconcilably destructive without pleading them in the alternative. This alone renders both the application for leave to appeal and the prospects in the appeal fatally defective.

5.40. The above is to be found in the applicant's first ground of appeal captured on page 118 of vol. 2 of the record, where he

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[34] S. 78 provides that *"Where an appeal has been noted or an application to rescind, correct or vary a judgment has been made, the court may direct either that the judgment shall be carried into execution or that the execution thereof shall be suspended pending the decision upon the appeal or application. The direction shall be made upon such terms, if any, as the court may determine as to security for the due performance of any judgment which may be given upon the appeal or application."* [Own emphasis].

[35] *Inter alia*, Philani-Ma-Africa & Others v W M Mailula & Others 2010 (2) SA 573 (SCA).

states: *"The learned magistrate erred in finding that the Respondent [-i.e. the applicant in the present proceedings] is not the registered owner or beneficiary, and is in fact an unlawful occupier of the land in question."*

5.41. In the second ground of appeal on page 119 of vol. 2 of the record, the applicant states: *"The learned magistrate erred in finding that the Respondent had the onus to prove that he was a bona fide occupier of the land in question, whereas the Respondent had resided on the land with the express consent of the Second Respondent [-i.e. the second respondent in the present proceedings] for a period of more than ten years prior to the eviction proceedings."* [Own emphasis].

5.42. The contradiction is that, on the one hand, the applicant claims to be the owner of the property, and on the other hand, he claims to have resided on the property with the *express consent* of the second respondent. This is consistent with the first respondent's case, that the applicant was never the owner of the property. The alleged express consent could not have been necessary if the applicant was the owner. We submit that such a contradiction is fundamentally fatal to the

applicant's case. [Own emphasis].

5.43. Taking the preceding point a step further, the applicant to contends that he had been staying on the property for a period of more than 10 (ten) years prior to the eviction proceedings. This makes things worse for the applicant in that this contradicts his own version yet again, that he is the owner of the property in dispute. It could never be more apparent that the appeal has no merits.

5.44. We make the following specific submissions by which any reasonable improbabilities that may have existed that the first respondent is the rightful owner of the property, ought to be cleared:

5.44.1. That the first respondent tendered the evidence of *T G Wambi* in a form of a letter dated 19 April 2011,[36] confirming that the property was allocated to the first respondent. This evidence was never refuted by the

[36] This letter served as annexure *"JJZL1"* to the first respondent's founding affidavit to the eviction application dated 11 July 2011. Unfortunately this does not form part of the record of appeal before this Honourable court.

applicant in his ***answering affidavit*** to the eviction application; nor was it refuted at any other stage to date. [Own emphasis];

5.44.2. That, admittedly, the second respondent's monthly utility bills are issued in the name of and to the first respondent;

5.44.3. That there is no evidence on record that the applicant, who is aware that the municipal utility bills are in the name of the first respondent, had queried this with the second respondent. Instead, the applicant stays acquiesced therewith;

5.44.4. That the applicant does not pay the monthly utility bills for services rendered in respect of the property he occupies and for his and his family's benefit; and

5.44.5. That the first respondent's name did not appear on the records of the second respondent, pursuant to the allocation in *Winnie Mandela Park* –i.e. on the list of persons who had not been allocated stands in *Winnie*

Mandela Park, and on the list of those that had to be and were in fact, allocated to *RDP* houses in *Esselen Park*; nor is the first respondent's name appearing on the second respondent's *'waiting list'* of persons who had not been allocated *RDP* houses or stands. By default, the first respondent's name would appear on the second respondent's records if the applicant's contention was to stand. This, is not the case.

5.45. The final point we wish to emphasize is that the applicant appears to be pleading a case that was not originally pleaded.

5.46. We make this submission because the applicant's case seems to be that s. 78 is unconstitutional, yet the applicant did not advance the same argument in the high court; regard had to his concession regarding these orders. In addition, the applicant introduces a new argument in this court based on s. 83 (b) of the Magistrates' Court Act.[37]

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[37] Paras. 17 & 18 of the applicant's heads of argument dd 30 July 2015.

5.47. We submit that doing so is impermissible.[38]

5.48. In case of ***Phillips and Others v National Director of Public Prosecutions***[39] Skweyiya J, writing for a unanimous directed that *"It is impermissible for a party to rely on a constitutional complaint that was not pleaded."* At paragraph 40, the court stated that *"Accuracy in pleadings in matters where the parties place reliance on the Constitution in asserting their rights is of the utmost importance."*

5.49. Furthermore, the applicant is now arguing the appeal against eviction order.[40] The latter application is not the case that before this court. The only appeal that this court was referring to in the direction of 14 July 2015, is the appeal against the enforcement order. This is impermissible.

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[38] Bel Porto School Governing Body & Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) at 119.

[39] 2006 (1) SA 505 (CC) at 39.

[40] P. 7, para. 17, of the applicant's heads of argument dd 30 July 2015.

Factual findings of the high court

5.50. In *his* statement of factual findings of the high court the applicant contends that the high court ought to make the allegations contained in this statement as findings of facts.

5.51. For the reasons set out in these heads, we are unable to see how doing so would have offered any assistance to the applicant. For instance, that it might be a fact that the applicant does not have alternative accommodation, as a fact, does not answer the question whether he should or should not be evicted. This question would be answered by ascertaining whether or not he had a legal right to occupy the property. Once the court was satisfied that he didn't, the eviction order was inevitable. This is what served as the basis of the eviction order that *Mnguni* made; which was consistent with *PIE*.[41] Any finding of fact, even if made, could not have the effect of changing the position.

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[41] PIE permits a court to grant an eviction order provided that it considers, prior thereto, the relevant circumstances enunciated in s. 4 of PIE. There was no reason for *Mnguni* to assume, in the light of the applicant's declining the Esselen Park property that the applicant would accept any other alternative accommodation offered to the applicant if *Mnguni* made such order. In addition, there was no reason for *Mnguni* to consider the

5.52. Therefore, the high court correctly found that the applicant had himself to blame.[42] The applicant's contention that he declined the *Esselen Park property* because he believed that the allocation of the property to the first respondent was an administrative error, and that it should have been allocated to him, is, with respect absurd. In any event the applicant failed to demonstrate that *(i)* the property had been allocated to him; *(ii)* any sound basis for believing that the allocation of the property to the first respondent was an administrative error; *(iii)* the fact that no evidence on record that he was able to demonstrate the administrative error; *(iv)* the fact that it is common cause that the property was allocated to the first respondent in any event; particularly when considered in conjunction with the fact that the second respondent's *uncontested evidentiary letter and the oral evidence of Wambi,*; and, in particular, *(v)* since the applicant did not advance this very contention as his basis for declining the *Esselen Park* property. [Own emphasis].

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matter to be one in which such an order for alternative accommodation would be appropriate and/or applicable in those circumstances.

[42] Vol. 1, p. A9, para. [16], second line, of the record.

6. *CONCLUSION*

6.1. On the strength of the aforegoing it is our submission that the applicant failed to make out a proper case for the relief sought; and, with respect that granting leave to appeal would not be in the interests of justice.

6.2. The applicant failed to demonstrate that the high court findings are impugnable.

6.3. Therefore, we submit, the application for leave to appeal must be dismissed with costs.

Per: Mr S. Masina

First Respondent Attorney

Date: 03 August 2015.

LIST OF AUTHORITIES

1. ***CASE LAW REFERENCES***

1.1. National Treasury & Others v Opposition to Urban Tolling Alliance & Others 2012 (6) SA 223 (CC) (OUTA) at para. [25];

1.2. Machele & Another v Mailula & Others 2010 SA 257 (CC);

1.3. President of the Republic of South Africa & Others v United Democratic Movement (African Christian Democratic Party & Others intervening: Institute for Democracy in South Africa & Another as *Amicus Curiae*) 2003 (1) SA 472 (CC;

1.4. Minister of Health and Others v Treatment Action Campaign and Others (No. 1) [2002] (5) SA 703 (CC) and Machele and Others 2010 (2) SA 257 (CC);

1.5. Philani-Ma-Africa & Others v W M Mailula & Others 2010

(2) SA 573 (SCA);

1.6. Bel Porto School Governing Body & Others v Premier, Western Cape, and Another 2002 (3) SA 265 (CC) at 119;

1.7. Phillips and Others v National Director of Public Prosecutions 2006 (1) SA 505 (CC) at 39.

2. *STATUTORY REFERENCES*

2.1. Section 78 of the Magistrates' Court Act 32 of 1944.

2.2. Section 4 (7) of Prevention of Illegal Eviction From and Unlawful Occupation of Land Act No. 19 of 1998 (herein referred to as *"PIE"*);

3. *THE CONSTITUTION*

3.1. Section 167 (7) of the Constitution of the Republic of South Africa, Act 108 of 1996 (as amended) (herein referred to as *"the Constitution"*).

4. *RECORD REFERNCES*

4.1. Vol. 1, pp. 13 – 17, of the record (Magistrate A. Mnguni's judgment dd 10/02/2012);

4.2. Vol. 1, p. A5, para. [7] & p. A6, paras. [8] & 9, of the record (high court judgment dd 01/10/2014, as per His Honourable Lordship, Mr Msimeki J, His Honourable Lordship, Mr Louw J concurring);

4.3. Vol. 1, p. A6, para. [9], of the record (high court judgment);

4.4. Vol. 2, p. 119, of the record (second & third paras. of van Niekerk's judgment dd 18/06/2013);

4.5. Vol. 2, p. 119, second para. lines 4 – 7, of the record (van Niekerk's judgment);

4.6. Vol. 2, pp. 118 & 119, of the record (van Niekerk's judgment);

4.7. Vol. 2, p. 119, third para, of the record (van Niekerk's

judgment);

4.8. Vol. 2, pp. 118 – 126, of the record (judgment of van Niekerk dd 18/06/2013);

4.9. Vol. 1, p. A5, para. [7], of the record (high court judgment);

4.10. Vol. 1, p. A7, para. [12], of the record (high court judgment);

4.11. Vol. 1, p. A7, para. [10], of the record (high court judgment);

4.12. Vol. 1, pp. 78 – 80, of the record, read with vol. 2, pp. 118 – 126, of the record (van Niekerk's judgment);

4.13. Vol. 1, pp. 71 & 72, para. 18.3, of the record;

4.14. Vol. 2, pp. 129 & 130, para. 2, of the record;

4.15. Vol. 2, p. 130, para. 3, of the record;

4.16. Paras. 17 & 18 of the applicant's heads of argument dd 30 July 2015;

4.17. Vol. 2, p. 130, para. 3, of the record; and

4.18. Vol. 1, p. A9, para. [16], second line, of the record.

5. *OTHER REFERENCES*

5.1. Annexure ***"JJZL1"*** hereto;

5.2. Para. 72 of the A/A;

5.3. Para. 25 of the F/A;

5.4. Para. 74 of the A/A;

5.5. Paragraph 4 of the applicant's heads of argument dd 18 July 2014, in the high court.

5.6. Para. 21 of F/A to the SCA;

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 22/15

In the matter between:

NTHOME STEVE MATHALE Applicant

and

JJZ LINDA First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1. Section 26(3) of the Constitution provides that "*No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.*"

2. One part of these "*relevant circumstances*" that a court is obliged to consider in an eviction application recognises the state's constitutional duty to take reasonable legislative and other measures, within its available resources, to achieve progressive realisation of the right of access to adequate housing.[1] That consideration is the availability of alternative accommodation.

3. This Honourable Court has called upon the second respondent to inform it whether or not alternative accommodation can be provided to the applicant in this particular matter. No mention is made of emergency or interim alternative accommodation.

4. The timing of the request made of the second respondent places it in an invidious position given that it is a party to other litigious proceedings in which the MEC for Human Settlements, Gauteng

[1] Section 26(1) and (2) of the Constitution.

has already undertaken to produce a detailed plan for the provision of housing to 133 applicants living in the same informal settlement, which plan will include possible alternative accommodation. This report is scheduled to be delivered on 6 August 2015.[2]

5. It is submitted that the second respondent's answer to this Court's further directions dated 14 July 2015 must be seen in the light of the specific facts of the application before this Honourable Court. In this application:

5.1. the applicant seeks an order which purports to concern the appealability of execution orders in terms of section 78 read with section 83(2) of the Magistrate's Court Act 32 of 1944. But when the applicant's appeal against the decision of Magistrate Mnguni is heard in the High Court, the order for his eviction from Stand 8702, Extension 14, Winnie Mandela Informal Settlement, Tembisa ("the property"), may well be set aside;

[2] Second respondent's answering affidavit, para 20. Note: at the time of preparing these written submissions the applicant had not produced an updated index which incorproated the second respondent's answering affidavit and applicant's answering affidavit. We have accordingly been unable to incorporate the relevant page references in these submissions.

5.2. if there was previously any doubt, the applicant has made it clear in his answering affidavit of 22 July 2015 that the applicant does not want alternative housing but rather insists upon the allocation to himself of the property and of the protection of his existing tenure;[3]

5.3. despite contending in his answering affidavit of 22 July 2015 that the second respondent had historically failed to make valid decisions pertaining to the allocations of stands in the Winnie Mandela Informal Settlement, the applicant has never challenged the allocations by way of judicial review;

5.4. in proceedings pending in the High Court, Gauteng Division, Pretoria under case no. 39602/15 where 133 individual residents and the Ekurhuleni Concerned Residents' Association have launched proceedings against the second respondent and other branches of government pertaining to the allocation of housing in the Winnie Mandela Informal Settlement, the MEC for Human Settlements, Gauteng has agreed to submit a report

[3] Applicant's answering affidavit paragraphs 18.4, 23.1, 23.6.

setting out a proposal for housing delivery to the applicants in that matter.

ORDER SOUGHT INTERIM IN NATURE AND APPLICANT'S POSITION RELATING TO ALTERNATIVE ACCOMMODATION

6. The applicant asks this Honourable Court to overturn the order of Magistrate Van Niekerk and to dismiss the first respondent's application for interim execution of the eviction order granted in his favour with costs.[4]

7. If the order sought by the applicant is granted, he will be legally entitled to remain in occupation of the property pending the outcome of his appeal against the eviction order granted by Magistrate Mnguni.

8. But it is the outcome of the pending appeal (and potential further appeals) against the eviction application that will determine the applicant's entitlement to occupy the property indefinitely. If the relief sought by the applicant herein is not granted, the applicant is only obliged to vacate the property on an interim basis, pending the outcome of his appeal.

[4] Prayer 6.2 Notice of Motion Application for Leave to Appeal, page 135.

9. This is submitted to be highly relevant to the determination to be made by this Honourable Court in relation to the second respondent's duty to provide alternative accommodation. The applicant still has the opportunity to present argument in due course dealing with the exercise of the court's discretion as to whether or not his eviction would be just and equitable after having considered all relevant circumstances. A final determination in that regard is not yet required.

10. Furthermore, the applicant does not want alternative accommodation. He has also previously refused a reasonable offer of alternative accommodation that was made available to him by the second respondent.

11. He states expressly in his answering affidavit that *"…my appeal before this Court is not directed at my obtaining some form of alternative housing, but at protecting my existing tenure*". The applicant does not want alternative accommodation, even though he says that if an eviction order were to be granted, he and his family would be homeless.[5]

[5] Founding affidavit, paragraph 14, page 142.

12. The second respondent commenced a process of allocating housing to the occupiers who had invaded land which became known as the Winnie Mandela Informal Settlement in the late 1990's and early 2000's. As part of this process both the applicant and first respondent herein were allocated stands. The first respondent seeks to enforce his allocation, while the applicant chose to reject the stand allocated to him, without contesting that allocation in the courts.

13. Now that the development of a further housing plan for the area is underway, if the applicant were to request alternative accommodation (which would only be of an interim nature the length of which would be dependent on the outcome of his appeal of the eviction application) the applicant could be considered to be a "queue-jumper" considering that he previously declined to take occupation of the stand allocated to him without any reasonable basis for declining the allocation. The applicant is accordingly submitted to be correct in refusing to be provided with alternative

accommodation.[6] However this does not necessarily mean that he is entitled to occupy the property.

14. The possibility that there may be no available alternative accommodation to a person such as the applicant on an interim or emergency basis, while still a necessary factor to be taken into consideration by this Honourable Court, is submitted not to constitute a precondition to his eviction, temporarily or otherwise. On the facts of this matter the second respondent previously made alternative accommodation available to the applicant, which he declined.[7] It is evident from the pending high court litigation referred to above that there are other persons who require alternative accommodation who have turned to the courts to pursue their rights.

NO PENDING REVIEW PROCEEDINGS AGAINST THE SECOND RESPONDENT'S HOUSING ALLOCATION IN WINNIE MANDELA INFORMAL SETTLEMENT

[6] See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 26.
[7] See Strydom, J and Viljoen, S "*Unlawful Occupation Of Inner-City Buildings: A Constitutional Analysis Of The Rights And Obligations Involved*" PER 2014 VOLUME 17 No 4 at pg 1215.

15. The applicant persists in his allegation that the property ought to have been allocated to him and contends that in not doing so, the second respondent made an invalid allocation decision.[8]

16. He persists in this allegation despite admitting that the first respondent has been allocated the property and that the second respondent allocated to him an alternative stand in Esselen Park in 2004, which he declined to accept, preferring instead to maintain the view that the property should have been allocated to him.

17. It is submitted that if the applicant indeed held the view that an invalid allocation had been effected by the second respondent in relation to the property, his remedy ought to have been to challenge the allocation in court proceedings by way of a judicial review.

18. An invalid administrative action or decision is treated as valid and in effect until pronounced as invalid and set aside by a competent court.[9] Without taking steps to have the second respondent's

[8] Applicant's answering affidavit, paragraph 17.3.
[9] *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) at para 32 and Hoexter, C *Administrative Law in South Africa*, 2nd edition, at pg 545.

decision set aside, the applicant cannot rely upon allegations of invalid decisions and historical failures on the part of the second respondent. These considerations ought not to be taken into account by a court hearing an application for an enforcement order pending the outcome of an appeal when making a determination on the "interests of justice" and "just and equitable" criteria alleged to be applicable.[10]

19. Similarly to the position adopted by the MEC for Health, Eastern Cape in the *Kirland* matter, the applicant here seems to have adopted the position that he can ignore what he contends is an invalid administrative decision taken in 2004 not to allocate to him the property on which he had resided, as at that stage, for 10 years but instead continue to occupy the property he regards as his home.

20. Absent a formal counter-application to the eviction application launched by the first respondent, in terms of which the applicant herein sought to have the decision not to allocate him the property declared invalid and set aside, it is submitted that the applicant is

[10] *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC) at para 66.

not permitted to invoke alleged invalid allocations as a factor to be considered by a court in either enforcement or eviction proceedings.

PENDING HIGH COURT PROCEEDINGS PERTAINING TO THE WINNIE MANDELA INFORMAL SETTLEMENT

21. The applicant on the one hand has indicated his intention to join the proceedings referred to in the second respondent's answering affidavit in terms of which the MEC for Human Settlements, Gauteng is to submit a proposal for housing delivery.[11] It is submitted that this is the correct approach for the applicant ought to adopt.

22. But he also seems to persist in claiming that he is "*entitled to have [the property] allocated to [him] and to receive title to it*" and accordingly alleges that by joining that application, he will not be afforded the relief he ultimately seeks, because the applicants in that matter seek an order for possible alternative housing as opposed to the housing they currently occupy.[12]

[11] Applicant's affidavit, paragraph 22.1.
[12] Applicant's affidavit, paragraphs 23.5 and 23.6.

23. For the reasons stated above, by persisting in this application and indeed with the appeal in the pending eviction proceedings, the applicant will still not be entitled to the relief he seeks as the property will not be allocated to him even if both proceedings are concluded in his favour.

CONCLUSION

24. The second respondent understands and accepts its duties in relation to providing alternative accommodation to unlawful occupants finding themselves in a vulnerable and potentially homeless position when a person with better title to a property seeks to enforce their rights to occupation.

25. However in relation to the facts of this matter, it is respectfully submitted that the second respondent is under no obligation to consider the applicant and his family for any emergency or interim alternative accommodation because:

25.1. The second respondent previously made a stand available to the applicant in nearby Esselen Park, which stand the applicant declined to accept;

25.2. The applicant does not want to be accommodated in alternative accommodation, but is desirous of having the property allocated to him, despite having been encouraged by the second respondent to join the proceedings instituted out of the Pretoria High Court under case no. 39602/15 in order to have his position dealt with permanently in the housing plan currently being formulated;

25.3. The applicant has not formulated a legal challenge to the second respondent's allocations of stands in the Winnie Mandela Informal Settlement and accordingly the allocation of the property to the first respondent remains valid.

26. The second respondent will only be in a position to deal with the availability of more permanent alternative accommodation within the Winnie Mandela Informal Settlement more generally once the housing plan of the MEC for Human Settlements, Gauteng is made available.

NA CASSIM SC
S FREESE

Chambers
Sandton
3 August 2015

LIST OF AUTHORITIES

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

2. Strydom, J and Viljoen, S "*Unlawful Occupation Of Inner-City Buildings: A Constitutional Analysis Of The Rights And Obligations Involved*" PER 2014 VOLUME 17 No 4.

3. *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA).

4. Hoexter, C *Administrative Law in South Africa*, 2nd edition, at pg 545.

5. *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (3) SA 481 (CC).