



**IN THE HIGH COURT OF SOUTH AFRICA  
WESTERN CAPE DIVISION, CAPE TOWN**

**Case No: A168/2023**

In the matter between:

<b>SHAYNE TALIONA</b>	First Appellant
<b>NTIMI AYABU GODFREY</b>	Second Appellant
<b>GLYNNIS CAROLINE BENTHAN</b>	Third Appellant
<b>JOHN ROERT BROPHY</b>	Fourth Appellant
<b>ALEX GANBASHANGA</b>	Fifth Appellant
<b>EMILIO HUTIRE</b>	Sixth Appellant
<b>MUAMUDO ASSANE</b>	Seventh Appellant
<b>RENE SAULS</b>	Eighth Appellant
<b>ADJION ATHMAN JUMAAN</b>	Ninth Appellant
<b>ERIC LUSINDE</b>	Tenth Appellant
<b>NKERENGURUTSIMANA JEAN-CLAUDE</b>	Eleventh Appellant
<b>MOHAMED AWAZI</b>	Twelfth Appellant
<b>BAKARI SALIM HASSAN</b>	Thirteenth Appellant
<b>AMANI FEROUZ KABANGA</b>	Fourteenth Appellant
<b>DESIRE ROZANNE PLAATJIES</b>	Fifteenth Appellant

<b>REGGIE POONYANE</b>	Sixteenth Appellant
<b>AHMED ABDULLAH</b>	Seventeenth Appellant
<b>JESSY TSHBAMBE</b>	Eighteenth Appellant
<b>GRAHAM PETERSEN</b>	Nineteenth Appellant
<b>RAPHAEL MAJURA</b>	Twentieth Appellant
<b>BONGANI MHLANGU</b>	Twenty-First Appellant
<b>ANTHONY BESTER</b>	Twenty-Second Appellant
<b>ABDULE KARREM SIMBA</b>	Twenty-Third Appellant
<b>JACQUES WISNER</b>	Twenty-Fourth Appellant
<b>FRANK CHARLES CHOMBA</b>	Twenty-Fifth Appellant

and

<b>CITY OF CAPE TOWN</b>	Respondent
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Coram:	Adams, AJ (Ndita, J concurring)
Heard on:	26 September 2024
Delivered on:	March 2025

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**JUDGMENT**

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**Adams, AJ**

**INTRODUCTION**

[1] In eviction proceedings, a court seeks within the specific circumstances of a matter to achieve balance between the rights of both parties while upholding the principles of fairness and equity. Eviction proceedings should reflect the principles of fairness, justice, and equity and in addition importantly reflect that the dignity of the evictee has been respected. The decision handed down should emphasize and reflect a court's duty to ensure that evictions are handled with dignity, respect for the constitutional rights of all parties involved, and balancing the rights of property owners with the constitutional rights of vulnerable occupiers. This will ensure the overall fairness of eviction proceedings and promote adherence to the just and equitable principle.

[2] This is an appeal against the judgment of the Magistrate, Cape Town, which granted an eviction order on 19 May 2023 against the Appellants, who were unlawfully occupying the property situated at Erven 28174 and 28181 situated at 2 Willow Road, Hartleyvale, Observatory ("the property").

## **FACTUAL BACKGROUND**

[3] The key facts pertaining to this case are largely undisputed. The historical background of the matter, as outlined in the affidavits filed of record by the respective parties, can be succinctly summarised as follows:

[4] During 2006, the City entered into a written lease agreement in terms of which it leased the property to the Trust for the period commencing 1 March 2006 to 31 January 2016 for a nominal rental. The property was leased for sporting purposes, specifically the education and training of children in the circus arts. The Trust conducted an operation known as the South African National Circus School from the property.

[5] In May 2015, the City issued termination notices, exercising its right to cancel the agreement. Following this notice, the Trust and the City engaged in several discussions. As a result, the City granted various concessions to the Trust, allowing it a chance to earn income to facilitate its relocation. The City had been informed that the Trust was not prepared to vacate by the end of July 2015. The City issued a further notice to vacate during June 2017, with no response from the Trust. On 22 March 2018, the City's Recreation and Parks Department conducted an inspection of the property, ostensibly following complaints received from the public.

[6] The inspection revealed that the main room of the hall/clubhouse had been divided into 5 rooms which housed approximately 12 people; a room located outside the hall was occupied by two persons; two caravans on the property were occupied by 4 persons; and two people were staying in one of the circus tents on the property. In total, approximately 20 people were living on the property and the report noted that the circus itself was no longer active but that the circus' *"owner has turned this premises into a business where people are paying him rent to stay..."*<sup>1</sup>

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<sup>1</sup> Photographs of the property as observed by City officials on 22 March 2018 are found at Volume 1, record page 67 to 78

[7] The City's Fire & Rescue Service<sup>2</sup> issued a summary abatement notice to the Trust on 7 June 2018 informing it that the various statutory violations on the part of the Trust endanger or are likely to endanger the health and safety of individuals.

[8] The occupiers were served with notices to vacate by the Sheriff on 21 January 2019, and with eviction application and notices in terms of section 4(2) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), on 18 September 2019 and 20 November 2019, respectively. On 21 January 2019, the occupiers were issued notices to vacate by the Sheriff. Subsequently, an eviction application, along with notices pursuant to section 4(2) of PIE was served on 18 September 2019 and 20 November 2019, respectively.

[9] The Appellants (the Respondents in the lower Court) opposed the application. They were initially represented by Attorney T.C. Dunn for most of the eviction proceedings, including for the preparation of the answering affidavits. Subsequent thereto, Ndifuna Ukwazi Law Centre ("NU"), "*a non-profit organisation specialising in housing litigation*" came on record for all the Respondents on 12 December 2022.

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<sup>2</sup> Fire & Life Safety Department

### **The offer of alternative accommodation**

[10] The City extended two initial offers to the Appellants for alternative accommodation. Both offers, the first at Kampies<sup>3</sup> and later at Bosasa<sup>4</sup> were rejected. The housing report identified the Kampies Informal Settlement in Philippi as a viable relocation site for the occupiers who would otherwise be rendered homeless by the eviction. The report specifies that new units would be constructed in Kampies to accommodate the occupiers requiring emergency accommodation.

[11] The offer of accommodation at Kampies was rejected on the basis that the occupiers appeared to be dissatisfied with what they observed at the location and they also raised concerns in relation to crime in the area and the distance from Observatory. The Bosasa site was rejected based on the fear of potential xenophobic violence.

[12] On 16 February 2023, NU provided a list of 29 individuals currently occupying the property. This list was included in the further conduct order issued by the magistrate. Prior to the hearing at the Magistrate's Court, the City extended another offer of emergency accommodation at one of its Safe Spaces, however, this offer was also rejected.

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<sup>3</sup> The first offer was set out in a housing report dated 11 May 2020 while the offer of accommodation at Kampies was further addressed by way of letter dated 11 August 2020

<sup>4</sup> A further offer of accommodation at Bosasa, in Mfuleni. That offer is set out in a letter dated 18 March 2022

[13] The City set out its case in the founding affidavit deposed to by Mark Basson, a Principal Facility Officer in the employ of the City. In its papers, the City sought an order from the court a quo granting the eviction of the unlawful occupants in terms of the provisions of the PIE Act and directing the unlawful occupants to vacate the property within 14 days of the date of the order. In the founding papers, the City addresses the personal circumstances of the unlawful occupiers found to be on the property and its duty to provide alternative accommodation but contends that such alternative accommodation is to be provided within the established policies and available resources. The City claims prejudice premised on the continued unlawful occupation of the property as it is not being utilised for its intended purpose. In addition, the City claims that the anti-social behaviour perpetrated by the unlawful occupants causes safety concerns with nearby residents.

[14] The Third, Fourth and Eighteenth Appellants filed individual affidavits to oppose their eviction. The affidavits contain identical averments setting out why the affidavits were deposed in the following terms:

*"I make this affidavit in order to:*

*(a) oppose my eviction from the property; place my personal circumstances*

*before the above Honourable Court;*

*(b) request that Applicant provide me with adequate housing at the property, in the alternative to permitting me to stay at the property in the circumstances that I do at present, and*

*(c) request that my Constitutional Rights, specifically my rights to housing, dignity and equality be upheld and enforced by the Applicant."*

[15] The First Appellant noted the following in an affidavit regarding the suitability of a shelter as alternative accommodation:

*“Due to the fact that a shelter is a transient space, it is not conducive to allowing or enabling the Respondents or other homeless person to keep and store personal possessions. This would include equipment used for work and making art.”*

### **Findings of the Magistrate**

[16] It is common cause that the respondent complied with all procedural requirements under the PIE Act, including proper service of the eviction notice and attempts to mediate the dispute. Further aspects which are common cause are that attempts were made to obtain information about the personal circumstances of the Appellants during the eviction proceedings and during the present proceedings. In addition, the Appellants provided information of their vulnerable circumstances, albeit that it was for the most part done in the appeal proceedings and that limited information relating to the relevant information pertinent to the question regarding whether an eviction would be just and equitable in the circumstances was placed before the Magistrate. These include details relating to financial struggles, health issues, dependents and relationship status.



[17] In the appeal proceedings, these were placed before this court in the context of an application to adduce new evidence. The question of whether the eviction of the Appellants was just and equitable centered around the issue of the appellants being rendered homeless in the event of an eviction.

[18] In this regard, the Magistrate considered the alternative accommodation the City offered to the appellants and found the shelter to constitute adequate emergency accommodation. The Magistrate found that the shelter provided access to medical and social services as well as providing accommodation, which is more formal than the accommodation at the informal settlements. The Magistrate noted the fact that there are foreigners who would not otherwise qualify for social housing and was satisfied that the concerns regarding a six-month maximum duration of stay at the shelter was addressed in the affidavit of Muneeb Harnaker. The concerns regarding a segregated dormitory which did not allow for couples was in the view of the Magistrate adequately addressed by an indication in the affidavit of Mr. Harnaker that a couple's dormitory was in the process.

[19] The lower court considered the eviction application and found that it was just and equitable to order the eviction of the unlawful occupiers. The order made on 19 May 2023 for the Respondents in the court a quo to vacate the property by 31 July 2023 was made conditional on the City assisting those who elected to be relocated to the Safe Space 2 and on the Appellants being "*permitted to stay at the shelter for a minimum*

*period of eighteen months subject to them complying with the rules and regulations of the shelter*". It is this order that the appellants seek to assail in this court.

[20] Aggrieved with the outcome, the Appellants now seek to overturn the decision on the grounds that the lower court failed to properly apply the just and equitable provisions of the PIE Act.

### **Grounds of appeal**

[21] From an initial number of 11 grounds set out in the notice of appeal, the grounds of appeal were limited to the three grounds dealing mainly with the appropriateness of the Culemborg Safe Spaces 2 ("the shelter") as suitable alternative accommodation.

[22] It is common cause that the Appellants are in unlawful occupation of the property. The grounds of appeal as discernible from the notice of appeal may, in a nutshell, be summarised as follows:

- (a) Lack of Security for belongings which is premised on the contention that the Magistrate erred in not considering the needs of the appellant to store their personal possessions and tools of trade which they have accumulated over many years. The shelter only provides a safe which does not provide sufficient storage capacity.

- (b) The Lock-out rule which ground of appeal is premised on the alleged failure of the Magistrate to follow the decision in *Dladla v City of Johannesburg (Dladla)*.<sup>5</sup>
- (c) The segregated dormitories which ground is rooted in the fact that the enforcement of a segregated or single sex dormitory policy violates, *inter alia*, the right to dignity and interferes with the family life of the appellants. The prohibition on receiving visitors at the shelter in addition means that partners and parents with children are not able to spend time with each other in the privacy of the shelter and such visits would have to happen in public.

[23] The Appellants are of the view that the learned Magistrate erred in exercising his discretion by not following the decision in *Dladla* and says it will not be just and equitable for them to be evicted from the property.

#### **The remaining Appellants before us**

[24] For any order or decision of a court to be effective, it is necessary to know who the parties are.

[25] This issue relates to what the order of the Magistrate says. The Magistrate's order as it appears from the record indicates that the order is limited to First to Twenty-Fifth Respondents. In these proceedings, however, it became apparent that the proceedings

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<sup>5</sup> [2017] ZACC 42

before the Magistrate was not static and during the proceedings, there was movement on the property with occupants leaving and new occupants moving in throughout. It appears that at some stage, a list of those considered to be involved in the proceedings before the Magistrate would be those individuals as they appear on a list compiled by the respondents in the eviction proceedings in consultation with their legal representatives as confirmed by counsel for the City and not confined to those formally cited as Respondents in the proceedings in the court a quo.<sup>6</sup>

[26] The judgment of the lower court however included individuals who were not cited by name and who were cited under the catch-all citation of all other unlawful occupants. These individuals would be those connected to the cited respondents such as children and/or spouses.

[27] Annexed to the order handed down by the Magistrate is a list of Respondents residing at the property as of February 2023 which was presented to the court. That list reflected a total of 29 adults who were included in the order albeit not formally cited in the proceedings.

[28] The number of Appellants remaining who are persisting with the appeal and who are represented by RKP Attorneys decreased to eleven, namely the Third, Fourth, Eighth,

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<sup>6</sup> The list of Residents/ Respondents residing at the property is reflected on a list found on page 304, Volume 4 of 11 of the Record and contains the names of 29 individuals.

Eleventh, Twelfth, Fifteenth, Sixteenth, Eighteenth, Nineteenth, Twenty-First and Twenty-Fourth Appellants.<sup>7</sup>

[29] The personal circumstances of the eleven individuals are reflected in information contained in the personal circumstances questionnaires; and affidavits filed in the eviction application; and in the appeal as part of further intervention; and consultation with the Appellants' updated information was provided to this court.

### **Preliminary Points**

#### **Application for condonation**

[30] The Respondent made application for condonation for the late filing of the conditional answering affidavit as well as for the late filing of the heads of argument. Reasons for the failure to comply with the timelines set out in the order dated 29 August 2024 were provided as part of the application.

[31] A similar application was brought by the Appellants for condonation for the late filing of their application for the admission of new evidence, the late filing of the appellants replying affidavit and the appellants supplementary heads of argument.

[32] Both parties gave detailed explanations in relation to the reasons underlying the late filing in the affidavits which accompanied the applications. The applications on both

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<sup>7</sup> See notice of withdrawal filed by RKP Attorneys

fronts were not opposed. The delay in filing the respective papers was minimal, the explanation for the delay is adequate and there is no prejudice caused to either party. Consequently, condonation was granted for both applications.

### **The application to admit new evidence on appeal**

[33] The Appellants applied for leave to submit further evidence on appeal and submitted that the new evidence is required to be admitted for consideration in the appeal as it is relevant to the issue of what is just and equitable and the Appellants would be prejudiced if the lower court's order was not upset on appeal. The Respondent, on the other hand, submitted that the Appellants had sufficient opportunity at the initial proceedings before the Magistrate to present evidence relating to their personal circumstance and reasonably considered, the application should not be granted.

[34] The appeal was set down for hearing on 16 August 2024. At that hearing, the parties were engaged inter alia regarding the question of who the parties before the court were and the matter was ultimately postponed facilitating a process whereby the appellants' counsel could do an occupancy audit and to enable consultation and interventions by the Social Development Department in relation to certain aspects of the circumstances of the appellants. An order was taken by agreement on the 29 August 2024, setting out the further conduct of the matter and postponing the hearing of the appeal to 26 September 2024.

[35] During the interlude, the legal representatives for the Appellants had a consultation and conducted an occupancy audit wherein they met with the appellants at the property in question. Flowing from this consultation, additional affidavits were filed and information obtained during that consultation and the interventions that flowed from it underpins in large part the application to present new evidence on appeal. The occupancy audit revealed that new occupants not listed in the eviction application had moved onto the property while others had left. It is apparent even in the proceedings in the lower court that the situation as to who resided on the property has always been fluid.

[36] The Appellant served and filed an application for leave to admit new evidence. The Appellant filed its answering affidavit on 16 September 2024 to which the Respondent replied.

[37] Pursuant to the occupancy audit, the evidence which the applicant sought to introduce on appeal before this court was ostensibly an attempt to place this court in a position to have regard to all the information so a fuller and bigger picture of the facts may emerge.

### **New facts relating to Safe Spaces 2**

[38] The Appellants' averments pertaining to the unjust and inequitable order handed down in the court a quo relate to the suitability of Safe Spaces 2 as alternative accommodation. They rely on three grounds to do so, and the new information seek to

provide additional information to elucidate some of these aspects. The First Appellant deposed to an affidavit wherein he deals with the storage of personal effects of the appellants as follows:

*“Due to the fact that a shelter is a transient space, it is not conducive to allowing or enabling the Respondents or other homeless person to keep and store personal possessions. This would include equipment used for work and making art.”*

[39] It is common cause that the Safe Spaces 2 shelter makes provision for each occupant to be provided with a locker to store their personal possessions. There is no indication regarding additional detail in relation to storage of furniture and other property.

[40] The new information the appellants wished to introduce relates to the size of the locker as well as the lock-out rule and the segregated dormitory rule. Additionally, they sought to present further information regarding the rules in place at the Safe Spaces 2 shelter which is contained in a document residents were required to sign prior to admission served before the Magistrate.<sup>8</sup> The difficulties with these rules will be discussed later in this judgment. The appellants also sought to introduce evidence relating to the conduct of staff members and the day-to-day operations at the Safe Spaces 1 and 2.

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<sup>8</sup> An affidavit deposed to by Mr Muneeb Harnaker on behalf of the City was presented in the eviction proceedings



[41] The other information relates to the grounds detailing the lock-out rule and the segregated dormitory rule which the appellants seek to explore in more detail by providing additional information regarding their relationship status and dependents as set out below.

### **New Evidence relating to the Appellants before Court**

[42] The personal circumstances of the appellants which were presented when the matter was heard in the court a quo can be summarised as follows:

- (a) of the twenty-nine occupants there were twenty-six males and three females.
- (b) the male occupants were aged between 28 and 50 years old and twenty-one of the twenty-six males were foreign nationals.
- (c) the female occupants were all South African citizens, then aged 27, 35 and 64 years, respectively.
- (d) their relationship status was reported as nineteen of the occupiers were either single with no dependents or no information was given; and
- (e) the questionnaires reflect only one couple in occupancy (namely the Eighth and Ninth Appellants) while the position with the Twenty-First Appellant is unclear as he describes himself as “engaged” but gives no indication of whether he was cohabitating with his partner.

[43] A few of the occupants indicated on the questionnaires that they have medical issues ranging from living with depression, one indicated that they are HIV-positive,

another stated that he has epilepsy which is controlled by medication, and one indicated that he suffers from an intellectual disability.

[44] The only occupiers who indicated they have dependents and provided details of the children were the Eighth and Ninth Appellants. The Magistrate did not call for additional information to be presented to him regarding the legal status of the foreign nationals nor those of the dependents listed despite these indications. As was indicated by the Appellants, this is key information to determine the unsuitability or otherwise of Safe Space 2 as alternative accommodation.

[45] As indicated earlier in this judgement, not all the Appellants before this court were named Respondents in the initial proceedings. Some were joined to the proceedings by way of the list of 29 occupants which was incorporated into the order handed down in the court a quo. The personal circumstances questionnaire of those on the list and included in the order were all filed prior to 16 February 2023,<sup>9</sup> albeit that some had taken occupation after the answering papers had been filed. These questionnaires set out details of their employment, family ties, dependents and in some instances marital status. Three appellants deposed to affidavits opposing the eviction.<sup>10</sup>

[46] The information contained in the personal circumstances set out information sparsely and by way of this application, the appellants seek to augment the information contained in the personal circumstances questionnaire which according to the

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<sup>9</sup> The date the application for eviction was heard

<sup>10</sup> 3<sup>rd</sup>, 4<sup>th</sup> and 18<sup>th</sup> appellants

submissions made on behalf of the appellants will be of great assistance to the court in determining the issue of whether their eviction is just and equitable.

[47] So, for example the Third Appellant seeks to introduce new evidence relating to her grandchildren who may reside/overnight on her property over weekends and which was included in the papers she filed but is considered pertinent to the issue to be determined. In other questionnaires information relating to partners, children and medical conditions<sup>11</sup> are mentioned but sparse information was given as was indicated earlier.

[48] The Fourth, Eighth, Twelfth and Fifteenth Appellants provide information regarding children but provide no further details of whether they reside with them on the property or not and if not, whether they exercise contact with the child(ren). From the questionnaires, there are foreigners in occupation at the property and no information is provided in the papers regarding their legal status. The information sought to be introduced as new evidence include information setting out the current legal status of these appellants.

[49] Adv. Nyman, counsel for the Appellants submitted that the information did not constitute entirely new information because it was placed before the Magistrate and the new evidence merely elaborates on the existing information. This was conceded by Adv. Wharton on behalf of the Respondent. It is noted that the respondents to the eviction proceedings (Appellants in this court) possessed the relevant information they now assert

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<sup>11</sup> The 4<sup>th</sup> appellant indicated he is living with depression, 18<sup>th</sup> appellant record that he is in receipt of a disability grant from SASSA for epilepsy and the 21<sup>st</sup> appellant recorded that he suffers from an intellectual disability

may assist the court at all material times and in *Luanga v Perthpark Properties*<sup>12</sup>, the court made it clear that the respondents to eviction proceedings have a duty to place such relevant information before the court. The onus however remains with the applicant seeking eviction to ensure that the court is in possession of all relevant information.

[50] Adv. Nyman submitted on behalf of the appellants that the magistrate did not ask pertinent questions in relation to; for example, the status of the foreigners and how their status may impact their ability to access accommodation offered by Safe Spaces. It is common cause that Safe Spaces do not offer accommodation to undocumented foreigners and this information would have been paramount for the Magistrate to have in the exercise of his discretion on the question of just and equitable. The number of undocumented foreigners is large in relative terms when compared to the number of evictees. In the present circumstances, this would mean that several of the appellants would not have had access to the shelter. Therefore, it would not have been just and equitable to order their eviction and removal to Safe Spaces 2.

[51] In relation to the affidavits describing conditions at safe spaces 1 and 2, Adv Nyman submitted that when the application served before the Magistrate, the only information regarding the proposed alternative accommodation was contained in Muneeb Harnaker's affidavit. Other information relating to whether safe spaces 2 may be considered as being appropriate alternative accommodation only became available to the appellants after the eviction order was granted.

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<sup>12</sup>(A99/2018) [2018] ZAWCHC 169

[52] Adv. Wharton submitted and correctly so, in my view that the information contained in these affidavits are not relevant because it relates to Safe Spaces 1 on the one hand; and those affidavits that do relate to Safe Spaces 2 which is the shelter in question, gives no context as to, for example, when the deponents resided there. The possibility of Safe Spaces being considered as suitable alternative accommodation was similarly also known to the Appellants at the time of the proceedings in the court a quo.

[53] It is indicated by Adv. Wharton that the information sought to be introduced on appeal was known at the time of the original application and could have been presented to the Magistrate. However, as Adv. Nyman correctly points out, not all the information was available such as the information regarding the status of the foreigners who have approached the Scalabrini Centre to regularise their legal status.

[54] As to why the evidence was not introduced during the eviction proceedings in the lower court, Adv. Nyman for the Appellants explained that those aspects that constitutes entirely new information was not known to the appellants at the time of the eviction proceedings before the Magistrate and the rest of the information is an attempt to provide additional information to assist this court on appeal and the respondent to have a fuller and bigger picture of the facts. It is not entirely new information, so the submission goes but the additional information merely elaborates on the existing information. This was similarly conceded by the respondent.

## The law relating to an application to present new evidence on appeal

[55] [Section 19\(b\)](#) of the [Superior Courts Act 10 of 2013](#), empowers a Court to receive further evidence on appeal. The relevant portion of the section provides:

“19. Powers of court on hearing of appeals:

The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law— ....

(b) receive further evidence;...”

[56] The test for the admissibility of further evidence on appeal is well established. The established criteria as to whether new evidence should be admitted are the need for finality; the undesirability of permitting a litigant who has been remiss in bringing forth evidence and to produce it late in the day; and the need to avoid prejudice.<sup>13</sup>

[57] An applicant must meet the following requirements:

(a) there must be a reasonably sufficient explanation why the new evidence was not led in the court a quo;

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<sup>13</sup> KSL v AL (Case no 356/2023) [2024] ZASCA 96 (13 June 2024) at para 13

- (b) there should be a prima facie likelihood of the truth of the new evidence; and
- (c) the evidence should be materially relevant to the outcome of the case.<sup>14</sup>

[58] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others*,<sup>15</sup> the Constitutional Court cautioned that the power to receive further evidence on appeal should be used sparingly and should only be permitted in exceptional circumstances.<sup>16</sup>

[59] In my view, not all the new evidence that is sought to be admitted falls within the criteria as set out. It is settled law that a court of appeal decides whether the impugned judgment is right or wrong primarily according to the facts in existence at the time the judgment was given and not according to new circumstances which came into existence afterwards.<sup>17</sup> The circumstances under which new evidence is admitted on appeal must be exceptional.

[60] As matters emerged, the appellants dealt with aspects which in my view are totally irrelevant and could never have been considered on appeal. Some of the evidence sought to be introduced should have been presented at the hearing of the application before the

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<sup>14</sup> *Spagni v The Director of Public Prosecutions, Western Cape and Others* (455/2022)[2023]zasca 24 (13 March 2023) at para 9

<sup>15</sup> (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004)

<sup>16</sup> See also *De Aguiar v Real People Housing (Pty) Ltd* [2010] ZASCA 67 2011 (1) SA 16 (SCA) para 11

<sup>17</sup> *Weber-Stephen Products Company v Airite Engineering (Pty) Ltd* (201/91) [1992] ZASCA 2; 1992 (2) SA 489 (AD); (24 February 1992)

Magistrate or at the very least prior to the handing down of the judgment, as the evidence was known and available to the appellants long before that time.

[61] The explanation as to why that was not done, according to the Appellants' submissions, is that the information that was known at the time of the original application was placed before the Magistrate and this application is aimed at augmenting the information by providing updated information which will be of assistance to this court and the Respondents in determining the matter.

[62] In addition, it was submitted that other information was not available at the time of the proceedings before the Magistrate such as for example; the status of the foreigners who have approached the Scalabrino Centre and the affidavits describing conditions at Safe Spaces. At the time of the application before the Magistrate, only the information contained in Muneeb Harnaker's affidavit was placed before the Magistrate. Other information became available after the eviction order was granted such as the information relating to why Safe Spaces 2 was unsuitable, alternative, accommodation.

[63] The other new information sought to be placed before us relates to the five new occupants who were not cited in the initial proceedings before the Magistrate. It was submitted that any eviction order would also impact these five people. They were living at the premises at all relevant times but were not cited in their personal capacities.



[64] Against this backdrop, this court must decide whether the new information is relevant whether it could be of assistance to this court and whether, within the requirements laid down as indicated, the new evidence stand to be admitted.

[65] Adv. Wharton's submissions relating to the application for new evidence to be admitted centered around the onus on the Appellants to have placed all available evidence before the court during the eviction proceedings. It was submitted that the Appellants were represented at all relevant times during application, and it was only during the preparation of the notice of appeal that they had no representation for a limited time. The respondent submitted that the appellants had opportunity to place personal circumstances before the court a quo and took the opportunity to do so.

[66] An order taken by agreement in February 2023<sup>18</sup> recorded that the Respondents would deliver their completed personal circumstance questionnaires by a certain date and para 4 of that order provides that the Social Development and Early Childhood Development (SDECD) would conduct social intervention to offer social assistance among other things. As a result of these interventions, a further housing report was obtained and a further report from the SDECD department providing for an opportunity for the Appellants/Respondents to comment on these further reports which, according to the Respondents submissions, provided ample opportunity to present the evidence they now seek to introduce on appeal.

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<sup>18</sup> see volume 4 page 302 -304

[67] I am mindful the Magistrate was dealing with changing sets of information, and it must be kept in mind that the occupiers were transient in the sense that people were leaving and others joining all the time. The new occupants, however, are not before this court. The Appellants had ample time to place the relevant information relating to new occupants before the court a quo but failed to do so. This is evinced by the information provided in the court a quo which culminated in the list of 29 individuals residing at the property which included some not cited as respondents in the eviction but who were included in the proceedings by agreement and incorporated in the order handed down by the Magistrate.

#### **The finding in the application to admit new evidence**

[68] The Appellants conceded that the 'new people' were not listed in the order of the Magistrate and are not part of the appeal. The information pertaining to them must accordingly be excluded from consideration as they are not parties to the appeal.

[69] The criticism regarding the information contained in the affidavits relating to the safe Spaces 1 not being relevant and those dealing with Safe Spaces 2 as being too sparse to be of assistance are equally meritorious. In the result, the application to admit new evidence relating to the Safe Spaces shelters and personal information relating to the five individuals who are not before the court is refused.

[70] I am of the considered view that the information setting out the updated personal circumstances of the appellants before court is relevant and of assistance to the court in the appeal and should be admitted. The application to admit the evidence as contained in affidavits setting out the current personal circumstances of the appellants is granted.

## **The Merits of the appeal**

### **Principal Submissions by the parties**

[71] Adv. Nyman placing reliance on the *City of Cape Town v Commando and Others*<sup>19</sup> and *Dladla*<sup>20</sup> judgments submitted that the Magistrate is enjoined to ensure that he is in possession of all relevant information and circumstances required to determine whether an eviction will be just and equitable. In addition, she submitted that the Magistrate in the court a quo was alive to the fact that there were circumstances which may have negatively impacted the ability of the appellants to take up the offer of accommodation at the shelter such as the undocumented foreigners, who would not be permitted entry. In other instances, there were Appellants with partners and children whose family life may have been adversely affected due to the segregated dormitory rule and the Magistrate was aware that at the time of the order, the couple's dormitory was not complete but in process. It was submitted that the failure to call for additional information was fatal and the order stand to be set aside. Additional submissions relating to the failure of the Magistrate to adhere to the principles of stare decisis in not following the decision of the

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<sup>19</sup> [2023] 2 All SA 23 (SCA)

<sup>20</sup> supra

Constitutional Court in *Dladla* which struck down rules similar in substance to the segregated dormitory and lock-out rule as unconstitutional, and which ought to result in the appeal being upheld was placed before this court in argument on behalf of the Appellants.

[72] Adv Wharton made submissions that the occupation was of a transient nature and there was no duty on the Magistrate to call for additional information as some of the occupiers were constantly leaving with new occupiers joining. It was submitted on behalf of the City that the Magistrate dealt with the information placed before him and since some information fell peculiarly within the knowledge of the appellants, they had a duty to place the relevant information before the Magistrate.

### **Issues for Determination**

[73] This appeal raises two critical questions for consideration, namely:

- (a) Did the Magistrate properly consider whether granting the eviction was just and equitable under the circumstances and with particular reference to the suitability or not of the shelter as emergency alternative accommodation for the Appellants.
  
- (b) Whether the eviction order was consistent with the constitutional rights of the Appellants.

## Applicable Legal Principles

[74] The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act*<sup>21</sup> (PIE) governs the eviction of unlawful occupiers and requires courts to ensure that an eviction order is just and equitable. Section 4(7) of the PIE Act specifically requires the court to consider:

- (a) The rights and needs of vulnerable groups, including the elderly, children, and persons with disabilities
- (b) Whether alternative accommodation is available for the occupiers
- (c) The respective interests of the property owner and the unlawful occupier.

[75] Section 26 of the Constitution further guarantees the right to adequate housing and prohibits arbitrary evictions.

[76] It is well established that for an applicant to be successful in evicting a person from its property, it should be proven that the applicant is the lawful owner or has a legal right to occupy or control the land or the property; that the occupier is in unlawful occupation of the property and that it is just and equitable that the occupier be evicted from the property.

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<sup>21</sup> Act 19 of 1998

[77] It is common cause that the procedural requirements for the eviction of the appellants had been complied with and that the appellants were in unlawful occupation.<sup>22</sup> The germane question for consideration by the lower court in the circumstances of this case was whether it would be just and equitable for the appellants to be evicted from the property of the respondent and the suitability or otherwise of the proposed alternative accommodation. It has been decided in several cases that the effect of PIE is not to expropriate private landowners of their land, but that it merely delays or suspends the owner's rights to exercise control over their property until a determination has been made as to whether an eviction will be just and equitable, and if so, under what circumstances.<sup>23</sup>

[78] In *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others*<sup>24</sup>, the Supreme Court of Appeal observed as follows:

*“Paragraph 11: In terms of s 4(7) of PIE an eviction order may only be granted if it is just and equitable to do so, after the court has had regard to all the relevant circumstances, including the availability of land for the relocation of the occupiers and the rights and needs of the elderly, children, disabled persons and households headed by women. If the requirements of s 4 are satisfied and no valid defence to an eviction order has been raised the court ‘must’, in terms of s 4(8), grant an eviction order. When granting such an order the court must, in terms of s 4(8)(a) of PIE, determine a just and equitable date on which*

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<sup>23</sup> *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA).

<sup>24</sup> [2012] ZASCA 116; 2012 (6) SA 294 (SCA) (14 September 2012)

*the unlawful occupier or occupiers must vacate the premises. The court is empowered in terms of s 4(12) to attach reasonable conditions to an eviction order.”*

[79] Apropos the question of personal and relevant information, the decision maker may be required to determine the issue of just and equitability in particular circumstances to order an eviction. The court in *Ndlovu v Ngcobo, Bekker and Another v Jika*<sup>25</sup> observed:

*“Paragraph 19: Another material consideration is that of the evidential onus. Provided the procedural requirements have been met, the owner is entitled to approach the court on the basis of ownership and the respondent’s unlawful occupation. Unless the occupier opposes and discloses circumstances relevant to the eviction order, the owner, in principle, will be entitled to an order for eviction. Relevant circumstances are nearly without fail facts within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties. Whether the ultimate onus will be on the owner or the occupier we need not now decide.”*

[80] PIE invests in the courts the right and duty to make an order, which is just and equitable, in the circumstances of the specific matter. This determination of eviction proceedings and the terms on which an order is granted is underpinned by what would be just and equitable in the circumstances as informed by specific circumstances that must be considered. In other words, the court, in determining whether to grant an order or in determining the date on which the property must be vacated, must exercise a

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<sup>25</sup> (1) (240/2001. 136/2002) [2002] ZASCA] 87; 4 All SA 384 (SCA) (30 August 2002) the Appeal Court stated as follows

discretion as to what is just and equitable. The discretion is one in the wide, and not the narrow sense. Consequently, the court does not have a free hand to do whatever it wishes.<sup>26</sup>

[81] The court considering what is just and equitable exercises a wide discretion and what is just and equitable will vary from case to case as circumstances inevitably will differ. Some of the circumstances the court will have to consider in this determination is:

- (a) the length and duration of occupation
- (b) whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier.
- (c) the rights and needs of the elderly, children, disabled person or households headed by women.
- (d) Section 4(7) of the PIE Act must be considered together with section 4(8) which is the empowering section as indicated supra. Section 4(8) provides:

“If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine –

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and

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<sup>26</sup> *Ndlovu v Ngcobo; Bekker and Bosch v Jika supra*



- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a)”

## **Discussion**

### **The impact of insufficient relevant information on the question of just and equitable**

[82] Counsel for the appellants by way of affidavit and in argument set out extensively the personal circumstances of the appellants before us. It was conceded in argument that the affidavits and information contained therein of the new occupants who are not before us is not relevant to these proceedings and have been left out of the account. It is apparent from these submissions that the circumstances of the various appellants differ substantially and that in determining what is just and equitable in terms of the respective occupants, their specific circumstances must be considered.

[83] There are various instances where it is apparent from the judgment that the Magistrate could have benefitted from additional information and should have called for such information to be provided to him. One instance that comes to mind is that a large number, in fact most of the unlawful occupants are foreigners as is apparent from the list provided and the judgment of the Magistrate reveals that he was alive to that fact,

however he did not follow up or call for information regarding their legal status to be provided to him.<sup>27</sup>

[84] The issue relating to the legal status of the foreigners is particularly important as the proposed alternative accommodation ultimately deemed suitable by the Magistrate effectively bars entry to undocumented foreigners and opened a real possibility of rendering some or all the foreigners in occupation at the property homeless, which the provisions of the PIE Act seek to prevent.

[85] In addition, even for some of those who are not excluded based on their legal status, there are other factors which point to the proposed alternative accommodation being unsuited. The personal circumstances of the appellants, some of which served before the Magistrate clearly points to them pursuing professions which require tools and which they would not be able to store at the shelter which would serve as the alternative accommodation and there is a couple who cohabit who would not be allowed to share the same space in the facility. While there was information presented to the Magistrate that Safe Spaces 1 may allow for couples and that dormitories to accommodate couples were in process at Safe Spaces 2<sup>28</sup>, it was not indicated at what stage the process was and no enquiries were made or information offered about the possibility of couples being accommodated at Safe Spaces 1.

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<sup>27</sup> See page 711 – 712 para 42 of the judgment where the Magistrate remarks: "...According to the report the respondents were informed that the period of six months permitted to stay at the shelter could be extended. They were advised that undocumented foreign nationals are not permitted at the shelters and that Safe Space 1 may allow for couples."

<sup>28</sup> Magistrates Judgment page 712

[86] The other concern was that some of the Appellants had children in respect of whom they exercised contact, and the facility was not family friendly or set up to accommodate the children of those occupants when they were permitted to exercise such contact. In addition, there are some minor children residing on the property with their parents, for example the Eighth Appellant and her partner together with their children would not be accommodated together at the facility and the family would be split. This is corroborated by the report and affidavit of Mr. Muneeb Harnaker filed by the Respondent in the eviction proceedings. The Magistrate's order did not make provision for any concessions to be afforded to couples and families to be accommodated in the same space nor did it make any provision for appropriate storage of the assets or tools of trade of the appellants.

[87] Moreover, an eviction order would leave some of the occupants homeless for the reasons stated. It was submitted by the respondents that the attitude of the occupants throughout the process was that they sought to be accommodated at the property and refused any offer of alternative accommodation. It is common cause that the initial offer of temporary alternative accommodation was for premises more than 32km from the property the occupants were residing at. It is also not disputed that those occupants who were employed, worked near the property and the reasons for declining the offer of accommodation at BOSASA and Kampies were linked to distance from work and other amenities as well as in the case of the foreigners, fear of xenophobic attacks.

[88] Upon reviewing the record of proceedings, it is apparent from the judgment that in determining the matter, the Magistrate had regard to the personal circumstances of the occupants as it was placed before him. It is apparent that to some extent, the Appellants presented evidence of their vulnerability, including details of, for example a child in the household, ongoing medical treatment, or specific requirements relating to their employment such as the need to have storage for tools. These factors should have been given greater weight by the Magistrate and as indicated, it is apparent that the information made available to the Magistrate was patently inadequate to inform the enquiry and there is a duty on him to become engaged in judicial active management and to take steps to ensure that he is placed in the best possible position to make an informed decision on the question of just and equitability of the order.

[89] In *Port Elizabeth Municipality v Various Occupiers*<sup>29</sup>, the Constitutional Court reminds us that a court in eviction proceedings is empowered to go on a fact-finding mission and must take an active role in the proceedings. It is noted that where required, the court is called upon to go beyond its normal functions and to engage in active judicial management, according to equitable principles and that in addition to lawfulness of the occupation, the court must have regard to the interests and circumstances of the occupier and pay due regard to broader considerations of fairness and other constitutional values, so as to produce a just and equitable result.

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<sup>29</sup> [2004] ZACC 7; 2005 (1) SA 217 (CC) at para [36]

[90] Regrettably, in the application before the Magistrate concerning the eviction of the appellants in this matter, it is apparent that he did not exercise the obligation to ensure that he has all relevant information prior to exercising his discretion, especially in relation to foreigners and families and was thus not best placed to make the decision on just and equitable in relation to the eviction.

[91] The Magistrate did not ask pertinent questions regarding circumstances inherent in the matter nor did he call for information which would have been paramount for the magistrate to have in the exercise of his discretion on the question of just and equitable. The number of undocumented foreigners is large in relative terms when compared to the number of evictees. In the present circumstances, in the absence of clear guidelines and directions from the Magistrate, this would mean that several of the appellants would not have had access to the safe spaces. Therefore, it would not have been just and equitable to order their eviction on the terms as stipulated in the order.

### **Availability of Alternative Accommodation**

[92] The Respondent failed to demonstrate that reasonable steps were taken to ensure the appellants would not be rendered homeless. This is apparent from the failure to follow up on information relating to the legal status of the foreign nationals who were occupants in circumstances where the fact that there were foreigners in occupation were not unknown but more importantly considering the rules in place at the shelter which prohibits

entry to undocumented foreigners. As indicated, the Magistrate similarly did not direct that pertinent information relating to this aspect be placed before him.

[93] It is common cause that the City is experiencing a shortage of emergency housing and due to the rapid increase in the number of people being evicted, the City has all but exhausted its facilities. The result is that the City has difficulty in providing emergency accommodation to affected individuals. The rules in place at the shelter is set out in a document referred to as the "Code of Conduct" which individuals must sign as a requirement to be permitted entry to the facility. These rules stipulate inter alia, that the maximum stay at these facilities is a period of six months. While the Magistrate tried to ameliorate the effect of that rule by stipulating in his order that the occupants must be allowed to remain for 18 months, they would still be required to sign the 'code of conduct' in the original form which makes provision for a maximum of six months without amendment. There is no indication of what criteria underpins the rules which may lead to expulsion from the shelter. It is apparent from the record of proceedings in the lower court that there was no enquiry directed by the Magistrate regarding the rules contained in the "code of Conduct" document, despite the finding of the court in the *Dladla and Another v City of Johannesburg and Others*<sup>30</sup>

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<sup>30</sup> Supra where rules enforced by the shelter which is similar to those in this appeal relating to 'lock-out' and 'family separation' under which the shelter admitted occupants were held to be unconstitutional as it constituted a violation of the right to dignity, freedom and security of the person, and privacy

[94] There have been several cases<sup>31</sup> commenting on the hardships imposed by the inability of local authorities to provide housing in general and emergency housing in particular. The undignified way vulnerable individuals who find themselves at the wrong end of an eviction order are treated and the type of accommodation offered has also been a source of concern and criticism for many years. In this matter, the lack of suitable and appropriate accommodation will have the result of separating families, minimising meaningful and quality contact time between parent(s) and child(ren) as well as preventing or making it difficult for individuals currently earning an income to keep on doing so and having to rely on already overburdened social security assistance benefits. The systemic shortfalls in emergency housing provision will have the undesirable consequence of negatively impacting the livelihoods and quality of family life of the affected individuals significantly, resulting in violations of their basic human rights of privacy, dignity, and the right to own property.

### **Balancing Interests**

[95] While the respondent has a right to their property, the eviction would have severe consequences for the appellants, particularly in the absence of immediate alternative housing. It is not just and equitable to enforce an eviction under these circumstances without a plan to address the housing requirements of the appellants.

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<sup>31</sup> See unreported judgment *Moholoholo Development (Pty) Ltd v City of Tshwane and Another* Case number 57383/2021 ZAGPPHC at para 2; *Living Africa One (Pty)Ltd v Ekurhueni Metropolitan Municipality and Another* (A5019/2022)[2023] ZAGPJHC 897; *Charnell Commando and Others v City of Cape Town and Another* (CCT49/23) [2024] ZACC 27 2025(3) BCLR 243 (CC) (20 December 2024)

[96] I hold the view that the Magistrate did not have sufficient information regarding the circumstances inherent in the eviction to adequately determine the issue of just and equitable. There is no evidentiary burden on an applicant in eviction proceedings to state the facts that are unknown about the respondent, but it is for the respondent to show to the satisfaction of the Court determining the eviction that there are factors in the personal circumstances and that of the household that militates against granting the eviction order.

[97] However, the authorities make it clear that where there is additional information required, the court has a duty to take the necessary steps to obtain the information to facilitate a proper consideration of the issues.<sup>32</sup> The judgment of the Magistrate illustrates clearly that the information at his disposal did not enable him to adequately consider the profound effect and negative impact the eviction and subsequent removal of the appellants to the Safe Spaces 2 shelter would have on them and by extension in some instances on their family life.

[98] In acknowledging the authorities relevant to the matter at hand, the Magistrate displayed a keen understanding of what in theory is expected of him but in the execution of that duty, he fell far short of what was expected of him in the circumstances.<sup>33</sup> In paragraph 50 of the judgment, the Magistrate acknowledges the need to:

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<sup>32</sup> Port Elizabeth Municipality supra

<sup>33</sup> See the reference to the Port Elizabeth Municipality supra where the Magistrate quotes the Constitutional Court regarding the meaning of Section 26(3) in relation to the special constitutional regard for a person's place of abode and the Magistrate's acknowledgement that a home is a person's place of abode with what that means to poor people in particular



“...respect the dignity of the respondents by providing them with alternative accommodation which acknowledged their basic rights especially their rights to safety, security and dignity.”

[99] On that basis, the magistrate then rejects Kampies and BOSASA informal settlements as suitable alternative accommodation. However, he determines that in the circumstances, it would be just and equitable to order the eviction and in relation to the Culemborg Safe Spaces 2 facility with a ‘segregated dormitory’ and ‘lock-out rule’ similar to the rules in place at and the shelter which the court in *Dladla* held to violate those very fundamental human rights, the magistrate deems the shelter to constitute suitable alternative accommodation. The Magistrate’s recounting of the rules and criteria attached to qualification for housing programs being inter alia, South African Citizenship or permanent residence within the Republic again shows he was alive to the fact that undocumented foreigners could not be accommodated within those structures and must have ensured that pertinent information relating to particularly the legal status of those persons was placed before him.

[100] The Magistrate erred in granting the eviction order without adequately addressing the principles of whether it would be just and equitable to grant the eviction in circumstances where he ought to, in line with the authorities, have taken steps to ensure that he had sufficient information to discharge his duties. The Magistrate did not distinguish between the respective individuals and did not acknowledge the significant differences in their personal and employment circumstances that warranted a robust approach to ensure that their rights, most notably to dignity, privacy, freedom and safety

and security of the person are respected and considered in the determination of alternative accommodation. It is apparent from the circumstances that the appellants could not be treated as a collective in terms of the suitability or not of the safe Spaces 2 shelter and at a minimum, the Magistrate should have called for additional information to facilitate a proper and adequate consideration of the just and equitability of the proposed eviction.

### **Is Safe Spaces 2 suitable alternative accommodation**

[101] In *Dladla*, the Constitutional Court pronounced on the constitutional validity of rules that the City of Johannesburg set as entry requirements for admission to temporary accommodation offered to evictees. *Dladla* confirms that the rights guaranteed by The Constitution in sections 10, 12 and 14 are conferred on everyone, regardless of where they are at a given time or in this context, whether the accommodation is temporary or not. These fundamental rights may only be limited in terms of section 36 of the Constitution.<sup>34</sup> The rules sought to be impugned was held to implicate the fundamental right to dignity<sup>35</sup>, safety and security of the person<sup>36</sup> and privacy<sup>37</sup> guaranteed by the Constitution and was accordingly struck down.<sup>38</sup>

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<sup>34</sup> *Dladla and Another v City of Johannesburg and Others* (CCT124/16) [2017] ZACC 42; 2018 (2) BCLR 119 (CC); 2018 (2) SA 327 (CC) (1 December 2017)

Para 44

<sup>35</sup> Section 10

<sup>36</sup> Section 12

<sup>37</sup> Section 14

<sup>38</sup> Para 47 *Dladla supra*

[102] The facts in *Dladla* show great similarity to the present matter as the appellants before us were also required to sign a 'code of conduct' as requirement for admission to the shelter provided as emergency alternative accommodation. The rules embodied in the code of conduct are similar to the lock-out rule and the enforcement of a separate or single sex dormitory applicable to the Culemborg Safe Spaces 2 Shelter. I turn now to consider the suitability of the Safe Spaces 2 shelter against the backdrop of the decision in *Dladla* juxtaposed with the circumstances as set out by the appellants before us.

### **Lack of security for possessions**

[103] The Constitutional Court in *Dladla* opined that once evicted from their homes, it would be reasonable to expect that evictees would be provided with a substitute which is commensurate with that which they had.<sup>39</sup> *Dladla* mentions this in the context of the privacy one's own dwelling offers but, in my view, it also holds true of the peculiar circumstances of the appellants before us in relation to the need to have safe, secure, and readily accessible storage for their possessions. These specific requirements are caused by the fact that most of the appellants have tools of trade which they need to access daily to generate an income. There is limited information about the size of the locker and how secure it is. What is clear from the available information is that the storage is not sufficient to keep the furniture and other effects the appellants have accumulated over many years and as Bishop AJ noted in *City of Cape Town v Various Occupiers and Another*.<sup>40</sup>

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<sup>39</sup> at paragraph 50

<sup>40</sup> (21101/2022) [2024] ZAWCHC 173; [2024] 3 All SA 428 (WCC); 2024 (5) SA 407 (WCC) (18 June 2024)

“The Occupiers all have possessions – their clothes, their shelters, and all the other things that make up a life. They may seem meagre to some, but they are part of a dignified life. The Occupiers have collected them over a period and should not be required to give them up.”<sup>41</sup>

[104] In the context of the appeal before us, and with reference to the issue of the possessions of the appellants, the facilities offered by the shelter in this regard is not “a substitute with a measure of the same.”<sup>42</sup>

### **The lockout rule**

[105] In *Dladla*, the Constitutional Court characterized the lockout rule as cruel, condescending and degrading for the reasons stated therein and thus it offends the right to dignity.<sup>43</sup> This was stated in absolute terms, and it is clear from the tone of the judgment that no discretionary assessment of the application of this rule will negate or ameliorate the impact of the application of this rule on the fundamental right to dignity of the individual concerned. The decision in *Dladla* remains that the rule does not pass constitutional muster because it offends section 10 of the Constitution and must be struck down.

[106] The violation of the right to privacy<sup>44</sup> of the appellants by the operation of the lockout rule is self-evident. The appellants before us had a ‘home’ they could seek

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<sup>41</sup> Para 216 of the

<sup>42</sup> *Dladla* at para 50

<sup>43</sup> At para 48

<sup>44</sup> Section 14

sanctuary in at any time and enjoy the privacy it offers. This right is impacted by the lockout rule because once the appellants are evicted and as a consequence take up residence at the shelter, they are turned out onto the streets for the better part of the day and they lose any sense of privacy. This is so because they are not permitted to enter the shelter and must conduct their business out in the open for all to see.

[107] The streets of Cape Town are not safe and pose many risks. The lockout rule can potentially expose an appellant who falls foul of this rule to be placed at risk of harm. In addition, anyone taking up the offer of accommodation at the shelter will be subject to the lockout rule and thus not free to enter the shelter during the day; and they are barred from staying out beyond 20h00 which not only impacts on their freedom of movement but also for those with partners and/or children not living with them would also mean significant impact on the quality of the time, they would be able to spend with them as such visits would have to be out in the streets and other public spaces and must be over before 20h00.

### **The Separate Dormitories**

[108] This rule is in practical terms the same as the family separation rule because no provision was made to accommodate families or couples in one space. Men and women older than sixteen were not permitted to stay in the same dormitories. In *Dladla*, the court states that the right to dignity encompasses the right to family life. The way in which this

right is impacted by enforcing separate dormitories for men and women are stated in the following terms:

“The family separation rule creates a vast chasm – between parents and children, between partners and between siblings – where there should be only intimacy and love. As the High Court notes, the family separation rule erodes the basic associative privileges that inhere in and form the basis of the family. Therefore, in so many ways, the lockout and family separation rules limit the dignity of the applicants.”

[109] The right to privacy of the appellants is impacted by the separate dormitories rule because they are forced to spend time and communicate with partners, spouses, and other family members in public as they are not allowed to visit or share the same space overnight in the privacy and sanctity of the shelter. The separate dormitories rule also limit an individual's ability to move about freely within the respective dormitories and inhibits intimacy between partners which is an essential component to maintaining healthy relationships.

#### **City of Cape Town v Various Occupiers and Another<sup>45</sup>**

[110] The basis on which Bishop, AJ distinguishes the matter before him from *Dladla* was inter alia that:

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<sup>45</sup> (21101/2022) [2024] ZAWCHC 173 [2024]; 3 All SA (WCC); 2024 (5) SA 407 (WCC) (18 June 2024)

“... unlike in *Dladla*, this case is not a challenge to the rules of the safe spaces. The permissibility of the rules arises in a different context – whether the safe spaces are adequate alternative accommodation.<sup>46</sup>

[111] In addition, the learned Judge acknowledged that, unlike in *Dladla*, the shelter would be more dignified accommodation than the pavements where the occupiers had been living before the application. The judgment in *City of Cape town v Various Occupiers and Another*<sup>47</sup> is different to the order handed down by the Magistrate in the appeal before us which the appellants are aggrieved by in the sense that several in the matter which served before Bishop, AJ concessions were made to address the legitimate concerns of the occupiers and ameliorate the negative impact on their fundamental rights by the rules governing entry to the shelter. These concessions made by the City, subject to what the court deemed reasonable conditions, were incorporated into the order handed down in that matter. In addition, the matter before Bishop AJ concerned Safe Spaces 1 which could accommodate couples and arrangements were made and included in the order for the storage of the possessions of those affected by the eviction.

[112] In the appeal before this court, the proceedings in the court a quo and the order handed down by the Magistrate merely incorporated the rules governing entry into the shelter, phrased in identical terms to the rules struck down in *Dladla*, in circumstances

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<sup>46</sup> Para 167 of *City of Cape town v Various Occupiers and Another* supra

<sup>47</sup> supra

where its implementation would severely impact the lives and livelihoods of the appellants before us.

[113] The deponent to the answering affidavit in the in *City of Cape town v Various Occupiers and Another*<sup>48</sup> encapsulates the essence of the desperation of so many when he notes:

“Each of us has experienced a great deal more than we are able to say in this affidavit. Each of us hopes for a great deal more than we have experienced in our lives so far.”<sup>49</sup>

[114] This is the echo of all those who come before us in these types of proceedings who, like everyone rise every day in hope of a brighter and better tomorrow.

## **Conclusion**

[115] In this matter, I have found that while the Magistrate demonstrates a clear understanding and proper insight into the principles developed by the Constitutional Court in *Dladla*, he failed to take heed of those principles and to give proper consideration to the fundamental rights of the appellants as espoused in the applicable legal principles set out in the statutes and relevant caselaw authority referred to in the *Dladla* judgment. It is therefore appropriate to remit the matter so the Magistrate is granted an opportunity to

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<sup>48</sup> *supra*

<sup>49</sup> The deponent to the answering affidavit in *City of Cape Town v Various Occupiers and Another* (21101/2022) [2024] ZAWCHC 173; [2024] 3 All SA 428 (WCC); 2024 (5) SA 407 (WCC) (18 June 2024) at para 56



reconsider the circumstances of the applicants in the light of their updated personal information and within the guidelines as set out by the Constitutional court in *Dladla*.

[116] Accordingly, the appeal must succeed.

## **ORDER**

[117] In the result, I make the following order:

116.1 The appeal is upheld.

116.2 The eviction order granted by the Magistrates' Court is set aside.

116.3 The matter is remitted to the Magistrates' Court for reconsideration, with specific instructions to:

- (a) to ensure and oversee the meaningful engagement between the City of Cape Town and the appellants to find suitable accommodation and to cause the city to compile a housing report detailing the Temporary Emergency Accommodation or Transitional Housing that it will make available to the applicants, and the location thereof and the date when it will be made available. Such a report should deal with the proximity of such accommodation or housing to the applicants' prior residence, to public and private transport, and to educational and medical and health facilities, and explain why the particular location and form of accommodation and/or housing has been selected, and

what steps were taken by it to engage the applicants regarding the provision of accommodation or housing in compliance with this order

116.4 No order as to costs.



**Adams, AJ**  
**Acting Judge of the High Court**

I concur  
and it is so ordered



**Ndita, J**  
**Judge of the High Court**

### **APPEARANCES**

For the Appellants: Adv. R Nyman SC and R Appoles

Instructed by: Rehana Khan Parker Attorneys Inc

For the Respondent: Adv. BC Wharton

Instructed by: Adriaans Attorneys