



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 22/15

In the matter between:

NTHOME STEVE MATHALE

Applicant

and

JULY JANSON ZENZELE LINDA

First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY

Second Respondent

Neutral citation: *Mathale v Linda and Another* [2015] ZACC 38

Coram: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J

Judgment: Khampepe J (unanimous)

Heard on: 13 August 2015

Decided on: 2 December 2015

Summary: execution orders appealable — final in effect — interests of justice — irreparable harm — municipalities' housing obligations

ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal against the decision of High Court of South Africa, Gauteng Division, Pretoria is upheld and its order is set aside. In its place there is substituted:
 - “(a) The appeal is upheld.
 - (b) The execution order granted by the Magistrates’ Court is set aside.”
4. The cost orders in the Magistrates’ Court and the High Court are set aside.
5. There is no order as to costs in the Magistrates’ Court, the High Court and in this Court.

JUDGMENT

KHAMPEPE J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J concurring):

Introduction

[1] The central question is whether execution orders granted in terms of section 78 of the Magistrates’ Court Act are appealable.¹

[2] The High Court of South Africa, Gauteng Division, Pretoria (High Court) dismissed an appeal against an execution order granted in terms of section 78 of the Magistrates’ Court Act by Magistrate Van Niekerk of the Tembisa Magistrates’ Court.

¹ 32 of 1944.

An application for special leave to appeal to the Supreme Court of Appeal was also dismissed.

[3] The execution order authorised the immediate implementation of an eviction order granted in the same Magistrates' Court by Magistrate Mnguni (eviction order). The appeal against the eviction order is still pending.

[4] The applicant seeks an order from this Court: (a) declaring section 78 execution orders appealable; (b) setting aside the High Court order that dismissed his appeal; and (c) setting aside the execution order granted by Magistrate Van Niekerk.

Parties

[5] The applicant, Mr Nthome Steve Mathale, resides at stand number 8702 in Winnie Mandela Park, Tembisa. He stands to be evicted in terms of the execution order granted by Magistrate Van Niekerk.

[6] The first respondent, Mr July Janson Zenzele Linda, resides in the same township. He is in the employ of the second respondent. He instituted the eviction and subsequent execution proceedings that gave rise to this dispute. The second respondent, the Ekurhuleni Metropolitan Municipality (Municipality), is the local authority within whose area of jurisdiction the property in dispute falls.

Background and facts

[7] Mr Mathale has resided at the property since 1994. He was part of a large group of occupiers who moved onto a sizeable tract of land that is now known as Winnie Mandela Park. Mr Mathale has lived on that land for a considerable period. With the exception of an unlawful eviction at the instance of the Municipality in 2004,² he had undisturbed possession of the property for almost 20 years until Mr Linda instituted eviction proceedings in the Magistrates' Court on 18 July 2011.

² See [12] to [13] below.

[8] Mr Mathale claims that, when he arrived on what was then a barren piece of land, stand numbers were already numbered and he and his family moved onto stand number 8702. They built their home on it and made “substantial improvements” to the property over time. Between 1998 and 1999, the Municipality undertook a formalisation process of the township, installing a variety of different services including toilets, water and sanitation services. He contends that the toilets were also numbered. This resulted in each of the stands having two different numbers. Mr Mathale avers that, because of this, “administrative confusion” arose; this was exacerbated by the Municipality allocating stands to the residents that were different from those they already occupied.

[9] Mr Linda, on the other hand, claims that when Mr Mathale and others similarly positioned arrived in 1994, there were no formal stands to speak of. Instead, the formal stands and their corresponding numbers came into existence only at the time of the formalisation process. Mr Linda asserts that the formalisation itself resulted in stands being allocated to people other than those who had previously occupied them during the time the occupiers settled on the land. This meant that many residents were formally assigned different stands from those that they already occupied.

[10] During this formalisation process, Mr Linda was allocated stand number 8702, the stand occupied by Mr Mathale. The stand Mr Linda had occupied was in turn allocated to someone else living in the township. The Municipality had to put in place the necessary infrastructure for the establishment of the township.³ This entailed resizing stands so that there would be more land for the residents. In turn, this necessitated a reallocation and, in some cases, relocation of some residents outside the township.

³ Part 3 of Volume 4 of the National Housing Code, read together with section 4 of the Housing Act 107 of 1997 (Act), requires certain infrastructure to be built before an informal settlement can be considered a township. For a full exposition of the Housing Code and the Act and the implications when a settlement is developed into a township, see *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC).

[11] In 2000, the Municipality allocated Mr Mathale a stand with an RDP⁴ house in an area known as Esselen Park, some seven kilometres away from the township. Mr Mathale, however, steadfastly refused to move, averring that stand 8702 should have been allocated to him as he had settled into the community and had built his entire life around that community. Furthermore, he rejected the offer because he had made substantial improvements to the house, which he had built with his own bare hands. He regarded his allocation of the property in Esselen Park as an offer, which he rejected on the basis that it did not constitute suitable alternative accommodation for him and his family. His persistent refusal to be relocated, for what appears to be approximately six years, led to the property in Esselen Park being assigned to someone else. Mr Mathale claims that the Municipality's "offer" was then "withdrawn" in 2006.

[12] The Municipality's allocation bungle is one Mr Mathale describes as a "common one" in the township. He offers as evidence for this proposition the fact that, in 2004, the Municipality unlawfully evicted him, his family and various other occupants and families living in the township from their homes. After the formalisation process had occurred, it appears that many families refused to move from the stands they occupied in the belief that the allocations had occurred incorrectly. Having evicted these residents, the Municipality proceeded to demolish their homes.

[13] The residents agilely applied on an urgent basis to the High Court for an order declaring their eviction illegal and for an order reinstating them to their homes. The High Court granted the orders and the residents were allowed to return to their previous occupation. In order to further prove his claim, Mr Mathale proffers the case

⁴ The Reconstruction and Development Programme (RDP) is "a policy framework for integrated and coherent socio-economic progress" that "seeks to mobilise all our people and our country's resources toward the final eradication of the results of apartheid". The RDP is aimed at meeting the "basic needs of people", which includes building houses to meet their housing needs. See White Paper on Reconstruction and Development GN 1954GG 16085, 1994 at 7-9.

of another resident who was, on a separate occasion, evicted in a similar manner and who subsequently obtained similar relief from the High Court.⁵

[14] Appended to Mr Linda's opposing papers in this Court is a copy of a utility bill issued by the Municipality in his name which corresponds to stand 8702. He avers that this constitutes prima facie evidence of the fact that he owns the stand, despite the fact that he admits to not being the registered owner. Mr Mathale admits that the stand was allocated to Mr Linda but asserts that Mr Linda is not the owner. Mr Linda applied to the Magistrates' Court for an order in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act⁶ (PIE) evicting Mr Mathale from stand 8702.

Litigation history

[15] On 10 February 2012, Mr Linda obtained an eviction order. The Magistrates' Court found that Mr Linda was the registered owner of the stand and that this was dispositive of the matter. Displeased with the result, Mr Mathale noted an appeal against the eviction order.

[16] A year later, the eviction appeal remained unprosecuted apparently because of difficulties in preparing a complete record. On that account, Mr Linda applied in terms of section 78 of the Magistrates' Court Act for the eviction order to be implemented pending the finalisation of the eviction appeal. Section 78 provides:

“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 execution thereof shall be suspended pending the decision upon the appeal or application.”

⁵ Unreported judgment of the North Gauteng High Court, Pretoria, Case No NGHC 47002/2008.

⁶ 19 of 1998.

[17] The Magistrates' Court granted the execution order. Once again, Mr Mathale appealed.

[18] In dismissing Mr Mathale's appeal, the High Court assumed that a section 78 order was appealable provided that it was in the interests of justice. It proceeded to consider whether it was in the interests of justice to regard this order as appealable. It concluded it was not. The Supreme Court of Appeal dismissed Mr Mathale's application for special leave to appeal.

In this Court

[19] Mr Mathale argues that the High Court and Supreme Court of Appeal erred. He contends that on his reading of the Magistrates' Court Act, section 78 orders generally, and in particular those that relate to an eviction from one's home, are not appealable. He argues that they should be. A finding to the contrary would, in his submission, be inimical to the Constitution's equality protections and this would have an exacerbated effect on multitudes of marginalised people and the vulnerable groups that appear before the Magistrates' Courts in relation to these orders. He further argues that the inability of those litigants to appeal to the High Court to vindicate their rights is an indignity too high to countenance. He urges this Court to extend the law so that section 78 orders from the Magistrates' Court are appealable on the same basis as interim orders emanating from the High Court.

[20] Mr Linda contends that the issue is not, as Mr Mathale states, whether section 78 execution orders that would result in an eviction pending an appeal are appealable, but whether execution orders in general are appealable. Mr Linda argues that this question is not a constitutional issue that would invoke this Court's jurisdiction. Mr Linda disputes Mr Mathale's claim that execution orders should be appealable. He vacillates between positions but overall, his view is that the current legal position is clear: execution orders are not appealable. Furthermore, the interpretation of legislation is not, and cannot be, a constitutional issue. He argues that Mr Mathale is the author of his own misfortune. There was an offer of alternative

accommodation by the Municipality in 2000. Mr Mathale refused to accept it. He should therefore lie in the bed of his own making. Mr Linda reminds this Court that he bears no legal obligation towards Mr Mathale and should not be deprived of housing simply to benefit Mr Mathale.

Condonation

[21] Mr Mathale applies for condonation for the late filing of both his application for leave to appeal and written submissions. Both were filed one day late. For the application for leave to appeal, Mr Mathale proffers the reason that his lawyers had trouble contacting him in order for him to sign his founding affidavit. He explains that the lateness of his written submissions was due to his counsel's inexperience in this Court and his underestimation of the time required to draft the submissions. Mr Linda does not oppose the granting of condonation in respect of either of the late filings. Given the minimal delay, the adequacy of Mr Mathale's explanations and the absence of prejudice to Mr Linda, I am satisfied that condonation should be granted.

Leave to appeal

[22] This matter implicates section 26 of the Constitution which provides everyone with the right of access to adequate housing and protection against eviction without court supervision. Evictions and housing matters are a daily concern for millions of South Africans. This Court's decision will have an impact on how execution orders, in general, and those concerning evictions from one's home, in particular, are to be dealt with at the Magistrates' Court and High Court. The applicant has prospects of success. I am satisfied that leave to appeal must be granted.

Issues

[23] Three issues arise for determination. These are whether—

- (a) in general, section 78 orders and those concerning an eviction from one's home, in particular, are appealable;
- (b) the High Court erred in its approach to the appeal; and
- (c) there are grounds for this Court to interfere in the discretion exercised by the Magistrates' Court when it granted the execution order in terms of section 78.

Are section 78 orders appealable?

[24] Where an appeal has been noted, section 78 of the Magistrates' Court Act empowers a Magistrate to "direct . . . that the judgment shall be carried into execution".

[25] Ordinarily, interim execution orders are considered interlocutory in that they provide parties with interim relief pending the finalisation of legal action. Generally, it is not in the interests of justice for interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief.⁷

[26] However, this rule is not without exception. Whether section 78 orders are appealable must be considered with reference to section 83(b) of the Magistrates' Court Act. This section states:

"[A] party to any civil suit or proceeding in a court may appeal to the provincial or local division of the Supreme Court having jurisdiction to hear the appeal, against—

. . .

⁷ *Machele and Others v Mailula and Others* [2009] ZACC 7; 2010 (2) SA 257 (CC); 2009 (8) BCLR 767 (CC) (*Machele*) at para 22.

- (b) any rule or order made in such suit or proceeding and having the effect of a final judgment, including any order under Chapter IX and any order as to costs”.

[27] There is little doubt that, once a court permits the eviction order to be executed, pending an appeal, Mr Mathale’s right to occupy his home will be brought to an abrupt end. When the eviction order was granted, he had not been afforded alternative accommodation by the Municipality. He is a poor individual who resorted to unlawfully occupying land - a choice made out of desperation and destitution. Mr Mathale seized an opportunity to erect a simple structure to house himself and his family.

[28] If evicted, he will inevitably have to resort to some similar expedient act in order to continue to house his family. To that end, he will need to demolish his present home and take the bits and pieces of corrugated iron, doors, windows and waterproofing to erect a shelter elsewhere.⁸ In the meantime, Mr Linda will be able to move on to the stand and construct whatever he chooses to erect in place of Mr Mathale’s home. Assuming the appeal succeeds, there is simply no guarantee that Mr Mathale will be able to return and continue living on the property as he has done for the past 20 years. The house that he has constructed there over the past 20 years will be gone, and, practically, it will be incapable of re-erection in the form in which it, at present, is a home for him and his family.

[29] Furthermore, the execution order has an immediate and devastating effect upon implementation -it renders Mr Mathale homeless. The suffering and indignity that are sure to result from giving effect to the execution order are immeasurable.⁹

⁸ Some photographs in the record show three buildings erected, it is true, of corrugated iron and similarly simple material, but nonetheless formal structures with doors, windows and external paving. They are not ramshackle but are immediately recognisable as a home.

⁹ See [43] to [46] below.

[30] It is indubitable that this execution order has the effect of a final judgment and is therefore appealable.

[31] Section 83(b) provides an avenue for interlocutory relief to be subject to appeal. Properly interpreted, the section means that all orders, even if they are interlocutory, are appealable if they have the effect of a final judgment. In other words, section 83(b) makes interlocutory relief appealable, provided it is final in effect.¹⁰

[32] The “final in effect” threshold provides the High Court with the necessary flexibility to dismiss frivolous and vexatious appeals and it avoids the possibility of the High Court being inundated with appeals against execution orders. This approach requires the High Court to examine the facts and circumstances of each case to determine whether, in truth, the order is final in effect. If the order is not final in effect, then it is not appealable.

High Court order

[33] In considering this appeal, the High Court assumed, without deciding, that section 78 orders are appealable where it is in the interests of justice. In doing so, the High Court failed to apply the correct standard, which was whether the order granted was, in terms of section 83(b), final in effect. The High Court also failed to give sufficient consideration to this Court’s decision in *Machele*, which found that interim orders are appealable provided irreparable harm would result. The Court instead found that the fact that the stand was lawfully allocated to Mr Linda was dispositive of the issue.

¹⁰ Mr Mathale placed reliance on decision in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) for the argument that execution orders are not appealable. However, that case is distinguishable in that it dealt with security for costs as opposed to this case that deals with eviction from a home. Van Loggerenberg similarly makes the proposition that section 78 orders are not appealable. See Van Loggerenberg *Jones and Buckle: Civil Practice of the Magistrates’ Court in South Africa*, 10 ed (Juta & Co Ltd, Cape Town 2015) vol I at 561. Given my interpretation of section 78 read with section 83(b), this is incorrect.

[34] The High Court erred in concluding that the execution order in this case was not appealable. As already stated, section 83(b) does not require a court to determine whether the interests of justice would favour viewing an order as appealable. Rather, the relevant inquiry under section 83(b) is whether the judgment or order would have the effect of a final judgment. When considering an appeal in terms of section 83(b), a High Court is required to undertake only this inquiry. Once it has found that the decision from the Magistrates' Court has the effect of a final judgment, it is obliged to look into the merits and decide whether or not to set aside the execution order. The High Court was accordingly incorrect in its approach to the appeal. It should have determined whether the execution order had the effect of a final judgment. If it found that it did, it should then have engaged with the merits. Instead, it dismissed the appeal on an erroneous ground. Although it is sufficient on this basis alone to set aside the High Court's order, there is also another reason for us to do so.

[35] The proper standard to be applied in a case of this kind is to be found in section 83(b). An execution order in terms of section 78 is appealable provided it has "the effect of a final judgment". The High Court misconstrued the findings in *Machele*.¹¹ In that decision, this Court held that the loss of one's home in the midst of litigation is, in itself, an indignity enough.¹² It is prudent to restate the importance of the right of access to adequate housing, the purpose for its constitutional protection and the need for courts to be more sensitive to housing matters.

[36] A home means more than just having somewhere to shelter your body. There is a cloth of dignity in calling a place your home as it is inextricably linked to one's self-worth, esteem and dignity. Sachs J in *PE Municipality* perceptively noted:

"Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure

¹¹ See [33] above.

¹² *Machele* above n 7 at para 30.

space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. As the United Nations Housing Rights Programme report points out:

‘To live in a place, and to have established one’s own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right.’¹³ (Footnotes omitted.)

It is this that makes the loss of the home irreparable.

[37] Indeed, it is not only the dignity of the poor that is violated when their desperate quest for refuge is denied, but that of our society as well. Our society also carries the shame and ignominy of denying access to our own people who are especially deserving of protection, to the basic elements of a decent existence, like housing.

[38] Courts play a special adjudicative and oversight role in ensuring the execution of evictions in the most humane manner possible. This duty is accentuated when a court is dealing with individuals that are specially deserving of protection. This is not an act of judicial philanthropy, but a duty borne out of the Constitution’s commitment to a life of dignity for all.¹⁴ For these reasons, the High Court order must be set aside.

¹³ *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (*PE Municipality*) at para 17.

¹⁴ *Id* at para 15.

Should we interfere with the discretion of the Magistrates' Court?

[39] Turning to the merits of Mr Mathale's appeal against the execution order, section 78 provides that the Magistrate "may" grant an execution order. This word has been interpreted to mean the conferral of a discretion on a decision-maker.¹⁵

[40] When an appellate court is seized with an appeal against a discretion exercised by a lower court, it may only interfere with that discretion in certain circumstances.¹⁶ These circumstances include where the lower court has: exercised its discretion in a non-judicial manner; applied the wrong principles of law; misdirected itself on the facts; or reached a decision that could not have reasonably been reached by a court that has properly appraised itself with the relevant facts and legal principles.¹⁷

[41] In the present matter, the question is whether the Magistrate reached a decision which could reasonably have been reached by another court that properly directed itself to the relevant facts and legal principles. He clearly did not. The Magistrate considered that the balance of convenience favoured Mr Linda, when this was not so. He also found that the harm suffered by Mr Mathale was reparable, when the facts evince the contrary. We are accordingly at liberty to interfere with the decision of the Magistrates' Court.

[42] When the Magistrates' Court considered whether to grant the execution order, it applied the just and equitable test. In considering what is just and equitable, a court is called upon to consider a number of factors, each weighed differently, depending on the circumstances and facts of each case. Here, I will examine the irreparable harm

¹⁵ See *South African Police Service v Public Servants Association* [2006] ZACC 18; 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC) at para 16.

¹⁶ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22 at paras 87-8.

¹⁷ *Id.* See also *South African Broadcasting Corp Ltd v National Director of Public Prosecutions and Others* [2006] ZACC 15; 2007 (1) SA 523 (CC); 2007 (2) BCLR 167 (CC) at para 95 and *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 11.

either party would suffer; the prospects of success on the main appeal and the balance of convenience.

Irreparable harm

[43] This Court's decision in *Machele* found that the indignity suffered through the loss of one's home, even on a temporary basis, will always cause irreparable harm.¹⁸ The facts of this case make perspicuous the desperate and urgent need for housing. This case exemplifies the daily struggle thousands face, each person searching for a place to rest their head in peace and to build their lives.

[44] This Court is aware that if Mr Mathale is turned away, he will lose his home. However, Mr Linda is also in an invidious position. It is common cause that Mr Linda is receiving the costs of the municipal charges on the stand Mr Mathale currently occupies. While the monetary expenses incurred by Mr Linda can be recovered at a later stage without undue hardship, this should not be considered in isolation from the lived and daily experiences of millions of people who live from hand to mouth. This Court is alive to Mr Mathale's possible homelessness but it is also cognisant of the difficulty Mr Linda faces. The little income he earns is not meant to provide only for his basic needs, but it is also meant to provide a sustained life for his family so that they too can be active participants in our economy. Mr Linda also suffers the indignity of being allocated land without security of tenure. He too finds himself unsure about whether the home he resides in will be his tomorrow.

[45] Each party is making strides to build a better life, each with limited financial and economic resources. As the recipient of a housing subsidy, each one is in a stratum of society that is in particular need of protection.¹⁹ However, this Court is required to engage in the arduous task of balancing the two competing rights of

¹⁸ *Machele* above n 7 at para 29.

¹⁹ *Id.*

individuals equally deserving of protection and to decide in whose favour the scale tips.

[46] The harm suffered by Mr Mathale if the eviction order is put into operation pending his appeal is irreparable. Mr Mathale is involved in ongoing litigation to vindicate and protect his right to occupy his home. To have his home taken away whilst he defends this right in the courts – given the sanctity of a home – would not serve the ends of what is just and equitable.²⁰ Mr Mathale quite literally built his home with his own hands using his own funds. Granted he did so as an unlawful occupier, however, this does not negate the need to afford him every opportunity to fully vindicate his rights.

[47] Although I appreciate that the harm suffered by Mr Linda is not simply monetary, on balance, the harm suffered by Mr Mathale outweighs that of Mr Linda. On the record, there is no immediate risk of Mr Linda being evicted from his current residence.

Prospects of success in the eviction appeal

[48] There are also questions about Mr Linda's title in law that would give him standing to evict Mr Mathale. Mr Linda admits to not holding a title deed. If he wished to prove that he was the registered owner of stand 8702, the best evidence rule required him to produce a certified copy of the title deed from the Deeds Registry.²¹ Mr Mathale argues that the lack of a title deed should deprive Mr Linda of any right to evict him.

²⁰ See generally on the importance of the right to housing, *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33; 2012 (2) SA 104 (CC); 2012 (2) BCLR 150 (CC) (*Blue Moonlight*); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1; 2008 (3) SA 208 (CC); 2008 (5) BCLR 475 (CC); *PE Municipality* above n 13; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC); and *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*).

²¹ See *Welz and Another v Hall and Others* 1996 (4) SA 1073 (C) at 1079C-E and *Zeffert and Paizes Essential Evidence* (LexisNexis, Durban 2010) at 127.

[49] PIE provides that only the owner or “person in charge” may apply for the eviction of an unlawful occupier.²² It defines an owner as a “registered owner of land”. An owner can only be considered to be “registered” when they possess a title deed in their name from the Deeds Office.²³ The Magistrate decided this case on the basis that Mr Linda was the owner, despite Mr Linda’s admission that he does not possess a title deed. The Magistrate also did not consider the case based on Mr Linda being the “person in charge” of the property under PIE because that was not Mr Linda’s case. It appears the Magistrate may have overlooked this fatal flaw in Mr Linda’s standing. The questionable nature of Mr Linda’s standing elevates Mr Mathale’s prospects of success on the eviction appeal.²⁴ Indeed, the order of the Magistrate may be set aside on this ground alone.

[50] Furthermore, the Magistrates’ Court’s understanding of our jurisprudence on the provision of alternative accommodation seems to be amiss. In granting the execution order, the Magistrate took into account that Mr Mathale had refused to take alternative accommodation that was offered by the Municipality almost 10 years ago. The court erred in this regard. The offer of alternative accommodation was unrelated to the eviction proceedings before the Court. The Court should have considered whether the offer was made as a consequence of those eviction proceedings. The offer must be related to the possible eviction of an unlawful occupier. Although there appears to be no absolute requirement for the provision of alternative accommodation before a court can order an eviction, the court, in considering what is just and equitable, has an obligation to determine whether the parties in question would be homeless. Indeed, a court should hesitate to grant an eviction where homelessness would result.²⁵ In this case, the Magistrate relied on an offer of alternative accommodation that was made by the Municipality to Mr Mathale nearly 10 years

²² See section 4 of PIE.

²³ Section 16 of the Deeds Registries Act 47 of 1937.

²⁴ See *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* 1993 (1) SA 77 (A) at 82A-C and *Ruskin NO v Thiergen* 1962 (3) SA 737 (A) at 744A-B.

²⁵ *PE Municipality* above n 13 at para 28.

before; an offer that was completely unrelated to the eviction proceedings. The Magistrates' Court omitted to consider whether, in fact, Mr Mathale had alternative accommodation.

[51] As already stated, there appears to be chaos in the Municipality's allocation of the stands.²⁶ Residents have been moved from pillar to post; others remain unsure whether the stands they occupy will remain theirs or whether those stands will be allocated to someone else due to court challenges of the Municipality's allocations.²⁷ How the Municipality intends to deal with this administrative bungle is noted in their report called "Response to SERI court application" that was handed up during the oral hearing by counsel on behalf of the Municipality. In that report, the Municipality admits that there are thousands of others like Mr Mathale and Mr Linda. Its plan: to place people in homes after setting aside land for that purpose. What is disturbing is the report's vagueness about when the Municipality's constituents will be able to gain access to housing. In the interim, however, it appears that some of the residents of this community have chosen to share stands allocated to a single beneficiary. The rationality or otherwise of their allocations seems to be one of the subjects of Mr Mathale's eviction appeal. Whilst he awaits finality in the appeal, he should not have been evicted.

Balance of convenience

[52] Ultimately, the balance of convenience favours Mr Mathale. He stands to be evicted from his home, with no alternative means of accommodation whilst still prosecuting his appeal. The inconvenience suffered by Mr Linda is understandable given that there is an ongoing appeal. This, however, cannot militate against the loss of Mr Mathale's home. It follows that the Magistrate did not reach a conclusion which another court could reasonably have reached on a proper understanding of the

²⁶ See [9] to [13] above discussing the administrative bungle.

²⁷ The parties brought to this Court's attention an application before the High Court instituted by the residents of Winnie Mandela Park wherein they are represented by the Socio-Economic Rights Institute (SERI). The application seeks to challenge the lawfulness of the Municipality's allocations in Winnie Mandela Park.

relevant facts and applicable legal principles. The execution order must accordingly be set aside.

Conduct of the Municipality

[53] This case illustrates not only the dire situation in which multitudes of poor people find themselves, but also the administrative hodgepodge the Municipality has caused in its formalisation process. It appears that there is general displacement of people in the municipality. Some people who have been resident in Winnie Mandela Park for years have effectively become homeless as a result of their stands being allocated to other members of the community.

[54] While much has been achieved, it is lamentable that after 21 years of democracy, the inhabitants of Winnie Mandela Park find themselves in this untenable situation. It is evident that there is general chaos in the municipality consequent on the formalisation process.²⁸ In the answering affidavit before this Court, the reasons proffered by the Municipality for this chaos are glaringly absent. All we are told is that “[t]he second respondent is presently reviewing the housing delivery situation in [Winnie Mandela Park].” This is simply disconcerting. The Municipality cannot, and should not, wait for litigation in order to meet its constitutional obligation to progressively realise the housing rights of its constituency.²⁹ Indeed, this is not expected of a municipality that avows to have the interests of its residents at heart through the “batho pele” principle.³⁰

²⁸ See generally the founding affidavit filed in *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others*, case pending in the High Court of South Africa, Gauteng Division, Pretoria under Case No 39602/15.

²⁹ See *Grootboom* above n 20 at paras 19 and 21 on the “progressive realisation” of the section 26 right and the obligations of municipalities as fine-tuned in *Blue Moonlight* above n 20 at paras 21-6 and 66.

³⁰ Batho pele means “people first”. The “Batho pele” principles were adopted by the Department of Public Works in 1997 to inform policy and legislative framework regarding service delivery in the public service. More importantly, these principles were adopted to guide public servants in delivering public services. See White Paper on Transforming Public Service Delivery: Batho Pele – “People First”, GN 1459 GG 18340, 1997.

[55] In response to questions from the Bench, counsel for the Municipality offered to facilitate mediation between the parties. He indicated that he would revert to the Court. Nothing came of this.

Remedy

[56] In light of the High Court's erroneous conclusion that the execution order in this case was not appealable, its decision should be set aside.

[57] The execution order granted by Magistrate Van Niekerk permitting Mr Mathale's eviction pending his High Court appeal against Magistrate Mnguni's eviction order should also be set aside.

Costs

[58] Mr Mathale is represented by a public interest law firm and is not pressing for costs. Although Mr Mathale is successful in his appeal, justice and fairness require that each party should pay their own costs in this Court.³¹

[59] Mr Mathale was mulcted with costs in the Magistrates' Court and the High Court. Given his success in this Court, the costs orders should be set aside and the parties must each bear their own costs in those courts too.³²

Order

[60] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.

³¹ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 90.

³² *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at para 48.

3. The appeal against the decision of the High Court of South Africa, Gauteng Division, Pretoria is upheld and its order is set aside. In its place there is substituted:
 - “(a) The appeal is upheld.
 - (b) The execution order granted by the Magistrates’ Court is set aside.”
4. The cost orders in the Magistrates’ Court and the High Court are set aside.
5. There is no order as to costs in the Magistrates’ Court, the High Court and in this Court.

For the Applicant:

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For the First Respondent:

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For the Second Respondent:

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