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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)**

Case no.: A285/2024

In the matter between:

COMMUNICARE NPC

(Registration No 1929/01590/08)

Appellant

And

HELEN ZANDILE MATUNZI

(Identity number: 8[...])

First Respondent

RICO MOTOBISHI

(Passport No: P[...])

Second Respondent

SHAUN BENTHAM

(Identity number: 7[...])

Third Respondent

SAMANTHA VALENCIA NAGEL

(Identity number: 8[...])

Fourth Respondent

PUMZA GUZA

(Identity number: 7[...])

Fifth Respondent

SMITH CHINAGOROM HERBET

Sixth Respondent

(Date of birth: 1986/06/13)

ZIMKITHA IWUEZI

Seventh Respondent

(Identity number: 6[...])

LUCK VINGOOD IWUEZI

Eighth Respondent

(Identity/Registration No. P[...])

YOLANDA BRIDGETTE WILLIAMS

Ninth Respondent

(Identity number: 7[...])

LLEWELLYN JOSEPH PRINS

Tenth Respondent

(Identity number: 8[...])

ALZONA USHAAN JANSEN

Eleventh Respondent

(Identity number: 8[...])

CITY OF CAPE TOWN

Twelfth Respondent

**ALL OTHER OCCUPANTS OF THE PROPERTY
HOLDING TITLE UNDER FIRST TO ELEVENTH
RESPONDENTS**

Thirteenth Respondent

Coram:

Francis J et Pangarker J

Hearing date:

25 April 2025

Judgment delivered electronically:

23 June 2025

JUDGMENT

PANGARKER J (FRANCIS J concurring)

Introduction

[1] This appeal emanates from a judgment and order granted by the Acting Magistrate of the Cape Town Magistrates' Court upholding two points *in limine* with costs in an eviction application brought by the appellant in terms of section 4 of the Prevention Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE Act).

The eviction application

[2] In February 2019, the appellant instituted eviction applications out of the Cape Town Magistrates' Court against various respondents in six matters under case numbers 1303/2019, 1960/2023, 8277/2022, 1869/2022, 4033/2023 and 4865/2023, respectively. By agreement between the parties, the applications were consolidated and heard under case number 1303/2019, being the matter of Helen Matunzi, which is the only appeal before us.

[3] The appellant approached the Court *a quo* on the basis that it is the registered owner of the immovable property situated at Erf 1[...], known as 1 A[...] Huise, J[...] Street, Brooklyn (the property), having concluded a residential lease agreement with Ms Matunzi, the first respondent, which would commence on 15 February 2015. In terms of the agreement, rental was payable at R1655 per month and a deposit due of R3310. The appellant alleged that subsequent to the first respondent taking occupation of the property, she breached the agreement in that she failed to comply timeously with its payment terms, resulting in arrears.

[4] The appellant's legal representatives made contact with the first respondent between October 2018 to January 2019, but despite promises to settle the arrears, the latter failed to remedy the breach. On 30 October 2018, the appellant's legal representatives dispatched a notice of cancellation which informed the first respondent that failing settlement of the arrears, the lease would be cancelled on expiry of the notice period and, in such event, the first respondent and those

occupying the property with her were afforded one calendar months' notice to vacate the premises.

The points *in limine*

[5] The first respondent opposed the eviction application and raised various points *in limine*, two of which were dismissed and one of which was withdrawn by the respondent. The remaining two points *in limine*, which fall to be determined on appeal were, firstly, that the appellant failed to follow due process in accordance with the Regulations of the Social Housing Act, and secondly, that there was insufficient engagement with the Social Housing Regulatory Authority.

Notice of appeal

[6] The appellant appeals the order upholding of the two points *in limine* and substantiated its grounds of appeal in its Notice of Appeal as follows:

- "1. In considering the remaining two points and in upholding them, the Learned Acting Magistrate firstly failed to distinguish between social housing stock and non-social housing stock.*
- 2. The Learned Acting Magistrate further failed to consider the ambit of the Social Housing Regulatory Authority's legislative mandate and further failed to properly consider the purpose of the Social Housing Act.*
- 3. The Learned Acting Magistrate further erred by failing to appreciate and understand that a project which has not received the benefit of public funding, and which was not an approved project for the purposes of the Social Housing Act, would not be subject to the Social Housing Act and its regulations, nor would it be subject to oversight by the Social Housing Regulatory Authority.*

4. *By failing to properly consider and understand the nature of the enquiry before him, the Learned Acting Magistrate further acted beyond the scope of his authority, by extending the mandate of the Social Housing Regulatory Authority beyond what it was legislatively required and empowered to do.*
5. *The Learned Acting Magistrate erred in finding that Social Housing Regulatory Authority had, or ought to have jurisdiction over properties which did not fall within their jurisdiction, and over properties which fell outside of the scope of the Social Housing Act.*
6. *By granting costs against the Appellant.”¹*

[7] Before turning to a consideration of the appeal, a matter of clarity is required. In the concluding paragraph of the judgment, the Acting Magistrate granted an order dismissing the application with costs. It is evident from the Notice of Appeal that the appellant is of the view that this constitutes a dismissal of the entire eviction application in case number 1303/2019.

[8] I disagree with the appellant’s understanding of paragraph 51. On a closer reading of the judgment, it seems to relate to case number 3079/2022, and not to 1303/2019 and the points *in limine* which were argued and form the subject of the judgment and this appeal. Thus, this judgment proceeds on the assumption that only the points *in limine* and not the substantive merits of the application, were determined.

Proceedings in the Magistrates’ Court

[9] The parties’ legal representatives agreed with the Acting Magistrate that the points *in limine* would be determined first. The appellant’s averment in the application was that the property did not form part of its social housing scheme and was thus not social housing stock but its private property.

¹ Notice of Appeal

[10] In very lengthy and protracted proceedings before him, which included several postponements, the Acting Magistrate required an explanation as to why the Drommedaris Pilot Project, 8 S[...] Road, Brooklyn² and the Bothasig Gardens property³ were the only two properties designated as the appellants' social housing stock.

[11] Unfortunately, as seen later in this judgment, this question led to a lengthy enquiry involving the calling of managers of the SHRA, at the behest and instruction of the Acting Magistrate. In this regard, the latter ordered the Compliance and Regulations Managers of the SHRA to attend Court and present oral testimony, which they duly did.

[12] Rheena Hansrajh, the SHRA's Compliance Manager explained in detail the process whereby a property identified by the appellant, Communicare, would fall under the SHRA's oversight. The Acting Magistrate, however, required in an order which he had granted, a list of accredited institutions and properties which fell under the auspices of the SHRA.

[13] Ms Hansrajh testified that the appellant has three social housing projects: Bothasig Phases 2 and 3, and Drommedaris. In questions by the first respondent's legal representative, she testified that properties which historically received institutional subsidies were classified as social housing stock in terms of the Act. The record reflects that the Acting Magistrate then required insight into the SHRA's internal processes, its AGM report and its quarterly report. The first respondent's legal representative also put to Ms Hansrajh that there were approximately three thousand properties which are regarded as social housing stock, funded from institutional subsidies.

[14] From the evidence placed before the Acting Magistrate, it appears that in 1929 the Housing Utility League Company was established as a non-profit company, which subsequently changed its name to the Citizens Housing League in 1964. In

² Excluding Drommedaris Phase 1

³ Excluding Bothasig Gardens Phase 1

1990, the latter became known as Communicare, the appellant. Ms Hansrajh confirmed that properties belonging to the appellant which were not classified as social housing, did not fall under the social housing Regulations, thus the appellant did not report to the SHRA regarding such properties, but only on the three aforementioned social housing stock. She also confirmed, to the extent that she could, that the appellant had private and social housing stock and that the SHRA was unable to obtain details on the source of the funding of certain stock. Her explanation, when pressed by the Acting Magistrate, was that if proved that stock was institutionally subsidised, then it fell under social housing stock and was to be regulated by SHRA.

[15] In what may only be described as a debate between the legal representative for the first respondent and the Acting Magistrate during Ms Hansrajh's testimony, it became apparent that Ms Matunzi deduced that because certain properties in Brooklyn were accredited as social housing and because of the "say so" of the first to eleventh and thirteenth respondents, therefore the property in question in case number 1303/2019 must therefore be social housing stock.

[16] Ms Hansrajh testified further that the SHRA had no evidence that the property was funded through public funds, and stood firm that it was not part of the appellant's initial application for accreditation to SHRA. The appellant had indicated in its application for accreditation that such property was unsubsidised.

[17] Ms Hansrajh painstakingly explained to the Court that her task involved looking at the appellant's accreditation application, the projects listed on such application, which housing were considered as being institutionally subsidised and comparing such information against the list of properties mentioned in the six applications. She also explained that it was not uncommon for institutions such as the appellant to own private housing stock as well as government funded stock. The witness confirmed that the properties mentioned on the list were not government-funded, however, she testified that she was unable to say whether A[...] Huise was subsidised by public funds, but according to the appellant's records, the property was unsubsidised.

[18] Significantly, Ms Hansrajh testified that private stock meant that there was no government funding and that often private stock was available to an institution to supplement its income. An institution, such as the appellant, would invest in private rental properties.

[19] The second witness required by the Court *a quo* was Sithengwa Dladla. Mr Dladla's portfolio as Regulations Manager of SHRA involved mainly the enforcement of the Act. He provided a forensic report into the investigation of Communicare, authored by an independent auditor, and was required to read the report into the record. Part of the report dealt with the history of social housing, the Act, and the establishment of the appellant.

[20] The report recommended that the SHRA was, *inter alia*, to perform a verification to determine which of the appellant's properties were social housing stock and which were private housing stock. Mr Dladla also confirmed that after the previous hearing, the SHRA was able to compare the properties listed in the eviction application with the list of properties registered on the appellant's name and found the property referred to in Ms Matunzi's application, to be private stock. There was no institutional subsidy received for the property.

[21] On being pressed by the Acting Magistrate, Mr Dladla testified that the SHRA could not confirm or determine whether the appellant received loans linked to mortgage bonds for the property in question. The rest of his evidence dealt with the Act, ownership of the property and institutional funding. The forensic report was admitted into evidence by the Acting Magistrate.

The judgment and order

[22] The Acting Magistrate relied on ***Occupiers, Berea v De Wet NO and Others***⁴ to motivate that a Court hearing on eviction application in terms of the PIE Act, must play an active role in the adjudication of such matter and should engage in active judicial management, hence his calling of the SHRA witnesses.

⁴ 2017 (5) SA 346 (CC)

[23] In his judgment, the Acting Magistrate questioned whether the properties in the six applications should be regarded as social housing stock. He found that it was common cause from the Title Deeds registered over the properties that it had benefitted from public funding, which constitutes an institutional subsidy, and hence the properties in the six applications were regarded as social housing stock. He held further that the property “*under discussion*” should have been registered as social housing and been regulated by the SHRA. Furthermore, in the judgment he stated that it appeared that there was no indication that the SHRA fulfilled the necessary controls and administration.

[24] The Acting Magistrate was also of the view that the SHRA should have been more involved in decisions to evict occupants from social housing stock where they failed to pay rental. Accordingly, the two remaining points *in limine* were upheld and the appellant was ordered to pay the costs. Further findings were made in respect of another property forming the subject of case name 3079/2022, which did not form part of the applications before the Court *a quo*.

The Social Housing Act and Regulations

[25] In order to address the grounds of appeal it is necessary to first consider the relevant legislation applicable to social housing. The Preamble to the Act sets out the aims and purpose of the Act as requiring of all spheres of government to prioritise the needs of the poor in respect of housing development, the promotion and establishment of socially and economically viable communities and safe living conditions⁵. The Preamble also recognises the need for the regulation of social housing and the dire need for affordable rental housing for low to medium income households.

[26] The term “*social housing*” is defined in section 1 of the Act as:

“Definitions

⁵ The reference in the Preamble to safe living conditions which exclude slum conditions

1. *In this Act, unless the context indicates otherwise –
“**social housing**” means a rental or co-operative housing option for low to medium income households at a level of scale and built form which requires institutional management, and which is provided by social housing institutions or other delivery agents in approved projects in designated restructuring zones with the benefit of public funding as contemplated in this Act;*

[27] Aside from the above, I must emphasise that it is common cause in the appeal that the appellant is a social housing institution, which is defined as follows:

*“**social housing institution**” means an institution accredited or provisionally accredited under this Act which carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households (excluding immediate individual ownership and a contract as defined under the Alienation of Land Act, 1981 (Act No 68 of 1981), on an affordable basis, ensuring quality and maximum benefits for residents, and managing its housing stock over the long term;⁶*

[28] Section 7 establishes the SHRA which is accountable to the National Minister of Housing. Furthermore, sections 11 and 12 convey the functions and intervention powers of the SHRA. From a reading of the Act and its Preamble, it is apparent that, firstly, the Act applies to social housing only, and secondly, the functions and powers of the SHRA apply to social housing only. In that case, it must be so, as argued by the appellant, that the SHRA’s powers and functions are legislated by the Act and that it cannot act beyond or outside of its legislated mandate. Thus, the SHRA has no authority, regulatory or otherwise, in respect of properties which are not defined as social housing stock, such as privately owned property or private vacant land that did not have the benefit of public funding.

[29] It is also important to note from the Preamble that the SHRA’s core function is to regulate all social housing institutions which obtain or have obtained public funds.

⁶ Section 1 of the Act

Having regard to the above initial parameters, the application of the Act and the ambit of the SHRA's legislative mandate, where an institution such as the appellant did not obtain public funds for a particular project or property, and/or where the particular property owned by the relevant institution is not social housing, then the Act does not apply and the regulatory function of the SHRA also finds no application. This conclusion is self-evident and logical.

[30] Furthermore, the Act applies to institutions that received accreditation by the SHRA which allow such social housing institution access to grants under the social housing programme. Public funding would then be granted for an approved social housing project in terms of which the social housing institution would acquire, develop, convert or upgrade buildings for social housing⁷. Section 11(3)(b) of the Act prescribes one of the functions of the SHRA to be that of accreditation of social housing institutions which meet accreditation criteria as a social housing institution, for purposes of applying for grant funding as allowed in section 11(3)(a) of the Act.

[31] The appellant submits that having regard to the legislative framework, the SHRA only has jurisdiction over social housing stock when regard is had to the definitions in section 1, as set out above, read with the provisions of sections 11 and 12. Having regard to the text, context and purpose of the legislation, I agree with these submissions⁸. The SHRA is the Regulatory Authority, with an important role, key to the development, awareness and support of social housing development, but its powers and authority are strictly limited to social housing stock.

[32] Regulation 3 of the Social Housing Regulations addresses the qualifying criteria for accreditation of social housing institutions. Regulation 3(7) which the first respondent refers to in the answering affidavit, sets out the requirements necessary for an effective tenant/membership management, such as staffing resources, a tenant/membership plan, communication strategies, complaints management systems, surveys, consultation and empowerment programme and the like.

Interference on appeal

⁷ See meaning of "approved project" in section 1

⁸ Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13 par [18]

[33] In the absence of a demonstrable error, the Court *a quo*'s factual findings are presumed to be correct⁹. In ***Makate v Vodacom***¹⁰, the Constitutional Court emphasised that in the case of a misdirection on the facts, the appellate Court is entitled to draw its own conclusions from the facts as they appear from the record, and where it is convinced that the Court *a quo* was clearly wrong in its conclusion, the appellate Court will reverse the incorrect decision.

Discussion

[34] With the above in mind, I have regard to the remaining points *in limine* which formed the subject of the Acting Magistrate's judgment. At paragraph 10 of the judgment, he made a finding that no due process was followed by the appellant yet also found that the appellant had made concerted efforts to liaise with the respondents prior to commencing litigation. The Acting Magistrate found that in certain cases, agreements were reached with the respondents to settle arrear rental and that such agreements were, however, reneged on as some respondents failed to respond thereto. My understanding from the judgment is that the Acting Magistrate recognised that these agreements were concluded in terms of private leases with the appellant.

[35] In addition, the Acting Magistrate had already decided the point *in limine* that there was no pre-litigation nor meaningful engagement, yet the judgment later indicates that the second, fourth and fifth points *in limine* would be dealt with collectively. On a close reading of the judgment, particularly from paragraph 34 onward, it then transpires that the fourth point is not discussed further as indicated. Unfortunately, the confusion in the judgment was foreshadowed by the protracted and disjointed proceedings in the Court *a quo* which are addressed later herein.

[36] In view of these aspects, which set the scene for the remaining points *in limine* which the Acting Magistrate was required to determine, it was thus required of him to have appreciated and understood the limitation of the SHRA's legislative

⁹ Bee v Road Accident Fund [2018] ZASCA 52 par [46]

¹⁰ 2016 (4) SA 121 (CC) par [40]

mandate, its authority and the extent thereof within the parameters of the Act. However, he failed to do so.

[37] In respect of the second point *in limine*, described in the judgment as “*non-compliance with Social Housing Regulatory Authority*”, the Acting Magistrate found that it was common cause that the properties under discussion benefitted from public funding, and in this regard, relies on “*the title deeds registered over the properties concerned*”¹¹. He refers to the Certificate of Registered Title T[...] in respect of Erf 1[...] Cape Town, 9[...] J[...] Street, Brooklyn. The Certificate of Registered Title should be read with the Windeed Search which indicates that the property was registered in the appellant’s name in July 1975. The evidence of Ms Hansrajh confirms that 1 A[...] Huise forming the subject of the eviction application in this appeal, is situated at 9[...] J[...] Street, Brooklyn. The first respondent’s legal representative submitted that because the Title Deed refers to the Act, therefore it must be accepted that public funds were utilised to purchase the property, Erf 1[...]. The submission, in my view, was not correct because the Title Deed is not evidence that because a bond was passed in favour of the Citizen’s Housing League, the appellant’s predecessor, therefore it must be so that public funds were used to buy the particular property.

[39] In my view, the reliance on the Title Deed is based on the incorrect assumption that it is proof that public funding was used to purchase 1 A[...] Huise in Brooklyn. The appellant acquired the property in 1975 and the vague suggestion that the application of the Act’s provisions is retrospective, is unsustainable. Given that the points *in limine* were raised by the first respondent, it was incumbent on the latter to have proved that the property was purchased with public funds and thus constitutes social housing stock which must therefore be regulated by the SHRA. The first respondent failed to do so and neither of the SHRA managers summoned to appear and testify before the Acting Magistrate, provided evidence which would or should have caused the latter to reach a conclusion, as he did, that the property benefitted from public funding and was thus social housing stock.

¹¹ Judgment, par 36

[40] The Acting Magistrate's conclusion that it was common cause that the properties benefitted from public funding, was wrong. From the affidavits filed in the application, the further documents provided and the testimonies of Ms Hansrajh and Mr Dladla, there was simply no factual basis to conclude that it was common cause that the property was purchased from public funds.

[41] The further conclusion at paragraph 37 of the judgment that:

"...the funding received, falls under the definition of "institutional subsidy". It should therefore be regarded as social stock housing",

was thus tainted by an incorrect conclusion which was followed by further errors in the judgment insofar as the role and ambit of the SHRA's involvement and regulatory oversight in respect of the property in question. Ms Hansrajh and Mr Dladla confirmed the appellant's version that the said property was not social housing stock and that private stock was unsubsidised. In the result, the finding was incorrect because 1 A[...] Huise, 9[...] J[...] Street, Brooklyn was not social housing stock, as the appellant stated in its founding affidavit, and in those circumstances, it did not fall under the auspices and regulation of the SHRA.

[42] While the Acting Magistrate's exposition of the role and purpose of the SHRA cannot be faulted, his later finding that the property should have been registered as social housing stock, that the SHRA should have regulated these properties, and that in the case of social housing stock, there was no indication that the SHRA *"executed the necessary controls and administration"*, were all incorrect. These sweeping statements and findings were simply not supported by the evidence presented in the proceedings before the Court *a quo*.

[43] I agree with the appellant's submission that the Acting Magistrate, notwithstanding his acknowledgement that Ms Hansrajh had differentiated that private stock was unsubsidised and did not receive public funding, erred when he failed to properly consider the provisions of the Social Housing Act. He accordingly, furthermore, failed to appreciate that privately-owned property such as 1 A[...] Huise, was not subject to the Act and Regulations, nor to the oversight of the SHRA.

[44] I thus agree with the appellant's submission that by extending the powers of the SHRA to include private housing stock, the Acting Magistrate impermissibly extended the mandate and authority of the SHRA as delineated in the Preamble and sections 11 and 12 of the Act. As such, the Acting Magistrate acted beyond his authority and *ultra vires* the provisions of the Act.

[45] In my view, the Acting Magistrate's reliance on the **Berea** judgment requires closer scrutiny in this appeal as he sought to rely on the Constitutional Court's judgment to motivate and support his approach in the matter and the call for witnesses and further evidence from the SHRA. It is correct that the **Berea** judgment calls for a pro-active approach from Courts in eviction applications in terms of PIE, but on a proper reading of the judgment, this pro-active approach must be placed in context.

[46] In **Berea**, the Court addressed, *inter alia*, the approach and duty of Courts generally in PIE applications but specifically where there was a consent to eviction. It referred to **Port Elizabeth Municipality v Various Occupiers**¹² and other judgments when discussing the role of Courts in the enquiry into whether it is just and equitable to evict a person and the further consideration of relevant circumstances as contemplated in sections 4(6), 4(7) and 6(1) of the PIE Act, as follows:

“[41] The prohibition in section 26(3) is given effect to through the enactment of PIE. This Act goes further and enjoins the courts to order an eviction only “if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances” as contemplated in section 4(6) and (7) and section 6(1).

[42] This Court in Port Elizabeth Municipality emphasised the new approach that courts must adopt in eviction matters. A court must take an active role in adjudicating such matters. As this Court stated:

¹² [2004] ZACC 7 at par [36]

“The court is thus called upon to go beyond its normal functions and to engage in active judicial management according to equitable principles of an ongoing, stressful and law-governed social process. This has major implications for the manner in which it must deal with the issues before it, how it should approach questions of evidence, the procedures it may adopt, the way in which it exercises its powers and the orders it might make. The Constitution and PIE require that, in addition to considering the 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.”
(footnotes omitted)

[47] It is clear from the above authorities, that the active judicial management referred to in **PE Municipality** and **Berea** must be based on equitable principles. The procedures adopted, the approach to evidence, and the exercise of a Court’s powers in eviction applications must still be centred in equity, more particularly when determining whether it is just and equitable to evict, and if so, the Court’s consideration of relevant circumstances as referred to in the PIE Act.

[48] In my view, neither **Berea** nor **PE Municipality** allow for a situation as that which transpired in the proceedings before the Acting Magistrate, where he exceeded his authority and sought to extend the powers of the SHRA, as the regulatory authority, beyond the ambit of the Social Housing Act, under the auspices of his “*judicial management*” of the matter. The findings and conclusions in the judgment were not equitable, and decisions were based on a misunderstanding of the facts and misinterpretation of sections of the Act, namely that the property was institutionally subsidized and that the Title Deed is proof of public funding.

[49] Clause 6.5.6 of the lease agreement allows the landlord to collect information from the tenant in order to compile tenant registers, which may be used by the SHRA, provincial or local government authority. This is the only reference to the SHRA in the lease agreement and in my view, does not alter the conclusion that the

judgment was incorrect to find that the appellant's private stock fell under the authority and regulation of the SHRA. The parties could agree to be bound by the Act, but that does not mean that the SHRA's powers extend to the appellant's private stock¹³.

[50] In my view, the Acting Magistrate's finding that the SHRA had a role to play and had regulatory powers over the appellant's private stock was *ultra vires* the Act. Thus, I conclude that the Court *a quo* erred when it upheld the point *in limine* that there was non-compliance with the SHRA's authority.

[51] In respect of the point *in limine* that no due process was followed, it is telling that the first respondent does not identify in her answering affidavit what the "due process" was, except to refer to Regulation 3(7). This Regulation has no applicability to privately-owned property but even if it were applicable to the parties' agreement, it is evident from clause 6.5 of the lease agreement, that the appellant sought information from the tenant for reasons including legal and regulatory requirements¹⁴, for compiling tenant registers¹⁵, was required to determine support structures¹⁶ and for compliance with various management and administrative functions. To this extent, it cannot be said that due process was not followed in relation to the first respondent and accordingly, the decision to uphold this point *in limine* was wrong. Interference on appeal is thus warranted in the circumstances.

[52] It is evident that the appellant is a social housing institution and that 1 A[...] Huise, 9[...] J[...] Street, Brooklyn, is privately owned by it. Thus, it does not form part of the appellant's social housing stock, a fact which the Acting Magistrate should have been alive to. Furthermore, as the registered owner of the property, the appellant elected to exercise its right as owner and lessor to terminate the lease agreement with the first respondent in view of the alleged material breach of the provisions of the lease agreement.

¹³ See section 11(1) of the Act

¹⁴ Clause 6.5.13

¹⁵ Clause 6.5.6

¹⁶ Clause 6.5.10

[53] Whether the first respondent is an unlawful occupier or not is an aspect yet to be determined by the Court *a quo*. It is also evident from the application and the evidence presented during the hearing that the appellant is not a normal landlord and if one has regard to some of the provisions of the lease, it is also clear that it operates in a particular space in respect of low-income housing¹⁷. In view of the above findings, the appeal will be upheld.

Concluding observations

[54] I am cognisant that this is an appeal and not a review of the proceedings in the Cape Town Magistrates' Court. However, I am also of the view that it would be remiss to turn a blind eye to the numerous incorrect decisions and procedural deficits adopted by the Acting Magistrate which unfortunately are glaring from the very lengthy and voluminous record. In view of the fact that the parties are agreed that the eviction applications are still to be determined and that the matters are to be referred to the Magistrates' Court for such hearing, the aspects addressed below are thus necessary.

[55] The comments are not meant to cause the Acting Magistrate any embarrassment but are intended to highlight errors which had the result of unnecessarily protracting and delaying the eviction proceedings. Firstly, notwithstanding finding that the application regarding property at 2[...] G[...] Flat, 9[...] J[...] Street, Brooklyn, was not before him, meaning that he should not have made any decisions and findings regarding such matter, the Acting Magistrate nevertheless dismissed the application. Secondly, he allowed the first respondent's legal representative to include a lease agreement related to an unrelated property not forming part of the matters before him and to attach same to an order which he had granted.

[56] Thirdly, the Acting Magistrate also insisted that Ms Hansrajh investigate funding of the appellant's projects and return to Court to testify about the report. Despite Ms Bruintjies, the appellant's legal representative in the Court *a quo*, having

¹⁷ See for example, clauses 5.6, 6.5.2, 6.5.6 and 6.5.13 of lease agreement

informed the Acting Magistrate that the Goedehoop property which he had queried and wanted investigated, was not part of the applications, he nonetheless persisted that an investigation be conducted. It is apparent that despite concerted efforts by the legal representative to inform the presiding officer that 1 A[...] Huise is not the same property, the significance of the distinction was not appreciated by the Acting Magistrate.

[57] Fourthly, the Acting Magistrate also insisted upon a forensic report and further investigation regarding the appellant and its business, which in my view, goes beyond what he was called upon to decide in the determination of the points *in limine*. Furthermore, it is concerning that throughout the proceedings regarding the points *in limine*, he constantly and regularly deferred to the first respondent's legal representative, requesting the latter to write letters to the SHRA for further information which the Court wanted. These actions are concerning because the request came from the Court and not from one of the parties to the proceedings, and he should thus not have abdicated this responsibility to the legal practitioner.

[58] In addition to the above, the Acting Magistrate allowed witnesses to testify regarding a report related to the appellant, which was compiled by an external auditor, who was not called to confirm the correctness and veracity of the content and findings of the report.

[59] Regrettably, the record reflects that the proceedings were conducted in a haphazard, disorderly fashion, with countless interjections during witnesses' testimonies, including submissions by legal representatives while witnesses testified.

[60] In my view, the consequences of these combined circumstances and the Acting Magistrate's insistence that he had wide powers, led to a situation where proceedings on points *in limine*, which should have been brief and concluded within a few hours at most, became a remarkably and unnecessarily lengthy hearing.

[61] Witnesses from the SHRA were required to fly to Cape Town to testify more than once, conduct investigations and testify regarding a report by a third party, at the behest of the presiding officer who misconceived the ambit of authority of the

SHRA and paid no heed to the fact that 1 A[...] Huise was private stock. In light of these factors, my view is that the eviction proceedings should proceed before a different Magistrate.

Costs

[62] Insofar as costs are concerned, the order upholding the appeal and setting aside the Acting Magistrate's decision on the two points *in limine* would have the effect that the costs order against the appellant would also be set aside. During the hearing, counsel for the appellant submitted that should the appeal succeed, costs should not be awarded against the first respondent, and I am in agreement with this view.

Order

[63] In the result, I would make the following order:

- a. The appeal is upheld. No order as to costs.
- b. Paragraphs 46 and 47 of the Order granted by the Court *a quo* are substituted with the following:

“The points in limine are dismissed. No order as to costs.”

- c. The matter under case number 1303/2019 is referred to the Cape Town Magistrates' Court for hearing of the merits of the eviction application before a different Magistrate.

M PANGARKER
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M FRANCIS
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: **Adv A Lawrence**
Instructed by: Toefy Attorneys
Kenilworth

For First to Eleventh, and Thirteenth Respondents: Mr B Dlova
Instructed by: Dlova Attorneys
Cape Town