

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: HCA 36/2024

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO THE JUDGES: YES/NO

(3) REVISED.

DATE: 18/09/2025

SIGNATURE:

In the matter between:

MAHLASE, JAMES MORUTI

APPELLANT

and

MAHLASE, JOHN TSHETLOANE

RESPONDENT

ORDER

**On appeal from Nebo Magistrate's Court, District of Makhuduthamanga,
Limpopo (MJ Ramped sitting as court of first instance):**

1. The appeal is upheld.
2. The order of the Nebo Magistrate's Court, District of Makhuduthamaga is set aside and replaced with the following:
 - a. The Appellant will be allowed to enter the premises situated at number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo from 08H00 - 17H00 on weekdays and this will be for the Appellant to use as a Dental practice only.
 - b. The Respondent will be allowed to use the property known as number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo as his residential home.
3. The Respondent is ordered to pay the costs of the appellant in this Court on scale "B" as well as in the Nebo Magistrate's Court.

JUDGEMENT

Stroh AJ (Naude-Odendaal J concurring):

Introduction

[1] The *first question* to be answered is: when may a High Court set aside the whole judgement of the lower court and make its own decision?

Second question: May a Court on appeal invoke the Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution") and more specifically section 172 (1) (b) of "the Constitution" which confers on this Court a wide discretionary power to make an order that is just and equitable?

[2] I must emphasize that the application by the Appellant in the Magistrate Court was in respect of the Domestic Violence Act 116 of 1998 (hereinafter "the Domestic Violence Act") however in this appeal, the main consideration is that of the Appellant's and Respondent's rights in terms of "the Constitution".

Background

[3] The Appellant is the biological son of the Respondent. On the 28th of November 2023, the Appellant obtained an Interim Order against the Respondent not to commit any of the following acts: to wit, assault, threaten, to harm or kill the Appellant and not to damage the property known as number 9[...] Matshollela (Village) Section, Ga- Marishane, Limpopo.

[4] On the 19th of February 2024, the return date of the Appellant's Interim Order, the Respondent obtained an Interim Order against the Appellant after submitting a counter-application in terms of the Domestic Violence Act. In the court *a quo* the proceedings started with an application by the Appellant but ended up with both parties also leading oral evidence (*viva voce*) in the Application. Oral evidence was led after both parties filed the necessary Answering Affidavits and Replying Affidavits, respectively. The Appellant testified and called three (3) witnesses, and the Respondent testified on its own.

[5] On the 1st of August 2024, the court *a quo* dismissed the Interim Order that was granted in favour of the Appellant and granted an Interim Order for the counter-application in favour of the Respondent. The Order in the court *a quo* reads as follows:

" Moruti James Mahlase is Prohibited from committing the following acts of Domestic Violence: Assaulting, Threatening John Mahlase
Damaging property of the Respondent John Mahlase: Threatening Respondent Entering no 9[...] Matshollela (Village) Section, GaMarishane" ¹

[6] The Appellant was not satisfied with the decision of the Magistrate in the court *a quo*, applied for leave to appeal and leave to appeal was granted to this Court.

¹ Court A Quo Bundle on page 314, Volume 4 of 4

[7] In general, the Domestic Violence Act restricts the Constitutional rights of an individual and that being the reason why the individual's Constitutional rights (as found in "the Constitution") is relevant and discussed in this judgment.

[8] This matter relates to section 9 of "the Constitution" that states:

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

[9] When relying on the applicability of "the Constitution" and the rights contained therein, such as section 9 of "the Constitution", there are reasonable prospects for success in this matter. "What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law. That a court of appeal could reasonably arrived at a conclusion different to that of the trial court."² The *interest of justice* dictates that the question be finally and authoritatively determined by this Court.

[10] The answer to this question must surely turn on the interpretation of "the Constitution". In this regard section 2 of the Constitution states that:

"This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[11] Another important section to consider is section 36 of "the Constitution" that refers to the limitation of one's constitutional rights. Section 36 of "the Constitution" states:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;

² *S v Mabena & another* 2007 (1) SACR 482 (SCA) para 22

- (a) *the nature of the right;*
 - (b) *the importance of the purpose of the limitation;*
 - (c) *the nature and extent of the limitation;*
 - (d) *the relation between the limitation and its purpose; and*
 - (e) *less restrictive means to achieve the purpose.*
- (2): *Except as provided in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

[12] Before this Court deals with the merits of the appeal, we consider it necessary to underpin the very notion of whom fundamental rights are meant to protect. The creation of fundamental rights was about the protection of *human beings*, and we find the expression in **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996** [1996] ZACC 26 (6 September 1996) (hereinafter the '*First Certification Judgment*'). In the *First Certification Judgment* the Constitutional Court said:

"The movement to recognize and protect the fundamental rights of all human beings gained increased momentum in the international arena from the Second World War. In 1945, the Charter of the United Nations was signed. Among its aims were the achievement of 'international co-operation in promoting and encouraging respect for human rights and for fundamental freedoms for all' (article 1(3)). This ambition was given voice by the 1948 Universal Declaration of Human Rights ('UDHR'). Then in 1966, in order to give these rights the binding force of international obligations, the General Assembly of the United Nations adopted the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights ('ICCPR' and 'ICESCR'). The adoption of the UDHR led also to the drafting of regional instruments such as the European Convention on Human Rights and Fundamental Freedom in 1951, the European Charter in 1961, the American Convention on Human Rights in 1969 and the Banjul Charter on Human and Peoples' Rights in 1981. These developments in the international spheres were mirrored in various national constitutions, many of which now contain bills of rights."

Applicant's Submission in this Court

[13] It was argued by counsel for the Appellant and contained in his heads of argument - The Magistrate erred and misdirected himself on the facts when he found that the evidence of the Traditional Council Members confirmed that the Appellant and the Respondent cannot live together under one roof or at stand number 9[...], Matshollela (Village) Section, Ga-Marishane, Limpopo Province.

[14] The Argument by counsel for Appellant is clear from the evidence of Makgotlane Marishane, a member of the Royal Family and Traditional Council in the court a quo, as appears hereunder.³

"Mr Marishane: It is so in our indigenous laws that the lastborn son will be the rightful owner. They even came to the Royal House to discuss the said matter and we indeed got a resolution on that."

[15] The evidence of Mr Makgotlane Marishane ⁴ under cross-examination confirms the submission and argument of Appellant's counsel:

"Mr Aggenbag: That is my question Your worship. How did the Traditional Council resolve the matter?"

Mr Marishane: That they should live together harmoniously as the homestead belongs to both of them."

"Mr Aggenbag: "Okay. Do you agree that the son, Applicant in the matter and his father, the Respondent in the matter, struggles to live together on the same residence?"

*"Mr Marishane: "I do not agree to that.""*⁵

[16] Another one of the submissions made by the Appellant counsel was that the Magistrate failed to analyse the evidence critically and holistically and therefore erred

³ *Appeal Bundle*: Volume 3 of 7, paginated page 224, lines 20-23:

⁴ *Appeal Bundle*: Volume 3 of 7, pages 237, lines 22-25, page 242, lines 12-14

⁵ *Appeal Bundle*: Volume 3 of 7 page 242, lines 12 to 14

in finding that the Respondent's evidence was: *"that the Appellant came with a crowbar and the Respondent came with an axe"*.

I find the Appellant argument correct since in the Court a quo, the Magistrate said: *"The Applicant mentioned that Respondent once wanted to hit him with axe when the Applicant has come to fix a door at Applicants home and Applicant had to defend himself with a crowbar."*⁶

[17] The Appellant submitted that the finding of the Magistrate in the Court a quo was only based on the evidence given by the Respondent without considering the evidence given by the Appellant:⁷ The evidence of Appellant in the court a quo was and I quote:

"Mr Mahlase: explained, I do not know where he was coming from. Whether he was coming from the house or the side of the surgery, he approaches, holding a crowbar in hand then he says to me, today I am going to kill you. So, out of fear, I stood up ran out of the yard. Leaving the yard I even sprained my leg where I sustained an injury. This is why I am using a walking stick. It was since the day that I sustained those injuries that I have been using this stick. Had he been able to catch me that day, something bad would have happened. As I was outside the yard, standing there, he was standing next to his car and then he had the crowbar placed in the boot of his car. As I tried to [indistinct] towards getting back into the yard, he says to me that, if you try and come and even take two steps, I am going to kill you. I stood there watching and there were people there inside the garage. I do not know what they"

Mr Mahlase: were doing there exactly. Once they were done in the garage, they left. I do not know these people. He said to me you can now enter. I proceeded to enter the yard. As I was walking, I looked at him so that I can see what he was doing. In my mind I was going to walk and get into the room. If he follows me and tries to do something I will see what I will do when I am there. I entered the house. Upon entering the house I went and took my axe and I held it, or I put it around my waist and then I went and stood at the

⁶ Court a Quo Bundle on page 313, Volume 4 of 4 and more specifically paragraph 7

⁷ Appeal Bundle: volume 4 of 7, paginated pages 394, lines 10-25; paginated pages 395, lines 1-17; and paginated pages 396, lines 1-10.

fairway. Standing there his employees went out and got into the car. He also then proceeded to enter the car and reversed the car a bit. Seeing that I was standing there, he came and approached me with that car. He got out of the car, went and took the crowbar and came next to me. It was at that point when I said to myself I .. [intervene] .. [indistinct] Then I took out the axe and I threatened him with the axe."

"Mr Mahlase: that I was standing there looking at him. He drove by a bit then he came out of the car and he was holding his crowbar. He then came next to me. When he came nearer, I also produced the axe. When he was trying to come closer to me, at that point when I produced the axe, he tried to go back a bit. This is when he slipped. So now in that moment there was a person Phaleng, they had already got a hold of that axe of mine. When they took away the axe from me, he proceeded to get into the car. Then they gave back my axe after he got into his car and they all left."

[18] It is the Appellant's submission - and I quote from his Heads of Argument - that "Clearly the Magistrate misdirected himself on the factual finding in his judgment."

Applicable Law and Case law relevant in this judgment

The Constitution of the Republic of South Africa

In my view the following sections are important for discussion in this judgment as well as the following case law:

[19] Section 2 of "the Constitution":

"This Constitution is the supreme Law of the Republic, Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

Important words contained in this section of "the Constitution" are "supreme law".

[20] Section 9 of "the Constitution":

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

Important words contained in this section of "the Constitution" are "everyone" and "equal".

[21] Section 36 of "the Constitution":

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including;

- (a) the nature of the right;*
- (b) the importance of the purpose of the limitation;*
- (c) the nature and extent of the limitation;*
- (d) the relation between the limitation and its purpose; and*
- (e) less restrictive means to achieve the purpose.*

(2): Except as provided in subsection (1) or in any other provisions of the Constitution, no law may limit any right entrenched in the Bill of Rights."

An important word contained in this section of "the Constitution" is "*limitation*".

[22] **Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa**, 1996 [1996] ZACC 26 (6 September 1996) (hereinafter the '*First Certification Judgment*')

[23] In **State Information Technology Agency (SOC) Limited v Gijima Holdings (Pty) Limited**,⁸ it was held:

"That the creation of fundamental rights was about the protection of human beings finds expression in the First Certification Judgment. There this court said: "The movement to recognise... "

⁸ *State Information Technology Agency (SOC) Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) Para 19

[24] **Limpopo Traditional Leadership and Institutions Act, 6 of 2005** (hereinafter the "Limpopo Traditional Leadership and Institutions Act").

In the *pre-amble*, the Act states: "*Whereas the Constitution recognizes-*

- *The Institution, status and role of traditional leadership according to customary law; and*
- *A traditional authority that observes a system of customary law."*

Under the heading definitions the Act states: "*area of jurisdiction,*" as: "*the area of jurisdiction designated for a traditional community and traditional council that have been recognized in terms of this Act."*

[25] In **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency**⁹ Froneman J held that it is necessary to consider whether the evidence on record established the factual existence of any irregularities and, if so, whether the materiality of the irregularities justifies the legal conclusion that a ground for review exists.

[26] In **JE Mahlangu and Another v Minister of Police**¹⁰ where it was held that once it has been established that the constitutional right not to be deprived of one's *physical liberty* has been interfered with, the deprivation is *prima facie* unlawful, and the infringer bears the onus to prove that the inference was justified.

[27] In **Greater Tzaneen Municipality v Bravospan**¹¹ 252 the Court states: "The Supreme Court of Appeal held that section 172 (1)(b) confers a wide discretionary power upon courts to make *any order* that is *just and equitable*."

Applying the Law to Evidence

[28] The same reasoning that Froneman J applied in **Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African**

⁹ *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC)

¹⁰ *JE Mahlangu and Another v Minister of Police* [2021] ZACC 10 at para 32

¹¹ *Greater Tzaneen Municipality v Bravospan* 252 CC 2025 BCLR 1 (CC) para 23

Social Security Agency,¹² can apply to appeals and grounds for appeals, meaning that if only one of the grounds of the several grounds for appeal is established to exist, it justifies the legal conclusion that the appeal is successful.

[29] In **JE Mahlangu and Another v Minister of Police**,¹³ the Judge reasoned that the Minister of Police had to bear the onus to proof if justification is pleaded and have a duty to begin adducing evidence. In the court *a quo* the Magistrate clearly erred in allowing the Appellant to start to lead evidence in the Application. The Magistrate erred in not finding that on a point of law, the Respondent raised self-defense, therefore, the onus rested upon the Respondent to start.

[30] In terms of the evidence given in the court *a quo*, the Appellant and Respondent fell under the Limpopo Traditional Leadership and Institutions Act, and the decision taken by the Traditional Council is relevant and applicable and that they should live together harmoniously as the homestead belongs to both of them.

Relief Sought

[31] I conclude that the Magistrate acted contrary to what the law dictates as to who has the burden to start leading evidence. Section 172(1)(a) of "the Constitution" allows a Court to declare law or conduct that it finds to be inconsistent with the Constitution, invalid. In terms of the Constitution and the caselaw discussed in this judgement, the burden to start a proceeding in a court when grounds of justification are pleaded, clearly rest on the Defendant (in this case, the Respondent). The procedure followed by the Learned Magistrate in the court *a quo* falls to be incorrect.

[32] However, under section 172(1)(b) of the Constitution, a court deciding on a constitutional matter has a wide remedial power. It is empowered to make "*any order that is just and equitable*." As found in **Greater Tzaneen Municipality v Bravospan**

¹² *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer of the South African Social Security Agency* [2013] ZACC 42; 2014 (1) SA 604 (CC)

¹³ *JE Mahlangu and Another v Minister of Police* [2021] ZACC 10

252,¹⁴ the remedial power of a court that is deciding on a constitutional matter is wide enough that such a court is only bound by considering "just and equitable".

[33] Overall, it seems to me that "just and equitable" dictate that the Appellant be allowed to use the premises known as number 9[...] Matshollela (Village) Section, Ga- Marishane, Limpopo for his Dental practice only and that the Respondent uses number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo as his residential home.

[34] The aspect regarding ownership of number 9[...] Matshollela (Village) Section, Ga- Marishane, Limpopo was never before the court *a quo* and whether such rights did accrue to the Appellant is an issue for another court to decide.

Appellant's request as to this Court granting an Order (which includes Costs)

[35] The Appellant in his Heads of Argument asked this Honorable Court to make the following Order:

35.1 This Appeal is upheld with cost in terms of scale "B".

35.1.1 The Interim Order granted in favour of the Appellant is hereby confirmed; and

35.1.2 The Counter-Interim Order of the Respondent granted on the 19th of February 2024 is hereby set aside.

Alternatively;

35.1.3 This Honourable Court is requested to make an appropriate order under the circumstances.

¹⁴ *Greater Tzaneen Municipality v Bravospan* 252 CC 2025 BCLR 1 (CC) para 23

[36] Appellant achieves nominal success to the extent that the Appellant is allowed to use the premises at number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo for his Dental practice only and is entitled to all its cost, including cost of this Appeal.

Order

1. The appeal is upheld.
2. The order of the Nebo Magistrate's Court, District of Makhuduthamaga is set aside and replaced with the following:
 - a. The Appellant will be allowed to enter the premises situated at number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo from 08H00 - 17H00 on weekdays and this will be for the Appellant to use as a Dental practice only.
 - b. The Respondent will be allowed to use the property known as number 9[...] Matshollela (Village) Section, Ga-Marishane, Limpopo as his residential home.
3. The Respondent is ordered to pay the costs of the appellant in this Court on scale "B" as well as in the Nebo Magistrate's Court.

J D STROH AJ
JUDGE APPEAL

NAUDE-ODENDAAL J
JUDGE APPEAL

Appearance:

For the Applicant: Adv K.K. Kekana

Instructed by: DA Mawasha Attorney Inc,
c/o Buthane Rasemane Attorneys, Polokwane

For the Respondent: Mr A.H. Stander

Instructed by: AH Stander & Aggenbag Incorporated, Pretoria

Dates Heard: 9 May 2025

Date Reserved: 9 May 2025

Date Delivered: 18 September 2025