CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 269/21

In the matter between:

ALIAS MTOLO	First Applicant
MANEHENG MTOLO	Second Applicant
and	
THEUNIS CHRISTOFFEL LOMBARD	First Respondent
MINISTER OF POLICE	Second Respondent
JACOBUS HUNTER	Third Respondent
MARIA HELENTJE LOMBARD	Fourth Respondent

Neutral citation:	*Mtolo and Another v Lombard and Others* [2021] ZACC 39
Coram:	Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ, and Tshiqi J
Judgment:	Madlanga J (Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ, and Tshiqi J concurring)
Heard on:	21 September 2021
Decided on:	8 November 2021

ORDER

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

1. Leave to appeal directly to this Court is granted.
2. The appeal is upheld and the order of the Gauteng Local Division of the High Court (High Court) of 25 August 2021 striking the applicants' application from the roll for lack of urgency is set aside.
3. The first and fourth respondents must repair the roof of the applicants' home situate at Plot 8, Ardenworld, Vanderbijlpark, Gauteng (house) within seven calendar days of the date of this order.
4. In compliance with paragraph 3, the first and fourth respondents must repair the roof in a manner that renders the house fit for human habitation, including effecting repairs to such defects as may be necessary in order to repair the roof.
5. If satisfied with the repair work referred to in paragraph 3, the applicants may take occupation of the house as soon as the repairs have been effected.
6. To give full and meaningful effect to paragraph 5 or to any order that may be granted by the High Court pursuant to its supervision of compliance with this order in terms of paragraph 10, paragraphs 3 and 5 of the order granted by Antonie AJ on 5 August 2021 continue to apply.
7. If the applicants are not satisfied with the repair work referred to in paragraph 3 of this order, the Emfuleni Local Municipality, using a suitably qualified person, must inspect the house and prepare a report, within four calendar days of being requested so to do by the applicants, as to the safety and fitness of the house for human occupation in relation to the repair work envisaged in paragraphs 3 and 4 of this order.

8. The applicants' attorneys must file the report referred to in paragraph 7 with the High Court and serve it on the respondents' attorneys.
9. Costs incurred by Emfuleni Local Municipality towards compliance with this order, if any, must be borne by the first and fourth respondents.
10. If the Emfuleni Local Municipality is unwilling to comply with the order in paragraph 7, it is granted leave to apply to the High Court and give reasons for the unwillingness within three court days of being requested by the applicants to inspect the house and prepare a report.
11. The matter is remitted to the High Court for supervision of compliance with this order.

JUDGMENT

MADLANGA J (Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ, and Tshiqi J concurring):

[1] This is an application for leave to appeal against an order in terms of which the Gauteng Local Division of the High Court struck from the roll an application brought by way of urgency. The applicants, Mr Alias Mtolo and Mrs Maneheng Mtolo who are husband and wife, say that they and their eight children have been rendered homeless as a result of the removal of the roof and windows of their home by Mr Theunis Christoffel Lombard, the first respondent, Mr Jacobus Hunter, the third respondent, and Mrs Maria Helentje Lombard, the fourth respondent. What participation there was, if any, by Mr Hunter in the issues to be determined was minimal. In fact, no order was sought against him before the High Court in the proceedings that are the subject of this application for leave to appeal. Therefore, by "respondents" I am referring only to the first and fourth respondents.[1] The applicants obtained an order from Antonie AJ of the

[1] The second respondent is the Minister of Police who was cited insofar as it might become necessary for him to assist in giving effect to the order. He has not participated in the proceedings.

High Court requiring the respondents to replace the roof and windows to make the home fit for human occupation. The Court also granted the applicants leave to approach it on an urgent basis in the event of a failure by the respondents to comply with the order. It is an application in which the applicants alleged such failure that was struck from the roll for lack of urgency.

[2] In the main, what is at issue before us is whether there was compliance with the order of Antonie AJ and, if there was not, what – if anything at all – needs to be done by this Court. The matter is before us because it concerns the applicants' right of access to housing and, relatedly, their right to dignity, as well as their children's right to basic education. I explain how the latter is implicated later.

[3] The first applicant was employed by the first respondent from March 2000 at Zaiplaas Farm, Edenville, Free State. In 2010 the first respondent moved his family and the applicants' family to Plot 8, Ardenworld, Vanderbijlpark, Gauteng owned by the fourth respondent, the first respondent's wife. In Vanderbijlpark as well the first applicant continued to work for the first respondent. He and his family were accommodated in a house on the property. This is the house that is the subject of this application.

[4] Things took a turn for the worse on 16 June 2021 when the first respondent arrived at the home of the applicants accompanied by the police. He informed them that the property where their home stood had been sold. The applicants claim that the first respondent assured them that they would not be evicted until he had secured alternative accommodation for them. The first respondent denies this. For present purposes, nothing turns on this disputed fact.

[5] On 24 June 2021 and before alternative accommodation had been secured, police visited the applicants at their home and "intimidated" them to vacate the property. The applicants did not. On 6 July 2021 – whilst other houses on the farm were being

demolished – the first respondent allegedly arrived at the applicants' home with a TLB.[2] Concerned about what seemed likely to happen to his home, the first applicant enquired from the first respondent as to what was going on. The first applicant says the first respondent told him to remove his belongings from the house as it was to be demolished.

[6] The applicants say their house was subsequently "demolished". What is now common cause, and appears to have been for some time before this Court was approached, is that only the roof and windows were removed from the house. What is in dispute is who removed them. The respondents claim that it is the first applicant and his brother-in-law who did. On the other hand, the applicants claim that they were removed by the respondents. Yet again, it is not necessary for present purposes to determine where the truth lies. Suffice it to say, what is clear is that if the roof and windows were removed by the applicants, this was only because they feared the imminent demolition of their home and wished to salvage building material. They saw houses being demolished all around.

[7] The applicants vacated the property on 6 July 2021 and have not lived there since. They say they have no place to live. They sleep in the open and their children sleep in the car. Two of the children are in grade 12 and their education is being disrupted. In fact, the applicants aver that this situation is affecting the schooling of all their children and that the children "are traumatised". The family depends on the goodwill of members of the community for basic necessities such as bathing and washing their clothes.

[8] The applicants approached the High Court for urgent relief. The Court, per Keightley J, entertained the matter as one of urgency and declared that the demolition of the house was unlawful. It ordered the first respondent to provide the applicants with decent alternative accommodation of a standard acceptable for occupation by human beings. That never happened.

[2] This is short for an earthmoving machine which is on the smallish side called a tractor-loader-backhoe.

[9] The applicants brought another urgent application to the High Court seeking an order that would force the respondents to allow them to resume occupation of their home. On 2 August 2021 Antonie AJ postponed the matter to the following day, ordering the respondents to afford the applicants access to their home. That same day, the 2nd, the applicants were denied access. On the 3rd Antonie AJ directed the respondents' attorneys to arrange for the applicants to be allowed access. On that day the applicants did have access and discovered that the roof and windows were yet to be replaced. On 5 August 2021 Antonie AJ recalled the order granted by Keightley J in its entirety. This he did at the instance of the respondents who had applied for a "reconsideration" of the order on the ground that it had been erroneously sought and granted. But he then ordered the respondents to grant the applicants unrestricted access to their home and to replace the roof and windows of the dwelling. And he directed that the applicants and their children could not be evicted from their home without an order of Court. He granted the applicants leave to approach the High Court on an urgent basis should the respondents fail to comply with the order.

[10] Eleven days later, the applicants' attorneys checked with the respondents' attorneys if Antonie AJ's order had been complied with. The answer was in the affirmative. Seven days later the first applicant – in the company of his attorney – went to inspect the house. He says the roof had not been properly secured and that there were bricks on top which could fall and cause physical harm. And that this risk of harm was exacerbated by the fact that August is windy. The short point made by the first applicant is that the house was not fit for human occupation. In this regard the applicants rely on a report prepared by a social worker of Emfuleni Local Municipality. The basis on which a social worker could express this opinion is not explained in the affidavits. It seems that the applicants are no longer complaining about the windows. So, what remains of the present fray appears no longer to concern the windows. In accordance with the leave granted by Antonie AJ, the applicants once more approached the High Court on an urgent basis seeking compliance with Antonie AJ's order.

[11] The respondents contended that the matter was not urgent and that the applicants had not complied with the Uniform Rules or with a practice manual of the High Court on urgency.[3] Reliance was placed on the fact that a number of days had elapsed between 4 August 2021 when the order was granted and 23 August 2021 when the applicants eventually came to take occupation. And, continued the contention, despite having taken this long, the applicants gave the respondents no meaningful notice before moving the application. The respondents further submitted that – in granting the applicants leave to approach the Court on an urgent basis if there be non-compliance – Antonie AJ was not giving them carte blanche to flout the practice manual.

[12] On the merits, the respondents said that they had complied with the order. They specifically claimed that the roof was properly secured. They also said the applicants had alternative accommodation at Mullerstuine Hall where they were accommodated by the Municipality. In addition, the claim was that they were accommodated in a block of flats near where the respondents' attorney resides. For this second claim, the respondents relied on the fact that the attorney had spotted the applicants' car at that block of flats. In short, the respondents denied that the applicants are homeless or that they were evicted either unlawfully or otherwise. They also denied responsibility for the removal of the roof and windows and claimed, instead, that the responsibility for this lay with the first applicant and his brother-in-law.

[13] On 25 August 2021 Dippenaar J struck the matter from the roll with costs for lack of urgency. Save to assume that Dippenaar J accepted the respondents' argument on urgency, we do not know the reasons for this order as no reasons were given for it.

[14] Before us the applicants submit that this matter engages this Court's jurisdiction as it concerns the right to dignity, the applicants' children's right to basic education, an eviction and, therefore, the right of access to housing. On the latter, the applicants rely

[3] *Practice Manual, Gauteng Local Division, Johannesburg* (February 2018) chapter 9, para 23.16 stipulates that: "[w]hen an urgent application is brought for the Tuesday at 10h00 the applicant must ensure that the relevant papers are filed with the Registrar by the preceding Thursday at 12h00."

on *Occupiers, Berea*. There this Court held "[i]t is a well-established principle that an eviction from one's home always raises a constitutional issue".[4] Additionally, the applicants submit that the matter raises arguable points of law concerning the remedial powers of courts and the proper approach to urgency in eviction proceedings.

[15] The applicants argue that leave to appeal directly to this Court is warranted due to the urgent need to enforce Antonie AJ's order. The public interest in upholding court orders and the irreparable harm that the applicants and their family will suffer should they be made to wait for a hearing in due course dictate that this matter be disposed of by this Court. In highlighting the irreparable harm they will suffer, the applicants point to the fact that, as at the time Dippenaar J struck the matter from the roll, a hearing in due course was to take place in April 2022, some eight months later. The delay in enforcing Antonie AJ's order has left the applicants homeless, relying on the kindness of members of the community to bathe and wash their clothes. This has impeded the applicants' children's schooling, most notably the two who are in grade 12. The applicants argue that it was thus wrong of Dippenaar J to strike the matter from the roll for lack of urgency. This is especially so because both Keightley J and Antonie AJ had entertained the matter as one of urgency and Antonie AJ had granted them leave to approach the Court by way of urgency in the event of non-compliance with his order.

[16] The applicants rely on *Informal Traders*,[5] where the High Court had struck from the roll, supposedly for lack of urgency, a matter that was, in fact, urgent. There this Court entertained a direct appeal. The applicants frame this matter as a narrow dispute on whether Antonie AJ's order has been complied with. On this, the applicants ask this Court to interpret Antonie AJ's order to require the fixing of the house generally – not just the roof and windows – to make it fit for human occupation. They ask this Court to grant a substantive order specifying that *the house* (without focusing only on the roof) must be made fit for human occupation. In particular, the house must protect them and

[4] *Occupiers, Berea v De Wet N.O.* [2017] ZACC 18; 2017 (5) SA 346 (CC); 2017 (8) BCLR 1015 (CC) at para 21.

[5] *South African Informal Traders Forum v City of Johannesburg; South African National Traders Retail Association v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC).

their family from the elements and not be structurally hazardous. They contend that it is the power of courts to make just and equitable orders conferred by section 172 of the Constitution that entitles this Court to go wider than what Antonie AJ ordered.[6]

[17] The applicants argue that, while the respondents have attached a roof to the house, the roof is "rudimentary" and poses a danger. This renders the house unfit for human occupation. As a result, the respondents have not complied with Antonie AJ's order. This, they submit, is confirmed by the social worker's report. At the hearing, counsel for the applicants clarified that the value of this report does not lie in the social worker's technical knowledge. Rather, the report represents the view of an objective third party – according to them, the only objective evidence in this matter.

[18] On relief, the applicants ask this Court to retain supervisory jurisdiction, directing the respondents to file an affidavit explaining their compliance at which point the Court may decide to discharge its supervisory jurisdiction or remit the matter to the High Court. Alternatively, this Court should remit the application to the High Court with directions for the further conduct of the matter.

[19] *In limine* (preliminarily), the respondents argue that while the matter was struck from the urgent roll by Dippenaar J, its merits were never addressed. Therefore, the merits are pending before the High Court. Thus, the merits cannot be adjudicated by this Court before their determination by the High Court. The respondents also submit that the matter was correctly struck from the roll for non-compliance with the practice manual on the set-down of urgent matters.[7] The respondents repeat the contention made before Dippenaar J that the grant of leave by Antonie AJ for an approach to Court by way of urgency did not entitle the applicants to not comply with the applicable practice manual. In particular, the matter was not of such extreme

[6] Section 172(1)(b) of the Constitution provides that "[w]hen deciding a constitutional matter within its power, a court . . . may make any order that is just and equitable".

[7] Practice manual above n 3.

urgency that the applicants could – as they did – serve on a Monday for a hearing on Wednesday of the same week.

[20] The respondents submit that a direct appeal is not warranted since the applicants have other remedies available to them, one being the fact that that the merits are pending before the High Court. Additionally, Dippenaar J's decision to strike the matter from the roll was an exercise of discretion, which is appealable on circumscribed grounds. And there is no urgency as there are no rights violations. In this regard, the respondents aver that the applicants have secured alternative accommodation, either at Mullerstuine Hall where they are accommodated by the Municipality or at the residence of a member of the community near where the respondents' attorney lives. In support of the latter averment, the respondents have furnished us with photographs of the applicants' car parked outside the house of this member of the community. Their evidence is that their attorney lives next door to this house and that it is she who saw the applicants' car there. And they repeat the allegation that the windows and roof were removed by the applicants themselves. Additionally, they say nothing stops the applicants, who – according to the respondents – have two cars, from taking their children to school. Thus, nothing should disrupt the children's schooling.

[21] The respondents argue that the dispute has become moot since they have restored the roof and windows, thus complying with Antonie AJ's order. The social worker's indication to the contrary is of no weight, as a social worker lacks expertise to express an opinion on the matter.

[22] This matter certainly does engage our jurisdiction. It implicates constitutional rights, including the right to dignity,[8] the right of access to housing[9] and the right to basic education.[10] The next question is whether it is in the interests of justice to grant leave to appeal to this Court directly.

[8] Section 10 of the Constitution.

[9] Section 26 of the Constitution.

[10] Section 29 of the Constitution.

[23] This Court in *Informal Traders* held that section 167(6)(b) of the Constitution, which makes it obligatory for national legislation or the Rules of this Court to allow a person – when it is in the interests of justice – to appeal directly to this Court, grants this Court "wide appellate jurisdiction on constitutional matters", allowing it to "decide whether to hear an appeal from any court on any constitutional dispute provided it serves the interests of justice to do so".[11] But Moseneke DCJ, writing for a unanimous Court, cautioned that in matters of urgency – especially those involving interlocutory decisions like the striking off of applications from the roll – this Court should entertain direct appeals as an exception or last resort.[12] The determinant, though, remains the interests of justice standard set by section 167(6)(b).[13] Now, do the applicants meet the interests of justice standard formulated in *Informal Traders*?

[24] There is a suggestion by the respondents that the applicants have alternative accommodation. If that is correct, that may be of relevance to the interests of justice enquiry. The averment by the respondents – which is denied by the applicants – that the applicants are accommodated by the Municipality is not substantiated. For that reason, it cannot be accepted as true. It appears to be based purely on what appears in the header – not even content – of the social worker's report. Under "physical address" the social worker has inserted "Mullerstuine Hall, Vanderbijlpark", which is apparently a municipal hall. Even if this averment were true, being reduced to having to live in a hall is, in and of itself, downright degrading; it is at odds with human dignity.[14] I do not see how the averment can assist the respondents in the context of the point they appear to be making.

[11] *Informal Traders* above n 5 at para 17.

[12] Id at paras 17-9.

[13] Id at para 20.

[14] I should not be understood to say organs of state will be violating the right of human dignity of people who – as a result of, for example, some disaster – have to be accommodated on an emergency basis in halls, tents, etc, and that, therefore, organs of state must accommodate such people in conditions of luxury like hotels, residential apartments, etc.

[25] This averment is watered down by the different suggestion that the applicants also stay elsewhere; next door to where the respondents' attorney lives. So, where exactly do the applicants have this alleged alternative accommodation? At Mullerstuine Hall, or next door to the respondents' attorney? In any event, the allegation that the applicants live next door to the respondents' attorney must be rejected out of hand. The applicants admitted that they do go to the house next door to the attorney. But they said they go there to take baths and wash their clothes. They do not live there. That brings the attorney's evidence to naught. Nothing more need be said about this.

[26] The main issue that may impact negatively on interests of justice is a dispute of fact on whether the respondents have, in fact, restored the applicants' home such that it is suitable for human habitation. And this is a material dispute of fact: if the required restoration was done, that is the end of the matter. If it was not, barring any other factors that may be of relevance, there must still be compliance with the order. This issue has a factual and legal component. The legal component is the interpretation to be given to Antonie AJ's order. The order appears to link the restoration to habitability by human beings to the replacement of the roof and windows. Its reach does not seem to be so wide as to encompass restoration to human habitability in whatever respect may be found necessary. The order reads: "The respondents must, by no later than 10 August 2021, replace the roof and windows of the dwelling to make it fit for human occupation". A question of interpretation that arises is whether restoration to habitability by human beings requires more than fixing only the roof and windows. The applicants argued that it does. And the respondents argued the opposite.

[27] The factual component is: whatever the correct interpretation, was the necessary restoration done? As will soon become apparent, there are prospects of resolving this disputed issue on the papers.

[28] For the reasons that I give shortly, I am satisfied that leave to appeal directly to this Court must be granted.[15]

[29] The applicants allege that they live in the open, their children sleep in the car, the children's schooling is negatively impacted by this situation, the situation has traumatised the children and the family has been reduced to being dependent on the goodwill of members of the community for such basic necessities as taking baths and washing clothes. A most demeaning situation.

[30] If true, these allegations cry out for urgent resolution. And generally a situation of this nature cannot automatically be trumped by the fact that a litigant is out by a few days in timeously arranging for the set-down of an urgent application. It is so that a High Court that has as huge an urgent court roll as does the Gauteng Local Division of the High Court[16] must have a workable system which ensures that urgent court Judges are afforded sufficient time to read files before each hearing. But that must never mean that this system must be applied rigidly. I am not suggesting that it is being so applied. If anything, one understands the untold pressure to which urgent court Judges – and, indeed, Judges doing motion court – in busy High Court Divisions are subjected. And it is with this understanding in mind that one must approach this and similar matters.

[31] That said, there is a worrying trend where plainly urgent applications are struck from the roll for lack of urgency. A few years back an example was *Informal Traders*.[17]

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[15] Compare *Informal Traders* above n 5.

[16] In a recent notice to all legal practitioners Sutherland DJP advised that the Urgent Motion Court in Johannesburg is said to be in a "critical" state:

> "The sheer volume of cases enrolled has reached a critical scale. At present two judges are rostered per week. Routinely each is confronted with some 60 matters, or more. There is no spare capacity to supplement the two rostered judges."

[17] *Informal Traders* above n 5. In this matter, the City of Johannesburg's Metro Police indiscriminately evicted informal street traders from their stalls and confiscated their goods. Notwithstanding the fact that the informal traders negotiated their return with the City and verified their registration, they were prevented from returning to their stalls. When the traders approached the Gauteng High Court on an urgent basis seeking interim relief that would allow them to continue trading at their stalls while they took several decisions of the City on review, the matter was struck from the urgent roll without reasons. This Court held that the matter was manifestly urgent and granted the informal traders interim relief in the form of an interdict prohibiting the respondents from interfering with their trading activities.

A recent and most glaring example is *Moko*.[18] In that matter an acting principal of a school denied Mr Moko, a grade 12 student, access to an end-of-year examination for allegedly having failed to attend extra classes. The High Court struck from the roll an urgent application in which Mr Moko sought a mandamus that he be afforded an opportunity to write the missed examination in time for the result to be out with the results of other candidates. With no regard whatsoever for the impact that its decision was likely to have on Mr Moko's future, the High Court struck the matter from the roll for lack of urgency. That was plainly wrong. Unsurprisingly, we held as much.

[32] By their very nature, some cases call for the striking of a balance between compliance with practice directives on the conduct of urgent matters and the clamant need to come to the assistance of a litigant whose rights are severely being violated. *Informal Traders* and *Moko* are examples of such cases and, in my view, so is the present matter. The facts I have set out above about the instant case make this plain.[19] To have this matter heard in due course, that is, not as one of urgency, means it will be heard not earlier than the second quarter of 2022.[20] That cannot be. It is not without some significance that before two Judges of the same Court[21] the matter was entertained as one of urgency. And Antonie AJ went so far as, upfront, to grant the applicants leave to, again, apply to the Court by way of urgency in the event of non-compliance with his order. Of course, this did not give the applicants carte blanche to then be lackadaisical in making an approach to Court if that became necessary. But surely this demonstrable urgency twice recognised by Judges of the same Court cannot easily be swept aside by reason of the applicants possibly being out by a few days in complying with the practice directive.

[18] *Moko v Acting Principal, Malusi Secondary School* [2020] ZACC 30; 2021 (3) SA 323 (CC); 2021 (4) BCLR 420 (CC).

[19] See [29].

[20] At the time it was struck from the roll, the next available date on the High Court's roll was 22 April 2022.

[21] That is, Keightley J and Antonie AJ.

[33] Entertaining this matter does not mean this Court is readily available to hear direct appeals in matters where applications have been struck from the roll for lack of urgency. The word of caution sounded in *Informal Traders* continues to be the rule; this Court will entertain similar direct appeals as "an exception rather than the norm"[22] and as "a last resort".[23] The facts must unequivocally cry out for urgent intervention.

[34] Before grappling with the factual question whether there was compliance with the order of Antonie AJ, we must first determine what the order means; what I earlier referred to as the legal component. The order must be read in the context of what was before Antonie AJ and must, therefore, have informed the decision.[24] Insofar as the applicants are concerned, throughout the focus of the proceedings was that the respondents rendered the home uninhabitable by removing the roof and windows. For their part, the respondents also focused on the roof and windows, although they said it was the first applicant – assisted by his brother-in-law – who removed these items. That explains the specific mention of the roof and windows by Antonie AJ. Nothing was ever mentioned to him about anything else that had rendered the home unfit for habitation by human beings. It is unlikely, therefore, that his mind could have strayed beyond what had been brought to his attention. After all, context is key in the interpretation of documents, court orders included. Wallis JA explained why this is so in *Endumeni*:

> "Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used."[25]

[22] *Informal Traders* above n 5 at para 17.

[23] Id at para 19.

[24] See *Democratic Alliance in re Electoral Commission of South Africa v Minister of Cooperative Governance* [2021] ZACC 30 at para 13.

[25] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 25 (*Endumeni*).

[35] It seems to me, therefore, it would be straining the language of the order to say it requires that any aspect whatsoever that bears relevance to human habitability – even if unrelated to the fixing of the roof and windows – must be fixed. So, for that reason I do not agree with the applicants' interpretation of the order. Nor do I agree with their argument founded on section 172. My difficulty with it is that nothing in the pleaded case placed the respondents on notice that they were at risk of doing restorative work that went beyond, and was *unconnected* to, "replacing" the roof and windows. One does not know what they might have pleaded before the High Court if they had been placed on notice in this regard and what impact that might have had to the outcome of the case. In the circumstances of this case, it would be unfair and unjust to extend the meaning of the order to the wider reaches contended for by the applicants. And that is antithetical to the ruling epithets in section 172(1)(b) – "just" and "equitable".[26]

[36] But then again, one cannot be overly restrictive on what falls within the ambit of the restorative task. The respondents' argument appeared to suggest that it was enough for them to plonk the roof, secured of course, on top of the wall. That cannot be the case. Anything that is integral to the fixing of the roof must also be fixed. It matters not that ordinarily that other thing may seem unrelated to the fixing of the roof. Take this example. It may be possible to affix the roof securely, but if the last two courses of the brickwork just beneath the roof are – for whatever reason – so unstable that they pose a risk of collapse of the roof, then those two courses must be fixed to remove the risk. After all, the order requires that the "roof … of the dwelling [must be replaced] to make it fit for human occupation". With that risk, the house is simply not suitable for human occupation. Although the order is tied to the roof, its broader purpose is to ensure the safety of the occupants and to safeguard their health and general welfare. Defects connected to the fixing or replacement of the roof that in any way detract from that purpose must be fixed.

[26] This in no way seeks to hamstring the wide discretionary remedial power in section 172 by what was pleaded. I am only addressing myself to the injustice that will arise *in the circumstances of this case* if we were to accede to what the applicants are urging upon us.

[37] We do not have enough before us to itemise what these defects, if any, are. But in terms of the order the respondents bear a responsibility to fix any such defects. It is up to them to see to it that they identify and fix them. The reason for this is simple: it is they that must comply with the order. And if what they have done falls short of what the order requires, that constitutes non-compliance with the order.

[38] Coming to the factual question whether the order of Antonie AJ has been complied with, this is a hotly contested issue.[27] And the fact that this is a matter brought on affidavit does not assist. Each side is supporting its position on this disputed issue with photographs. At first blush it may appear as though this is a matter that must be resolved in accordance with the *Plascon-Evans* rule,[28] with the result that the applicants must fail. But on closer look, I am satisfied that the respondents' denial of the applicants' assertion that the roof has not been restored to a state suitable for human habitation falls to be rejected on the papers as untenable.[29]

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[27] This to me is the only remaining material factual issue. The respondents made much of the fact that the roof was not removed by them, but by the first applicant and his brother-in-law. This is immaterial because what we are now concerned with is that – regardless of who removed the roof and windows – Antonie AJ ordered that the respondents must restore them. Of course, what is at issue now is only the roof.

[28] See *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623; 1984 (3) SA 620 (A). This case held at 634E-F:

> "In such a case the general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:
>
> > 'where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order . . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.'"

[29] Compare *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) at 698H–J and *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd* [2010] ZASCA 66; 2011 (1) SA 8 (SCA). In the latter case the Supreme Court of Appeal held at para 19:

> "[I]n *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998 (2) SA 689 (W) Eloff AJ stated at 698H-J:
>
> > 'I am also mindful of the fact that the so-called "robust, common-sense approach" which was adopted in cases such as *Soffiantini v Mould* 1956 (4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.'
>
> I respectfully agree. The court should be prepared to undertake an objective analysis of such disputes when required to do so."

[39] There is a lot odd in what is depicted in photographs taken on the day the applicants and their attorney went to inspect the house after it had supposedly been fixed pursuant to Antonie AJ's order. The flat roof appears to be made of corrugated iron sheeting. That much appears from a picture proffered by the respondents which shows the roof from inside the house and from one corrugated iron sheet which, as I explain presently, is visible from the outside. There is nothing the matter with a roof made of corrugated iron sheeting. But then beyond that a lot looks unusual.

[40] On all the elevations of the building (front and sides) depicted on the photographs, the corrugated iron sheeting is not visible; it does not make an overhang beyond the wall. There is one exception, and that is what appears to be one corrugated iron sheet that juts out like a sore thumb on one side only. Without the overhang and nothing appearing to act as a sealant between the roof and the wall, it seems to me that rainwater falling at an angle from the sides can seep through onto the inside of the house. This appears to be exacerbated by a number of holes at the top end of the wall that were plainly caused by the removal of roof trusses that were previously embedded into the wall. I say this is exacerbated because, without an overhang, those holes are completely exposed. I can tell how the holes came to be there because of photographs[30] provided by the respondents and annexed to their affidavits in the earlier litigation. According to the respondents, these photographs depict the house after the roof had been removed. What is worth noting is that the trusses are in place, sticking out and embedded in the top end of the wall. On the photographs that both parties agree depict the house with the roof having been fixed, the trusses are not visible. And where they were, are gaping holes. Through those holes, it seems rainwater would not even seep through; it would gush in. When the possibility of rainwater going through to the inside of the house was put to counsel for the respondents at the hearing, she conceded this.

[30] Possibly this is the same photograph.

[41] The respondents claim that the roof has been properly secured. But here is an oddity. Right on the edge of the roof are small bricks. When the applicants query this, even stating that the bricks pose a risk of causing physical harm to them, the respondents content themselves with saying the applicants have no cause for complaint as there were big rocks on the roof even before it was removed. Even assuming that that was so, this does not answer the point of substance: if the roof is secure, why have the respondents placed the bricks on top of it; are they doing it purely as an attempt at matching what was there before; is it a for-the-sake-of-it exercise? Absent a cogent explanation from the respondents, the presence of the bricks is indicative of an attempt by the respondents to weigh down and keep the roof in position. Of course, it is doubtful that those small bricks can achieve that purpose. Also, those bricks are an eyesore. If the respondents truly believe that they have secured the roof properly, it makes no sense for them to place the bricks on top of it.

[42] I am satisfied that the respondents have not complied with the order. They must do so soonest so that the dignity of the applicants and their children may be restored. From the photographs, it is plain that this is a modest home. That matters not. As Mhlantla J says "[a] home is more than brick and mortar, it is often a place of comfort [and] safety".[31] Indeed, to the applicants their modest home is home nonetheless and for the past 11 or so years the applicants and their children have enjoyed a dignified family life, assured of a roof over their heads and protected from the indignity and pain of homelessness. All that Antonie AJ's order does is temporarily to keep that situation in place and guarantee that its termination will be done under judicial supervision.

[43] The appropriate order is for the respondents to comply with Antonie AJ's order. And a suitably qualified official of the Emfuleni Local Municipality must inspect the house for compliance. Because this has been necessitated by the respondents' failure to comply with the order, the first and fourth respondents must bear costs, if any, reasonably incurred by the Municipality in this regard. The Municipality was not party

[31] *Residents of Industry House v Minister of Police* [2021] ZACC 37 at para 1.

to the proceedings. Should it be unwilling to act as required by this order, it will be granted leave to apply to the High Court and give reasons for the unwillingness. The application must be made to the High Court for the same reasons given in the next paragraph.

[44] In the circumstances of this case and as the High Court ought not to have struck this application from the roll, it is only fair that it must be remitted to that Court to ensure compliance with the order of this Court. For all practical purposes, this order seeks to enforce compliance with the High Court's own order granted by Antonie AJ. So, this is not foisting this Court's process on the High Court. This should not be read to have a subtext that says this Court is averse to make orders of remittal.

[45] The applicants do not seek costs. They say, instead, that the parties must each pay their own costs. The respondents, on the other hand, seek costs *de bonis propriis* against the applicants' attorneys. Now that the respondents have not succeeded in their opposition of the application, their contentions in this regard must fail. So, no order will be made as to costs.

Order

[46] The following order is made:

1. Leave to appeal directly to this Court is granted.
2. The appeal is upheld and the order of the Gauteng Local Division of the High Court (High Court) of 25 August 2021 striking the applicants' application from the roll for lack of urgency is set aside.
3. The first and fourth respondents must repair the roof of the applicants' home situate at Plot 8, Ardenworld, Vanderbijlpark, Gauteng (house) within seven calendar days of the date of this order.
4. In compliance with paragraph 3, the first and fourth respondents must repair the roof in a manner that renders the house fit for human habitation, including effecting repairs to such defects as may be necessary in order to repair the roof.

5. If satisfied with the repair work referred to in paragraph 3, the applicants may take occupation of the house as soon as the repairs have been effected.
6. To give full and meaningful effect to paragraph 5 or to any order that may be granted by the High Court pursuant to its supervision of compliance with this order in terms of paragraph 10, paragraphs 3 and 5 of the order granted by Antonie AJ on 4 August 2021 continue to apply.
7. If the applicants are not satisfied with the repair work referred to in paragraph 3 of this order, the Emfuleni Local Municipality, using a suitably qualified person, must inspect the house and prepare a report, within four calendar days of being requested so to do by the applicants, as to the safety and fitness of the house for human occupation in relation to the repair work envisaged in paragraphs 3 and 4 of this order.
8. The applicants' attorneys must file the report referred to in paragraph 7 with the High Court and serve it on the respondents' attorneys.
9. Costs incurred by Emfuleni Local Municipality towards compliance with this order, if any, must be borne by the first and fourth respondents.
10. If the Emfuleni Local Municipality is unwilling to comply with the order in paragraph 7, it is granted leave to apply to the High Court and give reasons for the unwillingness within three court days of being requested by the applicants to inspect the house and prepare a report.
11. The matter is remitted to the High Court for supervision of compliance with this order.

For the Applicant:	T Ngcukaitobi SC and J Mitchell instructed by Marweshe Attorneys
For the Respondent:	N Smit instructed by Bernard L Du Plessis Incorporated