IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 18638/24

In the matter between:

ALLY AL HABSY	First Applicant
OCCUPIERS OF ERF 10256 RE OLD MARINE DRIVE CULEMBURG OFFSHORE	Second to Thirty-Eight Applicants

and

PASSENGER RAIL AGENCY OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
TRANSNET SOC LIMITED	Second Respondent

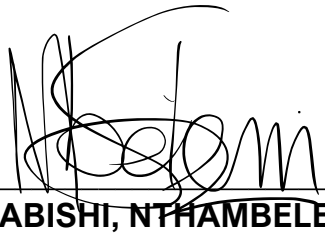
APPLICATION FOR LEAVE TO APPEAL

KINDLY TAKE NOTICE THAT the applicant Passenger Rail Agency of the Republic of South Africa (PRASA) hereby make an application for leave to appeal to the Full Bench, alternatively, to the Supreme Court of Appeal against the order

delivered by the Honourable Lady Justice Ndita on the **06** September **2024** and the orders granted on the same date.

TAKE FURTHER NOTICE; that the applicants reserve their rights to supplement the grounds for the leave to appeal when the Courts furnishes the full judgement in this matter.

DATED AT CAPE TOWN ON THIS 09TH DAY OF SEPTEMBER 2024.



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And to: **NDIFUNA UKWAZI LAW CENTRE**

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TRANSNET SOC LIMITED	Second Respondent

GROUNDS FOR LEAVE TO APPEAL

The applicants hereby file limited grounds of appeal on the basis that the court has only issued an order without full judgement in this matter. The applicants will furnish further grounds upon receiving full judgement in this matter.

THE COURT IGNORED THE NON-JOINDER OF INTERESTED PARTIES

1.

On the applicants in their own version dealing with the events that triggered the urgent application of 19 August 2024 stated the following *"On 19 August 2024, at or around 06h30, we were awoken by employees of PRASA Protection Services, Sechaba Protection Services and Fidelity Security arriving at the property*[1]*"*. That statement alone demonstrate that there were other parties that were involved in the operation that the Applicants did not cite.

2.

It is clear that Sechaba Protection Services as well as Fidelity Security as well as all other stakeholders in the "Operation Reclaim Our Rail**"** are interested parties in these proceedings and ought to have been cited as Respondents at least on the applicant's own version. It is trite and settled law that any party who has a direct and substantial interest in the subject matter must be joined in the proceedings to safeguard their interest.

3.

The Supreme Court of Appeal in **Absa Bank Ltd v Naude NO** formulated the test for non-joinder as follows: *" The test whether there has been non joinder is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined"*. The court in **Volkar NO and Others v Big Sky Trading 219 CC** and Another held as follows dealing with non-joinder *" The test whether there has been non-joinder*

[1] Page 7 of Ally Al Habsy founding affidavit appearing at paginated pages 7-37 of the record.

is whether a party has a direct and substantial interest in the subject matter of the litigation which may prejudice the party that has not been joined."

4.

There is what is also referred to as a " necessary joinder", where the failure to join a party amount to a non-joinder, and the court can decline to hear such an application until such joinder has been effected and or " the parties have consented to be bound by the judgement or waived their right to be joined[2]

5.

On the applicant's own version and in their founding affidavit at least the City of Cape Town is mentioned twice and the first time at paragraph 38 of the founding affidavit where it is stated that *" Mr Saate was unable to present any eviction order or any other court order. His response which was unclear, was that the operation had been authorised by the* ***City of Cape Town*** *and or Cape Town Office. He subsequently refused to engage further when he observed that recordings of the interactions on the property were being made. He also refused, despite request, to furnish Ms Govender with the contact details of the relevant person responsible for instructing him and the operation*[3]".

6.

The second time the City of Cape Town is mentioned in the founding affidavit is at page 13 where the following bald allegation is made; *" The City of Cape Town, through Ward Councillor Carmen Siebritz, expressed anger over illegal eviction that took place on 25 February 2024[4]"*. There was no confirmatory affidavit filed that support the allegation made by Ward Councillor Carmen

[2] Mahlangu v Mahlangu and Another [2020] ZAMPMHC 5 at para 5.
[3] See page 12 at paragraph 38 of the Applicant's Founding Affidavit.
[4] See page 13 at paragraph 44 of the Applicant's Founding Affidavit.

Siebritz in this matte save to state and place on record that the City was not joined as part of these proceedings.

7.

Besides the non-joinder of Sechaba Protection Services and Fidelity Security, the City of Cape Town ('the City') and all other stakeholders that were part of the operation that were not joined as a Respondent in these proceedings brought by the Applicants.

8.

The argument being brought forward by the Applicants against not joining the City of Cape Town is that the application before the court is a spoliation against the First Respondent and that the City did not take the possessions of the Applicants that should be restored through the order. This argument is flawed in material respects and the First Respondents will demonstrate to this Court the reasons thereto.

9.

On their own version the Applicants allege as follows: (a) that the was a demolition by the First Respondents; (b) the Applicants were evicted without a court order; (c) the Applicants were rendered homeless as a result of the demolition.

10.

In all evictions that involve unlawful occupiers the City of Cape Town becomes an interested party in any proceedings to be launched in court as the City has the responsibility to provide alternative accommodation to unlawful occupiers. This position is amplified by the applicants in their own founding affidavit that

the City was “allegedly” unhappy with the unlawful alleged evictions of the applicants.

11.

The contents of the founding affidavits of the applicants state as follows to confirm this contention *“ The unlawful and inhumane events that took place on the morning of the 22 August 2024 were traumatic for our entire community. Since the demolition, we have been sleeping without shelter or the security of our homes on the property and exposed to bad weather conditions over the weekend of 24 and 25 August 2024”.*

12.

The above paragraph indicates that the City is an interested party in these proceedings as it has a direct and substantial interest in this matter as alleged by the applicants in their own papers. Therefore, the submission that there was no need to cite the City in this application is misleading in all respects and the court should not entertain it as it is clear on the applicant version that the City is an interested party in these proceedings.

FIRST RESPONDENTS’ FURTHER GROUNDS

13.

The First Respondents submitted that there was a joint operation with other stakeholders and the South African Police Services (SAPS)[5]. There is nowhere in the Applicant’s papers where the South African Police Services was ever mentioned. However, it is not disputed that SAPS was part of this operation that resulted in their urgent application.

[5] [5] See paragraph 9 of the First Respondent opposing affidavit

14.

The joint operation named " Operation Reclaim Our Rail" was conducted on 19 August 2024 in the presence of the police officers and various stakeholders as acknowledged by the Applicants themselves. The First Respondent further stated that the property in question is the property of the Second Respondent and therefore the First Respondent have no legal authority or standing to evict persons in property that does not belong to them.[6] Therefore on that score alone, the eviction argument becomes impossible.

15.

According to the version of the Applicants in their papers, various raids were conducted previously that they refer to as previous demolitions.[7] The court may have been furnished with pictures and videos of the previous demolishing that is referred to in this paragraph as it is clear that no court application was brought by the Applicants for the previous demolitions.

16.

On probing the veracity of the pictures and videos presented the Applicants filed pictures with dates that are unverified through expert evidence or leading evidence in court. Therefore, the First Respondent submit that the pictures and the videos should be rejected as they fail to meet the requirements of evidentiary value under the provisions of the law of evidence as hearsay evidence.

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[6] See paragraph 12 of the First Respondent Answering Affidavit.
[7] See paragraph 15-18 of the Applicant's Founding Affidavit.

NON-COMPLIANCE WITH REQUIREMENTS FOR ADMISSIBILITY OF ELECTRONIC EVIDENCE

17.

In the urgent application a lot of reliance is being made on photographs and video evidence that have been attached with the founding affidavit. This is clear from photographs attached as **AA4**[8], **AA5**[9], a video marked as **AA6**[10]. More photographs marked as **AA7**[11] as well as **AA9**, **AA10** and **AA11**[12]. The last photographs attached appear as **AA14** and **AA15**[13].

18.

The Law of Evidence Amendment Act[14] 45 as amended stated that certain requirements must be satisfied for electronic evidence to be admissible in criminal or civil proceedings. This is especially true in cases where the credibility of a natural person determines the probative value of the information contained in the evidence, as stated in **Ndlovu and Others v. Minister of Correctional Services**[15].

19.

The High Court in Skosana stated unequivocally that for photos to be allowed into evidence, they must be accurate and unaltered; they must be presented in court for viewing; they must be pertinent; they must impact matters that the court will decide upon; they must be authentic and unaltered; and the device used to take the picture must be dependable.

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[8] See page 8 of the Applicant's Founding Affidavit at paragraph 25.
[9] See page 10 of the Applicant Founding Affidavit at paragraph 33
[10] See page 11 of the Applicant Founding Affidavit at paragraph 34.
[11] See page 11 at paragraph 35 of the Applicant Founding Affidavit.
[12] See page 11 at paragraph 26 of the Applicant Founding Affidavit.
[13] See page 15 at paragraph 50 and 51 respectively.
[14] 45 of 1988.
[15] Ndlovu and Others v. Minister of Correctional Services [2006] 4 All SA 165 (W).

20.

The photographic evidence may be considered by a court and admitted into evidence if all of the aforementioned conditions are met, however in the Applicants case most if not all of the conditions have not been met, thus it is the First Respondent's submission, that the court outright rejects the Applicant's photographic evidence as hearsay evidence.[16]

21.

It is important to place on record that on the entire " Founding Affidavit" of the applicants where all the pictures were attached no confirmatory affidavits were filed before this court as to who took the pictures and the video and when where the pictures and the videos taken and authenticated.

22.

The applicant's counsel made submission in court that confirmatory affidavits were filed and that is incorrect as the only confirmatory affidavit that was filed was after the answering affidavit of the First Respondent and not on the founding papers of the applicants. The confirmatory affidavit only dealt with the pictures and not the video that was also submitted as evidence that the court should consider. At the stage the respondents and the court are none the wiser and there is no probative value on the pictures and the video attached with this application.

[16] S v Skhosana 2016 (2) SACR 456 (GJ)

23.

Therefore, the court erred in entertaining evidence that is non-compliant with the requirements of the admissibility of Electronic Evidence thus granting the order that the First Respondents are unable to comply with as demonstrated through the answering affidavit.

THE RETURN OF THE APPLICANT'S MATERIAL

24.

Prayer 2 that was granted by the Honourable Court was as follows *" The First Respondent is to return and restore the Applicant's material and personal property, that they were disposed of on the 19 August and 22 August and to reconstruct the Applicant's temporary dwelling structures within 24 hours of granting this order".*

25.

The implementation of this impossible as it was the evidence of the First Respondent in his answering affidavit that during the "Operation Clean Our Rail" conducted by PRASA and other stakeholders no demolition was done due to the unavailability of the City of Cape Town. Therefore, it follows that prayer 3 is also unimplementable based on the reasons cited at paragraph 9 nine above.

INTERIM INTERDICT ORDER

26.

The applicants sought spoliation and the order granted them an interim interdict and as such granting an interim interdict when all the requirements were not satisfied is an error by the court.

DATED AT **CAPE TOWN** ON THE **09** SEPTEMBER **2024**

DABISHI, NTHAMBELENI INC

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