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Waste pickers: Unlawful occupiers or vulnerable workers?

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ABSTRACT

This article discusses how a waste picker's rights to human dignity as well as to work and an ability to earn a livelihood are inextricably linked together. When an individual's property rights threaten a vulnerable worker's ability to earn a livelihood, such rights must be weighed against each other and evaluated in context. A private landowner is expected to accept a certain limitation of property rights when a vulnerable person's ability to work, and therefore right to human dignity, is in the balance. Waste pickers are vulnerable members of society, and existing rights, such as the ability to access landfills – which, in turn, affords the right to earn a livelihood – should be protected. Not protecting waste pickers' right to work and ability to earn a livelihood undervalues their labour despite the contribution it makes to limiting the negative environmental effects of waste.

Keywords: waste pickers; ability to earn a living; rights to life and to human dignity; eviction

1 INTRODUCTION

Informal economy workers, such as waste pickers,¹ contribute significantly to the South African economy, but do not receive the same levels of protection as those in the formal economy. Most waste pickers endure extreme poverty and poor living conditions; a lack of work skills ensures limited opportunities for other employment. Unarguably, waste pickers bring benefit to society, especially in the form of protecting the environment.² However, for the most part, the contribution they make is not acknowledged and, consequently, they are provided with limited social and labour protections.³ Waste pickers are vulnerable members of society, and their existing rights, such as the ability to access landfills – which, in turn, affects their right to earn a livelihood – should be protected.

The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) is an ILO instrument designed to improve the level of protection provided to workers in the informal economy.⁴ It recognises that most workers in informal employment have not chosen that work but are forced to accept it due to “a lack of opportunities in the formal economy and the absence of alternative means of livelihood”.⁵

This contribution addresses two main questions. First, can the rights to life and dignity be extended to assert a right to have a livelihood and, if so, is that right in competition with other rights? Secondly, has the Gauteng High Court, in its decision in *Turnover Trading 191 v Moshela*,⁶ erred in the order evicting waste pickers, thus depriving them of their livelihood and the rights to human dignity and life?⁷ This article considers judicial decisions in cases such as *Victoria & Alfred Waterfront*,⁸ *Somali Association*,⁹

¹ Waste pickers are workers in the informal economy who earn a living by collecting, sorting, recycling, and selling recyclable materials and work on landfills or collect waste placed out on the street.

² Koen L & Fourie E “Waste pickers and the law: Contradictory and fragmented regulation in three metropolitan municipalities” (2022) 40(2) *Development Southern Africa* 373.

³ Columbia Constitutional Court Second Revision Courtroom Ruling Sentence No. T291-09, 2009, English translation by WIEGO available at <https://www.scribd.com/document/31696786/04-4-English-Judgement-T-291-09-of-the-Constitutional-Court-of-Colombia> (accessed 10 January 2024).

⁴ International Labour Organization (ILO) *Decent work for sustainability* Geneva: International Labour Office (2017) at 8.

⁵ Preambular paragraph of the ILO Recommendation concerning the Transition from the Informal to the Formal Economy, 2015 (No. 204).

⁶ *Turnover Trading 191 (Proprietary) Limited v Moshela and Others* (77405/2018) [2020] ZAGPPHC 240.

⁷ See *Moshela* (2020) paras 188–194.

⁸ *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* 2004 (5) BCLR 538 (C).

⁹ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* 2015 (1) SA 151 (SCA).

Rycloff-Beleggings,¹⁰ and *Mahlangu*¹¹ and discusses how a right to a livelihood can be read into the rights to dignity and to life in the context of the South African Constitution.

2 SOCIAL PROTECTION FOR WASTE PICKERS

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security ("AU Protocol") states that social protection refers to public or private measures created to protect individuals against life-cycle crises that limit their capacity to meet their needs.¹² Social protection encompasses all forms of social security, programming or strategy that support and sustain a minimum level of livelihood.¹³ Additionally, social protection aims to offer all persons access to essential social health services and care.¹⁴ Vulnerable workers, such as waste pickers, are often excluded from social protection as, strictly, they do not fall under the concept of "employee" as defined in the Labour Relations Act (LRA) and other pieces of legislation such as the Compensation for Occupational Injuries and Diseases Act (COIDA).¹⁵

In *Mahlangu v Minister of Labour*,¹⁶ the Constitutional Court of South Africa, in ruling on an application for confirmation of a High Court judgment, handed down a judgment that declared section 1(xix)(v) of COIDA unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of "employee" and in effect denies them statutory compensation if they contract a disease or suffer disablement,¹⁷ injury or death in the course of their employment.¹⁸

The applicants argued that the exclusion of domestic workers from the ambit of COIDA infringes such workers' right under section 9(3) of the Constitution not to be unfairly discriminated against on the basis of race, sex and/or gender, and social origin.¹⁹ This exclusion differentiates between domestic workers employed in private households and other employees covered by COIDA without any rational connection to a legitimate

¹⁰ *Rycloff-Beleggings (Pty) Ltd v Bonkolo and 70 Others* (2019/18156) [2022] ZAGPJHC 796 (4 October 2022).

¹¹ *Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

¹² Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security ("Protocol to the African Charter"), article 1(r).

¹³ Protocol to the African Charter, article 1(r).

¹⁴ Protocol to the African Charter, article 1(r).

¹⁵ It can be seen in the case of *Ubisse v Enviro-fill (Pty) Ltd* [2010] ZAGPJHC 165 that where waste pickers suffered occupational injuries, their claims were brought in terms of the law of delict instead of the COIDA, as they are not covered by that legislation's provisions.

¹⁶ *Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

¹⁷ Compensation for Occupational Injuries and Diseases Act 130 (GN 1850, GG 15158, 6 October 1993) available at https://www.gov.za/sites/default/files/gcis_document/201409/act130of1993.pdf (accessed 25 February 2025).

¹⁸ *Mahlangu* (2021) para 9.

¹⁹ *Mahlangu* (2021) para 28.

government purpose.²⁰ The purpose of COIDA is to afford social insurance to employees who are injured, contract a disease, or die in the course of their employment.²¹ Lastly, the applicants contended that excluding domestic workers from COIDA infringes on their right to dignity under section 10 of the Constitution.²² The applicants argued that section 1(xix)(v) is irrational and infringes on domestic workers' constitutional rights to equality, human dignity and access to social security.²³ The respondents conceded that the exclusion of domestic workers limits domestic workers' rights under sections 9, 10 and 27(1)(c) of the Constitution.²⁴ The Women's Legal Centre Trust proposed an intersectional approach to the matter, one which required the court to adopt a nuanced, purposive and socio-contextual approach in interpreting COIDA in reaching a decision on the latter's constitutionality and the retrospectivity of the order.²⁵

The majority judgment confirmed the order of constitutional invalidity made by the High Court and ordered it to have immediate and retrospective effect from 27 April 1994.²⁶ The Constitutional Court held that the exclusion of domestic workers from the definition of "employee" constitutes an infringement of the rights to access to social security in terms of section 27(1)(c) read with section 27(2) of the Constitution; it also infringes the right to equal protection and benefit of the law provided under section 9(1) of the Constitution, as well as the right human dignity under section 10. Moreover, the Court rules that the exclusion constitutes indirect discrimination on the basis of race, sex and gender as per section 9(3) of the same, which proscribes unfair discrimination by the state on certain grounds.²⁷ The majority judgment found that the obligation under section 27(2) to take reasonable legislative and other measures within available resources includes an obligation to extend the provisions under COIDA to domestic workers.²⁸

In applying the reasonableness test to the facts at hand, the majority judgment found that it is manifestly unreasonable to exclude this category of workers, who suffer intersecting vulnerabilities based on race, sex, gender and class.²⁹ Accordingly, the judgment concluded that the failure to include domestic workers under COIDA in the face of admitted available resources is unreasonable and constitutes a direct infringement of section 27(1)(c) read with section 27(2) of the Constitution.³⁰ The majority judgment held furthermore that the differentiation between domestic workers and other categories of workers is arbitrary and inconsistent with the right to equal

²⁰ *Mahlangu* (2021) para 28.

²¹ *Mahlangu* (2021) para 33.

²² *Mahlangu* (2021) para 18.

²³ *Mahlangu* (2021) para 19.

²⁴ *Mahlangu* (2021) para 26.

²⁵ *Mahlangu* (2021) para 18.

²⁶ *Mahlangu* (2021) para 131.

²⁷ *Mahlangu* (2021) paras 66, 115.

²⁸ *Mahlangu* (2021) para 66.

²⁹ *Mahlangu* (2021) para 65.

³⁰ *Mahlangu* (2021) para 66.

protection and benefit of the law under section 9(1) of the Constitution.³¹ Through the prism of an intersectional framework, the Court reasoned that the differentiation amounts to indirect discrimination in terms of section 9(3) of the Constitution, as the various grounds of discrimination against domestic workers intersect given that domestic work in South Africa predominantly is performed by black women.³² Their race, sex and gender are intrinsically bound up in the discrimination against them.

Lastly, the majority judgment held that the exclusion of domestic workers from benefits under COIDA has an egregious and stigmatising effect on their dignity.³³ The exclusion demonstrates not only that domestic workers are undervalued but also that their work is not considered “real work” of the kind performed by workers who do fall within the definition of the impugned section of COIDA.³⁴ The Court found that the multiple intersecting forms of discrimination exemplify the indignity that domestic workers endure.³⁵

In a third judgment, penned by Mhlantla J, the impugned provision was found to be unconstitutional in so far as it is not consistent with the constitutional rights to equality and dignity and unfairly discriminates against domestic workers. Justice Mhlantla found that it is insufficient to take cognisance of the discrimination that constitutes the lived experience of domestic workers and that it is also necessary to acknowledge the historical significance of the role domestic workers play and the accompanying struggles they face;³⁶ many of these struggles are caused by the intersection of various axes of discrimination, such as race, sex, gender and social class.

Moreover, the conditions of their employment are exacerbated by the private nature of the sphere in which they work.³⁷ Consequently, domestic workers are unseen and unheard, to the detriment of the practical realisation of their constitutional rights despite their pivotal role in society. Often, they are the sole providers for their households and, in the service of their employers, work long hours away from their own families.³⁸ In recognition of these circumstances, the third judgment underscored the importance of vindicating the rights of domestic workers in a greater and transformative constitutional project.³⁹ For these reasons, their voices must be heard and a means to vindicate their rights must be available to them.

The challenges domestic workers face are, to a degree, similar to those faced by waste pickers. Waste pickers do not fall under the formal definition of an employee, as defined in the LRA and social insurance legislation, much like domestic workers were excluded

³¹ *Mahlangu* (2021) para 72.

³² *Mahlangu* (2021) para 73.

³³ *Mahlangu* (2021) para 64.

³⁴ *Mahlangu* (2021) para 112.

³⁵ *Mahlangu* (2021) para 114.

³⁶ *Mahlangu* (2021) para 184.

³⁷ *Mahlangu* (2021) para 187.

³⁸ *Mahlangu* (2021) para 193.

³⁹ *Mahlangu* (2021) para 195.

from the scope of COIDA.⁴⁰ As a result, waste pickers are excluded from the social protection provided to persons classified as employees. Additionally, because waste pickers' work is not seen as "real work", their human dignity is infringed upon as their contribution to society is undervalued. Social stigma attaches to being a waste picker, which exacerbates the situation of their vulnerability.⁴¹

The Constitutional Court of Columbia opined that waste pickers' work often is not acknowledged despite the contribution to the benefit of society.⁴² Their work diminishes negative environmental effects; however, they are excluded from being offered social protection.⁴³ Waste pickers face intersectional discrimination, as a multitude of factors could contribute to their vulnerability, including gender, race and migration status.⁴⁴ Without any form of social protection, they are particularly vulnerable; their work is their livelihood, and if unfairly restricted, no mechanism protects this category of workers.

3 A RIGHT TO A LIVELIHOOD

The right to a livelihood is not a right explicitly provided for in the South African Constitution. However, in employing the lens of a right to life and a right to human dignity, courts have developed protections to cover this category. A starting-point for discussion is *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape*.⁴⁵

The Waterfront, in this case, is a privately owned property which is open to the public. This case concerns two homeless persons alleged to be beggars.⁴⁶ These persons exhibited improper public conduct, such as cursing and intimidating customers of the Waterfront. They assaulted a female security guard on the property.⁴⁷ In view of their conduct, the owners of the Waterfront wanted to exclude the two homeless persons permanently. The landowners approached the High Court for an interdict to prohibit

⁴⁰ As they are usually regarded as own account workers, i.e. persons who work for themselves.

⁴¹ Koen L *Extending labour law and social protection to waste pickers in the Fourth Industrial Age* (unpublished LLM thesis, University of Johannesburg, 2019) at 4.

⁴² Columbia Constitutional Court Ruling T291-09.

⁴³ See Koen (2019) at 2-4.

⁴⁴ It is known, for example, that a significant number of migrants work as waste pickers in South Africa. See Ramolelle J & Xweso M "Vulnerability, risks and coping: A case study of female street waste pickers in Mashaeng, Free State, South Africa" (2022) 12(3) *African Journal of Social Work* 133 at 136. It is also known that although the majority of waste pickers in South Africa are not necessarily women, there are several landfills where female waste pickers make up the majority of the waste pickers on the landfill. See Wilson K, Kootbodien T, Made F, et al. "Men and women waste pickers on landfills in Johannesburg, South Africa: Divergence in health and socioeconomic status" (2021) 95(2) *International Archives of Occupational and Environmental Health* 352.

⁴⁵ *Victoria & Alfred Waterfront (Pty) Ltd v Police Commissioner of the Western Cape* 2004 (5) BCLR 538 (C).

⁴⁶ *Waterfront* (2004) para 539.

⁴⁷ *Waterfront* (2004) para 542. The right to exclude is one of the incidents of ownership in common law – see *McLennan-Smith v Mannari* 2020 (3) All SA 814 (KZD) at para 34 for a discussion of common law rights arising from ownership.

the homeless persons from entering the premises, effectively exercising a right to exclude such persons.⁴⁸

The circumstances in this case touch directly on the issue of a property owner's right to exclude in competition with a person's rights to human dignity and to life. The court held that the right to exclude is an important entitlement and it is embodied in section 25(1) of the Constitution.⁴⁹ However, the persons whom the owners wanted to exclude from the Waterfront also have constitutional rights, such as the rights to life and to human dignity.⁵⁰

In the *Victoria & Alfred Waterfront* case, the court declared that beggars have a right to human dignity and a right to life. The court ruled there is a link between begging and a right to life: if persons do not have a job or an income, the only form of support they have is to beg.⁵¹ The court stated not allowing them to beg in a public space undermines their right to life. The court ruled that the property rights of the owners of the *Victoria & Alfred Waterfront* are subservient to the right to life.⁵² The court pointed out that in the South African constitutional order, rights and, specifically, property rights are not absolute. In deciding a dispute relating to property rights, other fundamental rights and the history of South Africa must be given attention.⁵³

Dhliwayo explains that the right to exclude is qualified in comparison with the rights to life and human dignity, which are unqualified.⁵⁴ Furthermore, because of their nature, if the rights to life and to human dignity are in conflict with a right to exclude, the latter must give way without a consideration of a balance of interests.⁵⁵ The Constitutional Court, as Dhliwayo points out, has stated that the rights to life and to human dignity are "the most important human rights".⁵⁶ Dhliwayo goes further, stating that the decision by the court in *Victoria & Alfred Waterfront* demonstrates that a landowner's right to exclude can be limited if access to the property is reasonably necessary to secure important constitutional rights.⁵⁷ The circumstances in the case indicate that the rights in property could in some circumstances limit the rights to life and to human dignity; without the "income" from begging, the beggars are unable to purchase food. Curtailing the beggar's access to a public space, such as the V&A Waterfront, has an impact on his or her means of generating a livelihood and, thus, his or her right to life. If the right to

⁴⁸ *Waterfront* (2004) para 542.

⁴⁹ *Waterfront* (2004) para 542.

⁵⁰ *Waterfront* (2004) para 544.

⁵¹ *Waterfront* (2004) para 541.

⁵² *Waterfront* (2004) para 541.

⁵³ *Waterfront* (2004) para 541.

⁵⁴ Dhliwayo P "Reflecting on landowners' right to exclude and non-owners' access to quasi-public property: *Victoria and Alfred Waterfront v Police Commissioner, Western Cape*" (2018) 32(1) *Speculum Juris* 66 at 70.

⁵⁵ Dhliwayo (2018) at 70.

⁵⁶ Dhliwayo (2018) at 71.

⁵⁷ Dhliwayo (2018) at 75.

life and the ability to have a livelihood conflict with property rights, then property rights must give way to an extent.⁵⁸

Protections that support the ability to earn a livelihood have gained subsequent recognition in the Supreme Court of Appeal and the Constitutional Court in cases such as *South African Informal Traders Forum v City of Johannesburg*⁵⁹ and *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism*.⁶⁰ The Supreme Court of Appeal held in the *Somali Association* case that without the ability to earn a livelihood, informal workers faced “humiliation and degradation”.⁶¹ The case relates to an application by a group of refugees and asylum seekers who claimed that the Limpopo Department of Economic Development Environment and Tourism placed restrictions on the ability of foreign nationals to obtain the required trading permit, thereby violating various constitutional rights, including the right to trade.

The right to trade is restricted as a right reserved for citizens.⁶² The court noted when a restriction on the ability to trade results in an impediment to the ability to live without degradation and humiliation, the right to human dignity is engaged.⁶³ Unlike the right to trade, the right to human dignity is not qualified by citizenship and is afforded to everyone. The Supreme Court of Appeal held that if a person cannot find employment and is on the brink of starvation, such person can rely on a constitutional right to dignity in support of a right to trade.⁶⁴ In this declaration, the ability to earn a livelihood is read into the right to human dignity. In line with the *Somali Association* judgment, which relates to the right to trade and the ability to earn a livelihood, these factors are read into the right to human dignity, a fundamental right. Respect for human dignity is a commitment by a society to all human beings, and cannot be partial.⁶⁵

In *Minister of Home Affairs v Watchenuka*,⁶⁶ it was held that refugees have a right to gain employment if their dignity is affected. The Supreme Court of Appeal stated that the right to choose an occupation, such as working in the safety and security industry, can be restricted if it is not a blanket restriction on the refugees’ right to employment but rather a narrow application of a limitation.⁶⁷ However, the court noted that if a

⁵⁸ *Waterfront* (2004) para 541.

⁵⁹ *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC) at para 31.

⁶⁰ *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* 2015 (1) SA 151 (SCA).

⁶¹ *Somali* (2015) para 30.

⁶² Section 22 of the Constitution of the Republic of South Africa, 1996.

⁶³ *Somali* (2015) paras 30, 43.

⁶⁴ *Somali* (2015) para 43.

⁶⁵ *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 344.

⁶⁶ *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA).

⁶⁷ *Watchenuka* (2004) para 32.

restriction impedes a person's ability to live without degradation and humiliation, then the limitation may not be justifiable.⁶⁸

4 TURNOVER TRADING 191 (PROPRIETARY) LIMITED V MOSHELA

In *Turnover Trading 191*,⁶⁹ the High Court ruled against waste pickers in determining that the respondent's right to livelihood was not a relevant consideration in deciding whether an eviction order should be granted. The circumstances of the case relate to waste pickers who lived and carried out their recycling business on private land.⁷⁰ The applicant in the matter based its argument on the facts that providing housing is a governmental obligation⁷¹ and people are not allowed to recycle waste on the property on which they are living. Furthermore, the applicant argued that Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) is inapplicable, as the waste pickers reside on and conduct their business from the property.⁷²

The Court supported these arguments and did not regard other interests and matters, especially the vulnerability of waste pickers in the context of South African history, including a right to life, to work and to have a livelihood. It based its decision on the case of *MC Denneboom Service Station CC v Phayane*, in which the Constitutional Court stated that the eviction of occupants from commercial property does not fall within the ambit of PIE.⁷³ The Gauteng High Court reasoned that the fact that the PIE Act does not apply in respect of commercial interests means that a commercial interest is not a relevant factor, as these interests are not protected within PIE.⁷⁴

However, in the author's view, this amounts to an incorrect application of the *MC Denneboom* case, as the court in that case did not rule that a commercial interest cannot be protected in terms of PIE; it merely included a caveat stating that a party need not comply with PIE when evicting purely commercial occupants subject to a proviso that "those persons do not also reside on the property".⁷⁵ Furthermore, in the author's view, waste pickers' act of securing their livelihood is inherently linked to their right to human dignity and cannot be likened to the protection of mere commercial interests. Procedural irregularities meant that the court in *Turnover Trading 191* excluded some statements and evidence, despite the Constitutional Court's stating that in protecting vulnerable groups, their interests should not be "mechanically sacrificed on the altar of jurisdictional formalism".⁷⁶ The waste pickers argued that although the state offered

⁶⁸ *Watchenuka* (2004) para 32.

⁶⁹ *Turnover Trading 191 (Proprietary) Limited v Moshela* (77405/2018) [2020] ZAGPPHC 240.

⁷⁰ *Turnover* (2020) para 3.

⁷¹ *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 14.

⁷² *Turnover* (2020) para 32; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

⁷³ *MC Denneboom Service Station CC and Another v Phayane* 2015 (1) SA 54 (CC).

⁷⁴ *Turnover* (2020) para 33.

⁷⁵ *MC Denneboom* (2015) para 17.

⁷⁶ *AD v DW* 2008 (3) SA 183 (CC) para 30.

alternative accommodation, it was not suitable, as it was 15 km distant from the property on which they recycled waste to earn a living.⁷⁷

5 RYCLOFF-BELEGINGS (PTY) LTD V BONKOLO AND 70 OTHERS

The facts in the *Rycloff-Belegings* case⁷⁸ relate to a group of persons living on the Randjiesfontein farm where they collected and sorted waste as a living.⁷⁹ The applicant in the case asked for the waste pickers to be evicted from the farm, stating they had resided on the farm illegally for more than six months and that the land was needed for commercial purposes. The court referred to the PIE Act, specifically section 4(7), as the occupancy had extended over a period of more than six months. The section of the Act states that, in this instance, the city should provide alternative emergency accommodation. The central issue in the case turns on whether, in reaching a decision on where to provide emergency accommodation, the city needs to consider the waste pickers' ability to earn a living.⁸⁰ The waste pickers claimed they need to be close to the Randjiesfontein farm in order to carry on their work – which their argument linked to the constitutional right to human dignity – and that the accommodation offered by the state did not make this possible.⁸¹

The court was required to find a balance between the competing interests of the commercial requirements of the applicant and the constraints on the budget of the city in providing accommodation to the waste pickers that would support their livelihood.⁸² It was not in the power of the judge in the case to order the city to perform what is not in its capability, but he gave an order that the city provide the waste pickers with accommodation that would enable them to continue with their work by being reasonably close to where they could use their flatbed trollies lawfully and collect waste.⁸³

6 COMPARING THE CONFLICTING HIGH COURT JUDGMENTS

In the *Turnover Trading 191* case, the decision of the High Court to deny the argument of the waste pickers, given their vulnerable condition, can be viewed as tantamount to denying their right to dignity. The Supreme Court of Appeal in *City of Johannesburg v Changing Tides* indicated that, in a case of eviction, all relevant factors should be considered if the decision is to be just and equitable; justice and equity demand consideration of whether the judgment renders the occupiers homeless.⁸⁴ The waste pickers in the *Turnover Trading 191* and *Rycloff-Belegings* cases indicated they were

⁷⁷ *Turnover* (2020) para 28.

⁷⁸ *Rycloff-Belegings (Pty) Ltd v Bonkolo and 70 Others* (2019/18156) [2022] ZAGPJHC 796 (4 October 2022). It is worth noting that the *Rycloff-Belegings* case was being appealed at the time of this writing.

⁷⁹ *Rycloff-Belegings* (2019) para 2.

⁸⁰ *Rycloff-Belegings* (2019) para 7.

⁸¹ *Rycloff-Belegings* (2019) para 8.

⁸² *Rycloff-Belegings* (2019) para 9.

⁸³ *Rycloff-Belegings* (2022) para 3 of the order.

⁸⁴ *Changing Tides* (2012) para 25.

prepared to be moved if provided with alternative accommodation in reasonable proximity for them to carry on their work. In *PE Municipality*, the court stated that an eviction can be granted even though suitable alternative accommodation is not available, despite it being a consideration; if accommodation is not available, it does not automatically result in the eviction being unjust.⁸⁵ In such an instance, the court would be hesitant to hastily grant an eviction order, especially if the occupiers are rendered homeless.⁸⁶ Consideration of all relevant circumstances, ultimately, will establish if an eviction is just and equitable. Koen contends that an important consideration in a decision which restricts a person's ability to work⁸⁷ is the right to dignity, as these factors are inextricably linked.⁸⁸

In *Affordable Medicines Trust*,⁸⁹ the court noted the relationship between work and the human personality.⁹⁰ It maintained that work is linked to existence⁹¹ and thus inextricably linked to the right to human dignity. In a decision by a court about an eviction order, consideration must be given to the right to human dignity and the constitutive role of work;⁹² eviction of waste pickers, whose position in society is vulnerable, threatens their livelihood and their right to life.

In *Turnover Trading 191*, the court accepted the applicant's argument in respect of its commercial and financial obligations. The decision of the court was that the waste pickers could not occupy the land until suitable alternative accommodation was found. The approach in the case of *Rycloff-Beleggings* is different; the court sought to balance the applicant's commercial interests, the state's financial constraints and the waste picker's ability to earn a living. The decision by the court in *Turnover Trading 191* effectively contradicts the ruling of the Constitutional Court in *City of Johannesburg v Blue Moonlight Properties*.

In *Blue Moonlight* the Constitutional Court held that a developer who purchases a property with knowledge of the presence of unlawful occupiers, as in this instance, may be reasonably expected to endure the occupation of the property for some time.⁹³ Therefore, it is not unreasonable to expect patience from a landowner until suitable alternative accommodation is found and the livelihood of the waste pickers' is not endangered. A court should take into consideration that a restriction on waste pickers' access to waste impacts their ability to generate an income and affects their right to

⁸⁵ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 58.

⁸⁶ *Port Elizabeth* (2005) para 59.

⁸⁷ Koen L "Investment law and South Africa's duty to combat xenophobic attacks on migrant-owned spaza shops" (2022) 29(2) *South African Journal of International Affairs* 214.

⁸⁸ *Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others* 2021 (2) All SA 357 (SCA) para 121.

⁸⁹ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC).

⁹⁰ *Affordable Medicines* (2006) para 59.

⁹¹ *Affordable Medicines* (2006) para 59.

⁹² *Informal Traders Forum* (2014) para 31 .

⁹³ *City of Johannesburg v Blue Moonlight Properties* 2012 (2) SA 104 (CC) para 40.

life.⁹⁴ In *Glen Elgin Trust v Titus*,⁹⁵ the Land Claims Court stated that the constitutional rights of any occupier affected by an eviction includes the right to life.⁹⁶ In the *Rycloff-Beleggings* case, the court found that the initial accommodation offered by the city restricted the waste pickers' ability to earn a living and ordered that accommodation be provided that allows the waste pickers to continue their work.⁹⁷

In *Governing Body of the Juma Masjid Primary School v Essay*,⁹⁸ the Constitutional Court held that the purpose in a horizontal application of the Bill of Rights is "not to obstruct private autonomy or to impose on a private party the duties of the state".⁹⁹ Koen points out, nevertheless, there is an obligation on private parties not to obstruct the existing access to a right.¹⁰⁰ Where waste pickers have secured a means of gaining a livelihood, which impacts their right to dignity, private entities and landowners are required to show greater tolerance.¹⁰¹ In *Turnover Trading 191*, consideration was not given to all of the factors applicable in this case, such as the constitutional right to life when the court had to balance the private owner's property rights against those of the waste pickers; the court in *Rycloff-Beleggings*, on the other hand, considered all relevant interests. In *S v Manamela*,¹⁰² the Constitutional Court held that the law does not permit a sledgehammer to be used to crack a nut.¹⁰³

In the author's view, the decision in *Turnover Trading 191* in favour of property rights against the claims of waste pickers is an example of using a "sledgehammer", unlike the decision in *Victoria & Alfred Waterfront*, where a better balance is struck between the competing interests. The court in *Turnover Trading 191* could have relied on less restrictive means, as in the case of *Rycloff-Beleggings*, which would not affect the occupiers' ability to earn a livelihood and endanger their right to life without exceeding the court's powers. The court could have afforded the waste pickers an extension of the period to find suitable accommodation rather than their being homeless and unable to earn a living.

⁹⁴ See Koen (2019) at 8.

⁹⁵ *Glen Elgin Trust v Titus* 2001 JDR 0002 (LCC).

⁹⁶ *Glen Elgin Trust* (2001) para 6. While it is acknowledged that the *Glen Elgin* case dealt with the interpretation of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and not PIE, in the author's view this does not change the principle that an eviction should be cognizant of an occupier's rights whether the matter is heard under ESTA or PIE.

⁹⁷ *Rycloff-Beleggings* (2022) paras 9, 11 and in the order para 3.

⁹⁸ *Governing Body of the Juma Masjid Primary School v Essay* NO 2011 (8) BCLR 761 (CC).

⁹⁹ *Governing Body of the Juma Masjid Primary School* (2011) para 58.

¹⁰⁰ See Koen (2019) at 9.

¹⁰¹ *Waterfront* (2004) 541. See also *Governing Body of the Juma Masjid Primary School* (2011) para 58 for a discussion of private parties' obligations not to obstruct existing access to the right.

¹⁰² *S v Manamela* 2000 (3) SA 1 (CC).

¹⁰³ *S v Manamela* (2000) para 34.

In *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*,¹⁰⁴ the Constitutional Court opined that “even if they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them”.¹⁰⁵ Nevertheless, the court in *Turnover Trading 191* was seemingly annoyed with the vulnerable waste pickers for not honouring the interdict despite the order effectively rendering them homeless and placing their right to life in danger.¹⁰⁶ In evictions, the provision of suitable alternative accommodation is an important requirement. There must be meaningful engagement to balance the conflicting interests in cases of property rights and to ensure an equitable outcome to the case. In the *Turnover Trading 191* case, the city in its papers before the court did not address the occupiers’ right to work or their ability to earn a living. The failure to offer accommodation that was suitable was an infringement of the right to dignity. The proximity of the location of the alternative accommodation to their place of work is a crucial factor in being able to make a living.¹⁰⁷

In the recent case of *Transnet v Mushandana*,¹⁰⁸ the court blocked an attempt to evict traders, as they had occupied the land for a considerable period and earned a living by trading. With their being indigent, waste pickers represent a vulnerable sector in society. They need to be shown greater tolerance and protection, which may require the diminution of property rights.¹⁰⁹ In the author’s view, the word “suitable” in “suitable alternative accommodation” is open to a wide range of interpretation.¹¹⁰ It is not a rigid or formalistic formulation that cannot consider unique circumstances.

7 CONCLUSION

The position of waste pickers is particularly vulnerable; generally, they pursue their occupation due to a lack of opportunity and in the absence of other means of earning a living.¹¹¹ They lack influence in the decisions relating to policies that affect the

¹⁰⁴ *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* 2020 (1) SA 1 (CC).

¹⁰⁵ *Freedom of Religion South Africa* at para 58; *MR v Minister of Safety and Security* 2016 (2) SACR 540 (CC) para 59.

¹⁰⁶ *Turnover* (2020) para 2.

¹⁰⁷ *Turnover* (2020) para 152.1.

¹⁰⁸ *Transnet Soc Ltd v Mushandana Humbulani Victoria & 34 Others* case no 400/2018 (M) (unreported).

¹⁰⁹ In *Seale and Another v City of Johannesburg Metropolitan Municipality and Another* (2023-078684) [2023] ZAGPPHC 1149 at para 51, the court recognised that the mere fact that a person resides on the margins of society neither negates the fact that such persons are entitled to human rights, nor renders them “invisible social outcasts or nuisances”.

¹¹⁰ The Constitutional Court has repeatedly emphasised that there is a duty upon the state to provide “suitable alternative accommodation” in the case of eviction. See *Baron v Claytile (Pty) Ltd* 2017 (10) BCLR 1225 (CC) para 45.

¹¹¹ Koen L & Fourie E “The role of international and regional instruments with reference to the labour and social protection of women workers in the informal economy” in Van Eck S, Bamu P & Chungu C (eds) *Celebrating the ILO 100 years on: Reflections on labour law from a South African perspective* (2020) Cape Town: Juta 147–152.

conditions of earning a livelihood.¹¹² However, the right to life is dependent on the ability to earn a living and is a constituent element of the right to human dignity: these are fundamental rights.¹¹³ Access to waste is crucial for waste pickers if they are to generate an income. The courts need to consider all relevant factors in eviction cases; a private owner's property rights, including the right to evict, must be balanced against rights to life and dignity. Property rights are not absolute and are subservient to a right to life. This article argues that the court in *Turnover Trading 191*'s failure to give consideration to the relevant rights meant the court sacrificed a vulnerable sector's ability to earn a living for judicial formalism.

The Constitutional Court has long accepted that the ability to earn a livelihood is a constituent of the right to human dignity.¹¹⁴ In *Turnover Trading 191* this understanding is absent in the order of eviction. In the light of the more recent *Rycloff-Beleggings* case, there are conflicting South African High Court judgments on the issue: one in the Gauteng Division of Pretoria and one in the Gauteng Local Division of Johannesburg. The Supreme Court of Appeal or the Constitutional Court will have to make the determination between these conflicting opinions. It is submitted that, in line with an earlier judgment in the Supreme Court of Appeal in the case of *Changing Tides*, the determination should favour the approach taken by the court in *Rycloff-Beleggings*.

¹¹² Fourie E *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy*" (unpublished LLD thesis, North West University, 2018) at 5.

¹¹³ *Makwanyane* (1995) para 217.

¹¹⁴ *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (6) BCLR 726 (CC) para 31.

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