



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG**

**CASE NO: A3095/2022
BENONI MAGISTRATES' COURT
CASE NUMBER 1462/21**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
	DATE
SIGNATURE	

In the matter between:

LARKMAN, CHERYL ANN

Appellant

and

LARKMAN, RONALD KENNETH

Respondent

JUDGMENT

MOORCROFT AJ [DODSON AJ CONCURRING]:

Summary

Eviction – residential property - Prevention Of Illegal Eviction and Unlawful Occupation of Land Act, 19 of 1998- section 4(7) – Court must determine if it is just and equitable to evict the appellant and if so, what an appropriate date would be for appellant to vacate the property

Constitution, 1996 – Bill of Rights - sections 25 and 26(3)

Order

[1] In this matter I make the following order:

1. *The late filing of the appeal record is condoned;*
2. *The appeal is dismissed;*
3. *The appellant and all who occupy through her are ordered to vacate the property situate at 11 Skylark Avenue, Farrarmere (“the property”) by no later than 30 November 2023;*
4. *In the event that the appellant and all who occupy the property through her fail to vacate the property by 30 November 2023 the Sheriff of the Court is authorised to evict the appellant and all who occupy the property through her on 15 December 2023.*
5. *There is no order as to costs.*

[2] The reasons for the order follow below.

Introduction

[3] The appellant appeals against an order granted by the Learned Magistrate Nana in the Magistrates Court in Benoni on 15 June 2022 in terms of which he ordered the eviction of the appellant from the respondent’s property situated in Benoni. The

appellant occupies the property for residential purposes and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998 applies. The appellant has been in unlawful occupation since 2020 and section 4(7) of the Act is applicable.

[4] The appellant is a lay person and she seeks condonation for the late filing of the appeal record. The appeal was on the court roll on 14 February 2023 but was removed from the roll because the appellant had failed to file a complete record of appeal - the *viva voce* evidence presented in the Magistrates Court had not been transcribed and did not form part of the appeal record. An application for an order declaring that the appeal had lapsed was enrolled with the hearing of the appeal on 14 February 2023. The respondent subsequently saw to the transcribing of the record in order for the appeal to be finalized. The application for an order that the appeal had lapsed was not seriously pursued and under the circumstances condonation is granted in order to deal with the merits of the appeal.

[5] The appellant and the respondent were previously married for 4 years and 7 months. There were no children born of the marriage. The marriage between them ended in divorce in the year 2001. In terms of a settlement in the divorce action the respondent afforded the appellant a right of habitatio over the property that would terminate upon her remarriage or otherwise six months after the death of the appellant's mother who was then living in the appellant's own house. The right of habitatio was notarially registered in May 2002. The appellant has lived in the property since the time of the divorce continuously, a period of some twenty-two years, three-and-a-half of which have been as an unlawful occupier.

[6] The property that the appellant owned at the time of the divorce in 2001 was subsequently sold by her to defray expenses.

[7] The appellant's mother passed away in June 2019 and in terms of the settlement agreement and the notarial deed of habitatio the appellant was obliged to vacate the property at the end of December 2019. She failed to vacate the property and was permitted a further two months in order to do so. A further indulgence was granted until the end of June 2020. Again she overstayed.

[8] The appellant is a 64-year-old pensioner and is not in robust health - she suffers from multiple sclerosis. The appellant's unemployed son, Neville, and her ten-year old

grandson, Levi, live with her in the property and she is the head of the household. Her son Neville is unemployed. According to the appellant he gave up his employment some years ago to be with Levi on a full-time basis after the latter suffered severe psychological trauma following his alleged abduction by his mother. When Levi had recovered sufficiently for Neville to return to work, he was not able to find employment. Levi is now home-schooled because the family cannot afford school fees. The appellant receives a monthly State pension and a small annuity. She is unable to pay for accommodation elsewhere for herself, her son and her grandson. It might be possible for her to obtain accommodation for herself alone through the MOTHS (the Memorable Order of the Tin Hats) organization. It is also contended by the respondent that it is possible for the appellant, her son and grandson, though not ideal, to move in with her other son who lives in a house with his own family but whose wife (the daughter-in-law of the appellant) is also coping with serious illness.

[9] The respondent who is also a pensioner, 78 years of age, pays the municipal rates and the cost of utilities of the property and also for the maintenance of the property. He has done so since 2001. The appellant admits that she has failed to maintain the property and that she does not contribute to the financial obligations to the local authority.

The parties' Constitutional rights

[10] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act gives effect to section 26(3) of the Constitution of 1996. This subsection of the Bill of Rights provides that no-one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. The Act creates the machinery and contains measures that enable a Court to consider all the relevant circumstances.¹

[11] The provisions are not aimed at the expropriation of private property but seek to delay or suspend certain ownership rights² – particularly occupation and use – pending an enquiry by the Court.³

¹ Compare *Ndlovu v Ngcobo; Bekker and Bosch v Jika* 2003 (1) SA 113 (SCA).

² See section 25 of the Constitution.

³ See *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) para 16.

The judgment of the Magistrate

[12] In his judgment the Learned Magistrate analysed the facts and the applicable legal principles contained in the Act and the case law. The Magistrate was satisfied that the formal requirements⁴ of the Act had been complied with and indeed the appellant does not rely on any non-compliance in this respect in this Court. The grounds of appeal relied upon relate to the personal circumstances of the appellant.

[13] With reference to case law,⁵ the Learned Magistrate correctly recognised that a court is faced with two discrete inquiries. Firstly, whether it is just and equitable to grant an eviction order having regard to all relevant factors, including those expressly listed in s 4(7). The circumstances of the occupier must be weighed with the owner's rights. Any limitation of the property rights of an owner in favour of an occupier will ordinarily be limited in duration.⁶ If eviction is just and equitable, a court must, secondly, determine what a just and equitable date for the termination of the right of occupation would be.

[14] In relation to the first enquiry, the Magistrate correctly recognised that when there is no defence to an eviction application (meaning both compliance with the formal requirements and that justice and equity point to eviction being appropriate) the owner of the land is entitled to an eviction order. The second leg of the inquiry then comes to the fore: the court must determine a just and equitable date on which the unlawful occupier must vacate the property as well as the date on which the eviction order may be carried out if the unlawful occupier has not vacated the property on the date so contemplated.⁷

[15] Having set out the facts and the law, the Magistrate proceeded to apply the law to the facts. He did so with care. In considering the availability of alternative land and housing he heard oral evidence from her other son, George, and concluded that Neville and Levi could be accommodated by George. They could use the one room in his house that could be made available. The appellant could be accommodated by the MOTHS. He balanced the needs of both the appellant (and her family) and the

⁴ Section 4(1) to (5) of the Act.

⁵ Primarily *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* 2012 (6) SA 294 (SCA).

⁶ *City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others* above para 25. See also *Dwele v Phalatse* 2017 JDR 1035 (GJ) para 20 and *Grobler v Phillips* [2022] ZACC 32 paras 22 to 39.

⁷ Section 4(8) of the Act.

respondent. On this basis he decided that the respondent is entitled to an eviction order.

[16] The magistrate then turned his attention to a date by which the appellant should vacate the property. He held that having regard to the length of the stay, the age of the appellant and all other factors it was just and equitable that the appellant and those who occupy through her be afforded two months until 15 August 2022 to vacate the property.

[17] A potential flaw in the magistrate's reasoning focused on by the appellant was his remark that no proof of her disability had been furnished. She insisted that she had advanced sufficient evidence that she was disabled, having been boarded as a result of her multiple sclerosis. However, his reasoning demonstrates that, notwithstanding his remark, he made his decision on the basis that as an elderly, disabled person "MOTH would take care of her needs".

[18] The judgment by the Magistrate cannot be faulted and the appeal must fail.

[19] The date of 15 August 2022 is long past and it is incumbent on this Court to determine a date at this point in time that meets the requirements imposed by section 4(8) of the Act. The following circumstances must be taken into account:

- 19.1 The age and personal circumstances of the appellant, including her multiple sclerosis;
- 19.2 The fact that she cares for her grandson, as well as her unemployed son both of whom live with her;
- 19.3 The appellant occupied the property in terms of a right of habitatio until 2019;
- 19.4 She has been in unlawful occupation since 2019 despite demands by the respondent that possession be restored to him;

- 19.5 In terms of the court order in the Magistrates' Court the appellant was ordered to vacate the property and restore possession to the respondent by 15 August 2022;
- 19.6 The appeal proceedings were delayed because of the appellant's failure to prepare the record of the appeal;
- 19.7 She does not maintain the property and the respondent bears the cost of maintenance as well as municipal rates and cost of utilities;
- 19.8 Whilst the eviction will impact her and her family severely there are options that will prevent homelessness from resulting.

[20] I come to the conclusion that –

- 20.1 in terms of section 4(8)(a), a just and equitable date for the appellant and all of those who occupy through her to vacate the property is 30 November 2023; and
- 20.2 in terms of section 4(8)(b), the date on which an eviction order may be carried out if the appellant has not vacated the property on the date contemplated in paragraph 20.1 is 15 December 2023.

[21] For the reasons set out above I make the order in paragraph 1.

J MOORCROFT
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

I agree and it is so ordered

A DODSON
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judges whose names are reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **AUGUST 2023**

APPEARANCE FOR APPELLANT:	IN PERSON
INSTRUCTED BY:	-
COUNSEL FOR RESPONDENT:	H P WEST
INSTRUCTED BY:	NOLANS INC
DATE OF THE APPEAL:	1 AUGUST 2023
DATE OF JUDGMENT:	AUGUST 2023