



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

Case No.: **A230/2023**

In the matter between:

PEARL RAKEN

Appellant

v

BRADLEY J STERN

1st Respondent

MICA C STERN

2nd Respondent

Coram : Salie, J et Bhoopchand, AJ

Date of Hearing : 16 February 2024

Date of Judgment : 16 February 2024

For Appellant : In Person

Counsel for Respondents : Adv. D Goldberg

Instructed by : Rubenstein Attorneys

JUDGMENT DELIVERED: FRIDAY, 16 FEBRUARY 2024

BHOOPCHAND, AJ:

1. This is an appeal of an eviction order made against the Appellant by the Magistrate's Court, Cape Town. The order was granted in terms of section 4(8) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land, Act 19 of 1998 ("PIE" on 5 September 2023).
2. The Appellant entered into a one-year lease agreement in August 2020 to rent the Respondents' upmarket Fresnaye property. The written lease was not formally renewed on expiry. Appellant continued renting the property. In February 2023, thirty months after the parties signed the initial lease, the Respondents issued the Appellant with a one-month notice to vacate their property in terms of section 5(5) of the Rental Housing Act 50 of 1999 ("the Rental Housing Act"). The Appellant did not vacate the property. Section 5(5) of the Rental Housing Act addresses the position where a lease is not formally renewed on expiry but is perpetuated by the tacit consent of the landlord. The lease becomes periodic in nature and is considered to be on the same terms and conditions as the expired lease. If either party chooses to terminate the

lease, they must give the other party at least one month's written notice of this intention. The Appellant's lease was lawfully terminated.

3. In April 2023, the Respondents commenced eviction proceedings against the Appellant and other occupiers of their property. The Appellant initially opposed the order for eviction but by the time the case was decided the only issues that remained for determination were the date of her departure from the property and costs. The court below ordered the Appellant and others living with her to vacate the property on 31 October 2023 failing which the Appellant and the others were to be evicted on 1 November 2023.

4. The Appellant was legally represented at the hearings in the Magistrate's court. The Appellant is unrepresented in this court. It is unclear as to why the Appellant did not secure legal representation for this appeal. Whilst there is an obligation to enquire from the unrepresented Appellant whether she requires legal assistance, the absence of any in the circumstances of this case does not point to affordability or inexperience in securing legal assistance. This court is nevertheless obliged to assist an unrepresented Appellant. Lay litigants are not held to the same standards of pleadings and presentation of their cases as trained lawyers.¹ Invariably, the court is expected to be lenient, forgiving procedural irregularities, omissions in the papers, and the quality of the argument made. In assisting the unrepresented Appellant in the presentation of her case, the court has to guard against any prejudice to her opponent, ensure that the Rules are largely followed, and the court system

¹ *Xinwa and Others v Volkswagen of South Africa (Pty) Ltd* 2003 (4) SA 390 (CC) at para 13

does not fall into disarray from belated requests for legal representation or poorly motivated applications for postponement. The challenge posed by the unrepresented Appellant is compounded when the Appellant absents herself from the scheduled hearing of her appeal.

5. The Appellant sent a flurry of emails commencing at 22h24 on the night before the hearing alleging, among others, that she was involved in an accident on Monday, 12 February 2024 and assaulted by the Sheriff on an unknown date. The Appellant indicated that she could not attend Court.
6. The Appellant is not required to be present in a Court dealing with her appeal. Had Appellant obtained legal representation there would be no concern about her matter proceeding. About one hour before the scheduled hearing of this appeal, Appellant made a request to be heard virtually. The Court is concerned that the Appellant's last minute communications are an abuse of the Court and its process. This Court has taken all of the new information into consideration in deciding how to proceed with this matter and the decision we make regarding the outcome of this appeal.
7. On 25 January 2024, the Appellant applied for a postponement by filing an affidavit ("the postponement affidavit") without a notice of motion. The postponement affidavit contains a terse two-paragraph statement relevant to the application. The Appellant sought a postponement due to medical reasons. The court was referred to a medical report attached to the affidavit.

The Appellant alleged that the doctor suggested a period of three to four months of “rehabilitation for trauma counselling and recovery”.

8. An applicant requesting a postponement seeks an indulgence for which she must provide a comprehensive explanation of the reasons necessitating the postponement. As this court is a court of first instance as far as the application for a postponement is concerned, this court exercises its discretion to grant or disallow the application in the true or narrow sense.² Where a party to litigation raises illness as a reason for seeking a postponement, the application must be supported by proper medical evidence.³

9. The medical report attached to the postponement affidavit asserts that the doctor consulted with the Appellant on 17 January 2024. The report does not indicate whether the doctor assessed the Appellant’s mental state or examined the Appellant physically. The content of the report is largely in the nature of a recital of the Appellant’s history as provided to the doctor. The doctor then recommended that all legal cases and matters be delayed to enable the Appellant to recover.

10. The medical report does not support the Appellant’s allegation that she is to receive three to four months of trauma counselling for rehabilitation and recovery. The First Respondent obtained a letter from the Appellant’s doctor seeking clarity on the foregoing allegation. The First Respondent does not

² Psychological Society of South Africa v Qwelane & others 2017 (8) BCLR 1039 (CC) at para 30

³ See Van Loggerenberg, Erasmus, Superior Court Practice, Second Edition, Volume 2, Juta, at pages D1-553- D1-560 for a full exposition on the principles relating to applications for postponement

state in his affidavit whether he obtained the Appellant's consent to make contact with her doctor and acquire information relating to the Appellant's ailments. In the absence of consent from the Appellant, the propriety of the First Respondent's actions is placed in question and cannot be condoned.

11. The report does not specify when the Appellant's ailments began, whether the Appellant had consulted any doctor previously for her symptoms, or whether the Appellant received treatment. The report suggests that the Appellant suffered protracted complaints of a psychological nature. The report is silent on whether the Appellant would be able to attend court on the day of the appeal hearing or whether her illness bars her from presenting her appeal.
12. The Appellant does not provide any reason in the postponement affidavit as to why she waited from 17 January 2024 to 25 January 2024, the day before her appeal heads of argument were due, to file the postponement affidavit. The content of the postponement affidavit falls short of satisfying the requirements for seeking a postponement.
13. The court has the discretion to grant or refuse an application for a postponement.⁴ The application must be timeously made, bona fide, and not used as a delaying tactic. The First Respondent's affidavit opposing the postponement is replete with allegations suggesting that the Appellant is delaying her departure from their property by moving this appeal.

Considerations of prejudice and the balance of convenience usually tilt a court

⁴ Magistrate M Pangarker v Botha (446/13) [2014] ZASCA 78 (29 May 2014) at para 23

towards granting or refusing a postponement. An order granting the postponement and allowing the Respondents' costs as solace will not relieve the prejudice suffered by them. They have three minor children and have been sheltering under unfavourable conditions with the Second Respondent's mother for three and a half months, the period that has elapsed since the Appellant initially agreed to depart their property. The balance of convenience favours a refusal of the application rather than granting it. The Appellant, unfettered by impecunity, has had sufficient time to secure other accommodation.

14. The Appellant was legally represented during her appearances in the Magistrate's court. She failed to file a proper application for a postponement and there is no explanation as to why she could have not sought the services of a legal representative to present her appeal in this court. The application for a postponement must therefore fail. I turn to deal with the appeal.

15. Section 84 of the Magistrates' Courts Act 32 of 1944, required the Appellant to raise her appeal within the period and in the manner prescribed by the rules. Rule 51 of the Magistrate's Courts Rules contains the requirements for the noting of a civil appeal. Rules 51(1), 51(3), 51(4), 51(7), and 51(8) find application in this appeal. The Respondents contend that the Appellant failed to comply with Rule 51(7). The Appellant did not file a notice of appeal stating whether she appealed the whole or part of the judgment, nor did she identify the findings of fact or rulings of law she contests. The Respondents are

correct. The Appellant's notice of appeal fails to satisfy both requirements of Rule 51(7). This is not the lone instance of the Appellant's failure to comply with the noting and prosecution of her appeal.

16. The Appellant initiated this appeal process belatedly and has not adhered strictly to the time periods or the prescribed content of her papers. The Appellant failed to file a written request to the Magistrate to provide a written judgment within ten days of the Magistrate's order granted on 5 September 2023. The Appellant's Rule 51 request was out of time. Instead, the Appellant filed her request for reasons together with a notice of leave to appeal supported by an affidavit of appeal on 6 October 2023. The notice of leave to appeal states that leave is sought in terms of Rules 51(3), (4), (7), and (8). Rule 51(3) required the Appellant to note an appeal within twenty days of receiving the written judgment. The Appellant's notice of appeal (and supporting affidavit) was prematurely filed. In noting an appeal, all that was required of the Appellant was to file a notice with the grounds of appeal set out in the body of the notice. Appellant filed a notice of the type prescribed (together with a supporting affidavit) in this court. Appellant provided security for the Respondents' costs, in compliance with one part of Rule 51(4). The Appellant failed to comply strictly with Rules 51(3) and 51(4). Rule 51(8) required the Magistrate to provide a statement dealing with the facts that were proved and the grounds of appeal raised by the Appellant against her findings of fact and rulings of law. This statement is optional if the Magistrate is satisfied that her written judgment addresses these aspects. There is no Rule 51(8) statement in the record.

17. The pertinent question that arises from the irregular steps taken by the Appellant is whether the appeal is properly before this court. Stated differently, does this court have the requisite jurisdiction to entertain this appeal given the irregularities identified in the noting of this appeal? There are mitigating circumstances evident from the record and the court must guard against form over substance in the case of an unrepresented Appellant.

18. The Appellant filed the Rule 51(1) register of the court below in support of her contention that the Magistrate was not forthcoming in providing her reasons for the decision. The register assists in determining whether the Appellant complied with the requirements of Rules 51(3) and 51(4), at least, as far as that court was concerned. The Rule 51(1) register records that the appeal was noted on the 6 October 2023 and the Rule 51(1), and 51(3) notices were dispatched to the Magistrate on the 10 October 2023. The Magistrate initially declined to provide a written judgment as the request for reasons was out of time, but she subsequently acquiesced. The Magistrate had access to the Appellant's notice of leave to appeal and supporting affidavit at the time she provided her reasons on 30 October 2023. The Magistrate's written judgment, unsurprisingly, does not address the findings of fact and the rulings of law the Appellant appeals. If a Magistrate's written judgment is not requested before the filing of the notices of appeal, and the Appellant is in a position to file a valid notice of appeal, the Magistrate is expected to respond in terms of Rule

51(8) to the latter notice.⁵ Compliance with the requirements of Rule 51(8) falls upon the Magistrate and the clerk of her court.

19. The procedural irregularities weigh heavily against the Appellant. Whilst this court has the power to condone omissions in the papers and irregularities in the noting and prosecution of an appeal, there are no applications for condonation before us. Whilst we are cognisant of the difficulties of an unassisted and unrepresented party, there has to be a limit to which this court can condone non-compliance with the rules. In the absence of a clear exposition of the grounds of appeal and the findings of fact and law that the Appellant appeals against, there is, in effect, no appeal before us. This court need not make a decision on this appeal based on the extent of the irregularities before considering the Appellant's prospects of success on the merits of her appeal.

20. The grounds of appeal raised by the Appellant are ambiguous and largely, if not wholly irrelevant to an appeal. The Appellant levels allegations of bias, prejudice, and discrimination against the Magistrate, and allegations of racism, harassment, maliciousness, and manipulative behaviour against the Respondents. The Appellant alleges that the Respondents refused her a letter of reference which would have helped her to secure other accommodation. The Appellant alleged further that the merits of the eviction application were pending a review in this court. Seeking clarity of the grounds of appeal from

⁵ Regering van Bophuthatswana v Van Zyl 1981 (1) SA 484 (NC) at 487 D-E

the supporting affidavit is unhelpful as it reflects the content of the notice, apart from an added reference to an ailing sister.

21. As the Appellant had occupied the Respondent's property for longer than six months, section (4)7 of PIE applied to her eviction. The court below was required to make a just and equitable order after considering all relevant factors including the rights and needs of children, the disabled, the elderly, households that are headed by women, and the availability of municipal or other accommodation. The Magistrate provided comprehensive reasons for her decision and on the totality of the evidence available to her, she concluded that an eviction order was just and equitable. The Magistrate considered the prescribed requirements included in section 4(7) of PIE and the applicable principles enunciated in the relevant case law. The Magistrate understood that each case had to be decided on its own merits.
22. The Magistrate noted the circumstances of both the Appellant and the Respondents. The Appellant was self-employed, received spousal maintenance, and had a minor son who lived with her. The Appellant declined assistance from the City of Cape Town as she preferred to secure accommodation of her choice. The Appellant paid a premium to rent the Respondents property and her ability to afford other accommodation was not an issue. The Appellant did not oppose the eviction and had initially agreed to depart the property on 31 October 2023. At the final hearing, the Appellant disavowed the agreement and sought an extension for a further month, citing

the Respondent's refusal to provide her with a letter of reference as the reason for the extension.

23. As for the Respondents, they were financially stressed and needed to generate income from their property. The Respondents had three minor children. The lease on the house they rented was coming to an end. The Respondents needed to move to their property. The Appellant's outstanding arrears did inform the Respondents' decision to cancel the lease and institute eviction proceedings.

24. The court below found on the totality of the evidence that an eviction order would be just and equitable. The prejudice to the Respondents weighed more heavily than that suffered by the Appellant. The court found, in addition, that the date of 31 October 2023 was a just and equitable date as it would give the Appellant ample time to secure alternative accommodation. The court ordered each party to pay its own costs as the matter proceeded on an unopposed basis and would provide the Appellant with an opportunity to focus on securing other accommodation. The order regarding the date of the Appellant's departure from the property was consonant with that initially agreed to between the parties. It is apparent from the content of the Magistrate's reasons that she applied the section 4(7) requisites properly and arrived at a decision that was just, equitable and judicially defensible.

25. Where a court of first instance is called upon to exercise a discretion, the identification of the type of discretion applied determines the standard within which the appeal court will interfere, if at all.⁶ If the court of first instance chose one of several equally permissible options available to it, it is exercising its discretion in the true (strict or narrow) sense. The court of appeal will not interfere merely because it preferred another of the available courses.⁷ When a court of first instance has regard to a number of disparate and incommensurable features in coming to a decision, it is exercising its discretion in the loose (broad or wide) sense.⁸ An appeal court is equally capable of determining the matter in the latter instant and substituting its decision for that of the court of first instance, without determining whether the discretion was exercised judicially. The appeal court would, however, proceed guardedly as its power to interfere may be curtailed by broader policy considerations.⁹

26. When a court of first instance exercises a discretion to determine whether or not to grant an order of eviction or determine a date for the eviction in terms of PIE, it has to consider all information relevant to the case in addition to certain prescribed factors before deciding whether it is just and equitable to grant or refuse the order. The court exercises a wide and not a narrow discretion.¹⁰

The Respondent's Counsel argued that the discretion exercised by the

⁶ *Trencon Construction (Pty) Ltd v Industrial Dev Corp of SA Ltd* 2015(5) SA 245 (CC) at para 83

⁷ *Media Workers Association of South Africa & Others v Press Corporation of South Africa Limited* [1992] ZASCA 149, 1992 (4) SA 791 (A) at 800E

⁸ *Knox D'Arcy Ltd and Others v Jamieson and Others* [1996] ZASCA 58, 1996(4) SA 348 (SCA) at 361I

⁹ *Media Workers Association supra* at 800H

¹⁰ *Ndlovu v Ngcobo, Bekker and Another v Jika* 2003 (1) SA 113 (SCA) at 124 B-D, (para 18)

Magistrate was a narrow one and that this court was limited in interfering with the order. The court disagrees with Counsel's characterisation of the discretion, but it declines any interference with the decision of the lower court for the reasons already canvassed.

27. The Appellant has no prospects of success on appeal. This court cannot reasonably come to a different conclusion on the law and the facts. The Magistrate's decision was eminently reasonable and was equally capable of duplication by a court directing itself properly to the relevant facts and principles. There are no grounds for this court to disturb the order granted by the Magistrate. In the premises, the litany of irregularities coupled with the prospects of success, are fatal to this appeal. The appeal must therefore fail.
28. The Respondents seek costs on a punitive scale. Punitive cost orders are awarded in exceptional circumstances.¹¹ Punitive cost orders are reserved for parties who conduct themselves in a clearly and "indubitably vexatious and reprehensible manner". We are not convinced that the Appellant has crossed that threshold.
29. **WHEREFORE IT IS ORDERED:**
- i] *The application for postponement is dismissed with costs,*
- ii] *The appeal is dismissed with costs.*

¹¹ Ward v Sulzer 1973 (3) SA 701(A) at 707, Herold v Sinclair 1954 (2) SA 531 (A) at 537

**BHOOPCHAND, AJ
ACTING JUDGE OF THE HIGH
COURT, WESTERN CAPE**

I agree and it is so ordered:

**SALIE, J
JUDGE OF THE HIGH COURT,
WESTERN CAPE**