

SOUTH AFRICA / JUDGMENT

Naude N.O and Others v Van Der Merwe and Others (A213/2024) [2025] ZAWCHC 16 (20 January 2025) [2025] ZAWCHC 16

COURT

Western Cape High Court, Cape Town

BEFORE

W R E Duminy, DM Thulare

CASE / FILE NUMBER

A213/2024

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

CASE NO: A213/2024

In the matter between

BRIDGET

MARY NAUDE

NO

1st

Appellant

ANTHONY

COTTERELL

NO

2nd

Appellant

ANITA

BHIKA

NO

3rd

Appellant

In the capacities as

the Trustees of the Vancot Trust, TM335

And

ANITA

VAN DER

MERWE

1st

Respondent

TERTIUS

PRETORIUS

2nd

Respondent

And all those

occupying unit 2[...], A[...] Park Village,

Brackenfell through

them

THE

CITY OF CAPE

TOWN

3rd

Respondent

Date of Hearing: 15 November 2024

Date of Judgment: 20 January 2025 (to be delivered via email to the respective counsel)

JUDGMENT

DUMINY,AJ

1. This is an appeal against the judgment and order of the Magistrates' Court, Kuils River, dismissing an application by the appellants for the eviction of the first and second respondents and all those occupying unit 2[...], A[...] Park Village, Brackenfell ("the property"), through them. The first respondent is a 66-year-old woman and the second respondent is referred to in the papers as her partner or common-law husband. They live together, and the second respondent is the breadwinner and cares for the first respondent, circumstances that will be referred to later in this judgment.
2. The central issue is whether Section 5 (5) of the Rental Housing Act, 50 of 1999, ("the RH Act") applies to a notice terminating a months-to-month lease, for breach. The facts from which it arises are summarised below.

3. The Appellants are the trustees of the Vancot Trust. It is not in issue that they are the owners of the property.
4. In March 2013 they concluded a lease with the first respondent for a period of one year from 1 March 2013 to 28 February 2014 in respect of the property. The initial term of the lease expired, and the respondents remained in occupation on a month-to-month basis, on the same terms as before. The second respondent evidently lives in the same unit with the first respondent.
5. Clause 9.1 of the lease provides that should the tenant fail to pay rental promptly, the landlord shall be entitled to summarily terminate the lease by written notice to the tenant.
6. By October 2019 the first respondent had fallen in arrears with the payment of rental. It is common cause that on 10 October 2019 a letter requiring her to pay the arrears within seven days failing which the lease would be cancelled, was delivered to her. The first respondent did not do so. On 22 October 2019 a further letter was delivered to her cancelling the lease and requiring her to vacate the premises by 31 October 2019. The respondents failed to vacate the premises, and remained in occupation, but the first respondent failed to pay any further amounts in respect of rental at this time.
7. On 5 May 2021 the appellants' attorneys addressed a letter to both the respondents referring to the 2019 correspondence and demanding payment of the arrears which by that time amounted to R115 070.31, within 20 business days, failing which the lease would be cancelled.
8. The respondents did not comply and on 3 June 2021 the appellants' attorneys addressed a further letter to them cancelling the lease and requiring them to vacate the property.
9. The present application was instituted on 15 July 2021. It is not in dispute that the appellants have complied with the formal requirements of section 4 of the Prevention of Illegal Evictions Act, 19 of 1998 ("the PIE Act").
10. The answering affidavit was delivered nearly 2 years later, on 10 July 2023. In the interim, the respondents remained in occupation of the premises. Although details thereof are scant, it appears that the appellants instituted separate proceedings for recovery of the arrears and obtained judgment against the first respondent. It is apparent that the respondents have made certain payments to the appellants but it is not clear whether the arrears have been fully settled. It is common cause that the respondents remain in occupation of the property without the appellants' consent. It is alleged that they that they continue to pay only a nominal rental, and not an agreed rental.
11. The Learned Magistrate dismissed the application for eviction on the basis that sec 5 (5) of the RH Act ("sec 5 (5)") applied, and that the correspondence of May and June 2021 did not satisfy the requirements of that provision.
12. Section 5 (5) of the RH Act provides as follows:

“If on the expiration of the lease the tenant remains in the dwelling with the express or tacit consent of the landlord, the parties are deemed, in the absence of a further written lease, to have entered into a periodic lease, on the same terms and conditions as the expired lease, except that at least one month's written notice must be given of the intention by either party to terminate the lease.”

13. Neither of the respondents remained in the dwelling with the express or tacit consent of the appellants after October 2019. The issue is whether sec 5 (5) is nevertheless applicable.
14. Sec 5 (5) was considered by Binns-Ward, J in *Magic Vending (Pty) Ltd v Tambwe* 2021 (2) SA 512 (WCC). In para [14] he held that the provision did not apply where a lease containing a forfeiture clause is terminated by the landlord by reason of the lessee's failure to pay the rent and that sec 5 (5) has no bearing on a landlord's right to terminate a lease on account of a material breach of contract by the lessee (518 A-B).
15. In *Stevens v Chester and Others* (Case nr 14796/2020) [2021] ZAWCHC 61 (16 March 2021) Hockey, J concurred with the reasoning of Binns-Ward, J in *Magic Vending v Tambwe*, but sought to distinguish that case on the basis that it had dealt with a written lease, albeit that it operated on a month-to-month basis, and that the landlord in that matter was therefore entitled to rely on the breach clause. However, Hockey, J considered that where a lessee remains in occupation with the express or tacit consent of the landlord after the expiration of the fixed term lease, and there is no further written lease, the parties are deemed in terms of sec 5
 - (5) to have entered into a periodic lease on the same terms as the expired lease, save that one month's written notice had to be given by either party to terminate the lease (para [16]).
16. In my respectful view, this distinction is not sound. In terms of sec 5 (5), the deemed lease is on the same terms and conditions as the expired lease. If the latter contained a forfeiture clause (or cancellation clause), so does the former. In *Magic Vending v Tambwe* it was found that notice of termination does not apply to cancellation for breach. In principle, it makes no difference whether the breach clause is found in an extant lease (whether written or oral) or in a relocation deemed to be on the same terms.
17. In my respectful opinion the approach in *Magic Vending v Tambwe* was correct. Termination on notice involves the exercise of a right by either party in terms of the contract. Although this may be rare, the parties can exclude the right of one or more parties to terminate on notice by agreement (see e.g. *Golden Lions Rugby Union v First National Bank of SA Ltd* 1999 (3) SA 576 (A); *Transnet Ltd v Rubinstein* 2006 (1) SA591 (SCA)). Whether a contract can be terminated on notice is a matter of interpretation (*Trident Sales (Pty) Ltd v AH Pillman & Son (Pty) Ltd* 1984 (1) SA 433 (W) at 441D – G). The position was explained as follows *Putco Ltd v TV & Radion Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) at 827GH – 828B, dealing with the construction of the language of the contract and its context:

“Where an agreement is silent as to its duration, it is terminable on reasonable notice in the absence of a conclusion that it was intended to continue indefinitely. The inclusion in the agreement of three specific grounds for termination does not exclude termination by reasonable notice. The logical consequence of an argument that only three specific grounds for cancellation of the agreement exist would be that, provided those grounds for cancellation do not arise, the agreement would continue indefinitely. This would not be a proper construction to place on the agreement as it ignores the intention of the parties when entering into the agreement, and such intention is paramount (cf Trident Sales (Pty) Ltd v A H Pillman & Son (Pty) Ltd 1984 (1) SA 433 (W).)”

18. This passage demonstrates the difference between termination on notice at the election of a party regardless of breach, and cancellation for breach. In the present case, different provisions of the lease deal with these matters; clause 2 of the schedule contains the following note:

“NB. Two calendar months written notice must be given prior to expiry of the lease. If the lease is not going to be renewed. At expiry of the lease agreement and no renewal lease. Enter into, 2 (two) months’ notice period by any party will be adhered to.”

19. This is echoed in clause 1.8 which provides that if the lease is not renewed after the fixed period “... then the Tenant and the Landlord agree that a mutual 2 (two) calendar months’ notice shall be given in writing to terminate the rental agreement.”
20. These provisions should be contrasted with clause 9 which deals with breach and cancellation.
21. Sec 5 (5) was again considered by Van Zyl, AJ, in SOHCO Property Investments NPC v Stemmett and Others (case nr 12553/2020) [2023] ZAWCHC 127 (16 May 2023). The respondents in that case contended that the applicant had been obliged to give one calendar month’s written notice to remedy a breach, and not 20 business days as provided for in the lease, on the strength of that section. The Learned Judge concluded that the section was clearly not applicable to the termination of a lease on the grounds of breach (para [52]). She considered the decision in Stevens, and declined to follow it on the basis that it was clearly wrong (para [60]). She relied on the decision in Hendricks NO and Another v Davids and Four Others (case nr A221/2021, judgment delivered on 12 April 2022) stating the following in para [63]:

“The Court defined the narrow point as being whether section 5 (5) of the Rental Housing Act affects the rights of a landlord to cancel a lease agreement on account of a lessee’s breach. The Court followed the decisions in Tambwe and Transcend [i.e. Transcend Residential Property Fund Limited v Nanziwe Tolbat and Others, Case No 14638/2017 WCC], and concluded that section 5 (5) of the Rental Housing Act did not override the provisions of the breach clause in so far as it concerned the right to cancel the lease on account of breach.”

22. Hendricks NO v Davids is a judgment of two judges of this Division and its ratio decidendi is binding on this Court unless we consider it to be clearly wrong. In my respectful opinion, it is correct and we are obliged to follow it. Applied to the present case, it means that sec 5 (5) of the Rental Housing Act is not applicable and that the Learned Magistrate erred in dismissing the application on that basis.
23. On appeal to this Court, the respondents did not advance any case based on the PIE Act and relied solely on the contention that sec 5 (5) of the RH Act had not been complied with. In the Court a quo they delivered affidavits dealing with the poor health of the first respondent, contending that she would be left homeless if evicted

from the property.

24. It is necessary to consider whether granting an eviction order in this case would be just and equitable, and if so, to consider the date of eviction (City of Johannesburg v Changing Tides 74 (Pty) Ltd 2012 (6) SA 294 (SCA), Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC), para [47] to [48]).
25. The appellants submit that there is no genuine concern that the respondents will be left homeless if an eviction order were to be granted. They submit that on the respondents' own version they can afford alternative accommodation. These propositions were supported by evidence of the financial position of the first respondent and of property rentals in the same area as the subject property. They were not contested before us on behalf of the Respondents, and can therefore be accepted.
26. The City of Cape Town filed an affidavit of investigations undertaken into the personal circumstances of the respondents, in June
2022. It stated in the affidavit that the second respondent could be provided with emergency accommodation if he was not able to obtain it himself, and he was required to advise the City whether he accepted its offer, or not, within 15 days. It is apparent

that the second respondent did not do so, and neither he nor the first respondent have taken any steps to engage with the City or to find a solution to their accommodation needs.

27. Regarding the personal circumstances of the first respondent, a report by a psychiatrist, Dr van Zyl, was submitted pursuant to an application in April 2024. In his report, Dr van Zyl states that he has been treating the first respondent as an outpatient since November 2022. She suffers from a long-standing major depressive disorder. He has tested her cognitive function twice, in June 2023 and February 2024. The results indicate advanced dementia. It is a condition which is likely to worsen over the next few years even with the use of medication. Dr van Zyl believes that due to her clinical condition she should access residential care as soon as possible.

28. In view of her condition, in 2020 the first respondent granted the second respondent power of attorney to attend to her affairs, but no application has been made for the appointment of a curator bonis. It is of some concern that despite the respondents and their legal representatives being aware of the first respondent's

condition, she has repeatedly deposed to affidavits, including on 3 April 2024 the founding affidavit in an application for the last report of Dr van Zyl, in which he testifies to her advanced dementia, to be received in evidence. It is evident from the date stamps on the latest affidavit that the first respondent, the second respondent and the respondents' attorney deposed to their affidavits before the same commissioner of oaths on the same day. It seems most unlikely that the commissioner was advised that the first respondent suffered from advanced dementia and that there might be doubt as to whether she was able to know and understand the contents of her affidavit.

29. Despite the second respondent having held the power of attorney referred to above since 2020 and the present proceedings having been ongoing since 2021, there is no evidence that the second respondent or anyone else responsible for her care, has taken any steps to find a suitable placement for the first respondent in a residential care facility, or to find suitable alternative accommodation.
30. Weighing up the equities, none of this can be laid at the door of the applicants, who are under no constitutional or other obligation to provide housing to the Respondents, who have been in occupation without the consent of the applicants since October 2019. These eviction proceedings commenced more than three years ago on 15 July 2021. As noted in *Changing Tides*, supra, para [18], the Constitutional Court has said that although their rights may be restricted and they can be expected to submit to some delay, private entities are not obliged to provide free housing for other members of the community indefinitely.
31. In my view, in this case justice and equity weigh substantially in favour of granting an eviction order against the first and second respondents, and anyone that might be occupying the property through them.
32. The remaining question concerns the date by which the respondents (and anyone occupying the premises through them) should vacate. The matter has dragged on for some years. Despite my misgivings and concerns about the absence of any evidence of steps to address the unfortunate position of the first respondent, I think it would be reasonable to direct that the respondents vacate the premises by 28 February 2025.
33. I would accordingly uphold the appeal and directed that the order of the Court a quo be set aside and replaced with an order in the following terms:

"1 The First and Second Respondents, and anyone occupying the property through them, are evicted from the property situated at unit 2[...], SS39/2007, SS A[...] Park Village 2[...], Welgelee Street, Brackenfell;

2. The First and Second Respondents and anyone occupying the property through them, must vacate the property by no later than 28 February 2025;
3. Should the First and Second Respondents and anyone occupying the property through them, fail to vacate the property as aforesaid, the Sheriff of this Court is authorised and directed to execute this order and to evict the First and Second respondents, and anyone occupying the property through them, from the property forthwith.
4. The First and Second Respondents are to pay the costs of this application, jointly and severally, the one paying the other to be absolved pro tanto.

W R E Duminy, A J

Thulare, J

34. I have read the judgment of Duminy, AJ and agree that the appeal should be upheld. Section 5 (5) of the RHA doesn't apply to a fixed term lease that has expired but where the lessee remains without the express or tacit consent of the lessor. This is clear from an inductive reading of the section itself. On the facts before us, the respondents remained on the property without the express or tacit consent of the appellant. Section 5 (5) of the RHA was not applicable to this matter and the Magistrate was clearly wrong to rely on it to deny the appellant the relief sought.
35. Section 5 (5) of the RHA applies to a situation where the agreement did not specify what would occur when the fixed term expired. Where the agreement spoke for itself and specified that the lease would convert to a month on month agreement, then the terms of the agreement would apply. Where the lease agreement provided for the notice period, that notice period would apply, having regard to the provisions of the CPA.
36. Having considered the vulnerability of the first respondent, both as an older person and with regard to her health, I find it necessary for an order that would advance and protect her interests. I deem it meet for an additional term in the order proposed, as follows:
5. The issue of the first respondent is referred for the attention of the Director-General, Dept of Social Development, Western Cape.

DM Thulare, J

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Prepared on 10 October 2026 · Esheria