

SOUTH AFRICA / JUDGMENT

Swartz v Butcher N.O and Others (A144/2024) [2024] ZAWCHC 405 (29 November 2024)

[2024] ZAWCHC 405

COURT

Western Cape High Court, Cape Town

BEFORE

Nuku, Bhoopchand

CASE / FILE NUMBER

A144/2024

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A144/2024

In the matter between

MARY ANN SWARTZ

AND ALL THOSE HOLDING TITLE UNDER HER

APPELLANT

and

TIMOTHY BUTCHER N.O.

MARK ANTHONY WEBB N.O.

BARBARA SANDBERG N.O.

As Trustees for the time being, of the

Tri-Action Investments Trust (IT424/2005)

Trading as

WESTERN CAPE ACCOMMODATION AND RENTALS 1st RESPONDENT

MORNE BOTES

2nd RESPONDENT

ALOMA WENDY BOTES

3rd RESPONDENT

THE MUNICIPALITY OF CAPE TOWN

4th RESPONDENT

Date of hearing: 29 November 2024

Date of judgment: 29 November 2024

Coram: Nuku J, Bhoopchand AJ

JUDGMENT

BHOOPCHAND AJ:

1. This is an appeal against the order of the Magistrate's Court, Cape Town, delivered on 12 March 2024. The Magistrate ordered the eviction of the Appellant under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ("PIE"). The Appellant, with her two daughters, aged 6 and 12, unlawfully occupied a fully furnished holiday apartment in Bloubergstrand ("the apartment") over a protracted period. The Appellant was the Respondent in the Magistrates Court, and the Respondents were the Applicants. She paid the rent for the first week on a seven-day short-term lease, then the rent for the second week, and secured a longer-term lease from the First Respondent. The Appellant did not pay any further rent. For ease of reference, this judgment shall refer to the parties as they are cited in this appeal.
2. Butcher N O ("Butcher"), one of the three Trustees of the First Respondent, attempted to persuade the Appellant to vacate the apartment. On 5 December 2022, the Appellant served Butcher with a notice under section 3 of the Protection from Harassment Act 17 of 2011.
2011. First Respondent gave the Appellant notice to vacate the apartment on 20 December 2022. Butcher was summoned to appear in court on 30 January 2023 and was temporarily interdicted from communicating with the Appellant. The harassment application was dismissed on 31 January 2023. The First Respondent was directed to institute eviction proceedings.
3. The Appellant allegedly failed or refused to attend to the application for the City of Cape Town's ("the City") housing obligations under PIE. The application was forwarded to her on 30 May 2023 and 20 June 2023. The first application for the Appellant's eviction was postponed four times before the judgment was delivered on 24 October 2023. The Appellant had disputed that the First Respondent owned the property. The parties involved at that stage were the First Respondent and the Appellant. The Appellant also raised the issue that the lease agreement was not cancelled, and she required one month's notice to move out. The application for the Appellant's eviction was dismissed as the Magistrate's Court found that the First Respondent did not have the locus standi to raise the application.

4. On 11 December 2023, the Respondents instituted the second

application to evict the Appellant. The hearing commenced on 15 February 2024. The Appellant had legal representation. Her attorney

informed the Court that he had advised the Appellant to seek emergency or alternative accommodation from the City if she could not secure one within her means. The Appellant waived any assistance from the City. Still, her attorney appreciated the necessity for its report as it would enable the Magistrate to make a just and equitable order to either dismiss or uphold the Appellant's eviction.

5. The Court indicated that it had wide powers and could call the City to testify, but if the Appellant waived her right to assistance by the City, then the Court could proceed with the inquiry. The Appellant's attorney indicated that he sought the Respondents' agreement to postpone the matter to enable the parties to agree to a timetable for filing affidavits and written arguments. The Court agreed to postpone the matter for a short period on just and equitable grounds as the Appellant had children. The Court undertook to contact the City about providing alternative emergency accommodation for the Appellant and suggested that the Appellant complete the housing questionnaire. The Court sought to assist the Appellant with a questionnaire. The Magistrate postponed the matter for three weeks to enable the City to provide a report and to appear before the Court to testify if required and for the parties to exchange further affidavits. The exchange of affidavits would occur once the parties had received the City's report. The Magistrate set a timetable reflecting that the City's report would be available by 26 February and the Appellant's answering would be filed by 28 February 2024. The Appellant's attorney agreed to the timetable. The Respondent's attorney undertook to file their replying affidavit on 1 March 2024. The Court permitted the Appellant's attorney to file written argument on the day of the rescheduled hearing. The matter was postponed to noon on 4 March 2024 to accommodate the Appellant, who had scheduled an appointment to look for alternative accommodation that morning.

6. On 4 March 2024, the Appellant appeared without representation. She asked for the matter to be postponed to 11 April 2024 to enable her to secure a lawyer. She explained that her relationship with her previous attorney was 'bad'; hence, he had withdrawn. The Respondent's attorney informed the Court that it was the third time an attorney had removed himself from the Appellant's case. She feared the matter would be inordinately delayed if a postponement were granted. The Appellant failed to complete the housing questionnaire. The parties could not adhere to the timetable to file further papers. The questionnaire was handed to the Appellant's attorney, who withdrew as the Appellant did not complete it. The Respondent's attorney indicated that she would oppose any further postponements.

7. The Appellant refused to answer questions without an attorney. She could not procure one to represent her on that day. The Respondent's attorney referred to the previous hearing where the Appellant's

attorney had raised the necessity for a report from the City. The Appellant's attorney had submitted that the City's report was essential to formulating the Court's decision on eviction. The absence of a report could become contentious if the matter proceeded to an appeal. Respondent's attorney received the terse report indicating that the Appellant could not be assisted as the City did not know her personal circumstances, which they would have gleaned from the completed questionnaire. The report was handed to the Magistrate. He informed the Appellant that he had to proceed without considering what the City could have offered her as she had refused to complete the questionnaire. The Magistrate refused the postponement, and the hearing proceeded.

8. The Appellant testified that she approached Whitney Butcher for the accommodation. The initial arrangement was for her to rent the premises every week. The rental was R4000. There was confusion as to when the Appellant had last paid her rental. The Court established that the Appellant had never paid any rent since the beginning of 2023. The Court asked the Appellant if she was in lawful occupation of the premises. The Appellant once again protested that she required the assistance of an attorney to answer the question. The Magistrate informed the Appellant that she could remain silent, but he would make an adverse finding against her. She could take the Court into her confidence and answer the question. The Court repeatedly informed the Appellant that she could remain silent. The Appellant indicated that she would answer. The Court asked her when she required to vacate the apartment. The Appellant required six months to secure work and alternate accommodation.
9. The Court reminded the Appellant that she had been asked to vacate the apartment a year before that hearing. The first application had been instituted on 1 June 2023. The Appellant was asked as to what she had done since. The Appellant testified that she had searched for a job and accommodation. She spoke to three persons who informed her that holiday accommodation in Blouberg would not be available from March 2023 to February 2024. She did not search for accommodation in the suburbs. The monthly rental for the apartment she occupied was R16 000. The Appellant was unable to pay that amount. The accommodation she had viewed on the morning of the hearing was in Bayside for R13 000 per month. The Court asked the Appellant if she had not considered cheaper accommodation. The Appellant wanted a two-bedroom apartment. The cheaper ones had just one room. The Appellant could not provide any reason for requiring two bedrooms, given that her children were still young.
10. The Court enquired whether the Appellant could prove that she secured employment and accommodation for the next six months. The Appellant was unable to confirm any. The Magistrate reminded the

Appellant that she had been assuring the Court of obtaining employment and accommodation since June 2023. The Magistrate asked

about her employment enquiries, cognisant of her inability to secure it without money or a job.

11. In response to questioning from the Respondent's attorney, the Appellant insisted that she was not in unlawful occupation of the apartment. She confirmed receipt of the letter cancelling her lease. She confirmed that she had not paid rent since at least January 2023. The Appellant could not understand how the cancelled lease and unpaid rent equated to unlawful occupation. The Appellant was probed about why she sought expensive accommodation on the Blouberg beachfront when she could not afford it. After indicating that she had proof of an upcoming job interview on 25 March 2024 on her WhatsApp messages, the Appellant could not find it. She then alleged that the message was on her tablet, and she would obtain a screenshot. The Appellant then indicated that the person who could take the screenshot of her tablet would not be available as the latter had to fetch her children from school. The Respondent's attorney protested that the whole issue was descending into a farce. The Appellant indicated she would call her brother to testify about her attempts to obtain work and other accommodation. He would testify that she looked for work daily and would confirm the upcoming job interview for the 25th.
12. On 5 March 2024, the Appellant called the witness, who was purportedly her brother. It transpired that he was distantly related to the Appellant, knew little about her, and could shed little light on the Appellant's search for work or alternative accommodation. The Appellant returned to the witness box for further questioning. She confirmed that her children were healthy and did not need special schooling. The Appellant then proceeded to provide proof of her search for work and accommodation. The proof turned out to be on the cellphone of the person who had testified earlier. The

Appellant referred to enquiries she had made about alternative accommodation. One was for a twelve-bedroom home in Blouberg. The

Appellant could not explain why she required a twelve-bedroomed home. She was then referred to a further message on the phone. The message emanated from the Appellant to a letting agent. The Appellant indicated the accommodation available was too 'outskirt for her. She wanted accommodation in the Bigbay or Blouberg area and on the beachfront. The matter was postponed to 12 March 2024 for

judgment.

THE MAGISTRATE'S JUDGMENT

13. The Magistrate was asked to determine whether the Appellant was an unlawful occupier and, consequent upon a positive finding, whether it would be just and equitable to evict her and when she should vacate

the apartment. The Magistrate referred to the Appellant's legal representation, noting that she was represented on the first day. He refused the application to postpone the hearing to enable the Appellant to appoint another attorney.

14. The Magistrate summarised the evidence already traversed in this judgment and included the Appellant's search for work and accommodation, her waiver of assistance from the City, and her two children. The Magistrate appraised himself of the Constitutional Court's directive for judicial officers to assume a proactive role when adjudicating PIE matters.[1] The imperative induced him to call for comprehensive evidence, including that of the Appellant's witness. The Magistrate had no hesitation in finding the Appellant to be in unlawful occupation of the apartment. He considered that this application was the second attempt to evict the Appellant. The Appellant's children had no special needs and were in good health. He considered that there was suitable accommodation about five to ten kilometres away from where the children were schooled. The Appellant had failed to pay rent and was aware of a possible eviction since 20 December 2023.
15. The Magistrate noted that the apartment occupied by the Appellant was managed as a holiday let, and the owners had suffered financial harm due to the ongoing unlawful occupation. After carefully considering

all the facts, circumstances, oral evidence adduced and submissions made in the matter, the Magistrate ordered the Appellant to vacate the premises by 30 April 2024. The Sheriff was authorised to evict the Appellant and those living with her from the property on 8 May

2024. The Appellant was ordered to pay the Respondent's costs.

THE APPEAL

16. The Appellant raised eleven grounds of appeal. They can be conveniently grouped under four themes: the City's report, the risk of rendering the Appellant homeless, the criteria for the choice of emergency or alternate accommodation, and the time to achieve the latter. The submissions made on behalf of the Appellant lament the paucity of personal information available to and elicited by the Magistrate. The Respondents deplore the lack of clarity of the appeal grounds and consider them misplaced. The Appellant cited the cases encapsulating the dicta that follows.
17. A court hearing an application for eviction at the instance of a private person or body owing no obligation to provide housing or achieve the gradual realisation of the right of access to housing is faced with two separate enquiries. First, it must decide whether it is just and equitable to grant the eviction order after considering all relevant factors. Those factors include the availability of alternative land and accommodation. The latter has to be weighed against the property owner's protected right under section 25 of the Constitution, and any limitation of that right in favour of the occupiers will ordinarily be for a limited duration. If there is no defence to the claim for eviction, the Court is obliged to grant the order. Before doing so, it must consider what justice and equity demand concerning the date of implementation of that order and what conditions must be attached to that order.[2]

18. The second enquiry must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless or need emergency assistance to relocate elsewhere. The order granted

through the two enquiries is a single order. It cannot be granted until both enquiries have been undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the Court is satisfied that it has all the necessary information to make both findings based on justice and equity.

19. The court will grant an eviction order only where (a) it has all the information about the occupiers to enable it to decide whether the eviction is just and equitable and (b) the court is satisfied that the eviction is just and equitable having regard to the information in (a). The two requirements are inextricable, interlinked and essential. An eviction order granted in the absence of either one of these two requirements will be arbitrary. The enquiry has nothing to do with the unlawfulness of occupation. It assumes and is only due when the occupation is unlawful.[3]
20. Where no information or inadequate information is available, the court must decline to make an eviction order. The absence of information is an irrefutable confirmation that the court is not in a position to exercise this important jurisdiction.[4]
21. The City has a constitutional obligation to persons evicted from accommodation who face homelessness. The City must provide information relating to the building occupied, the occupiers of the building, whether the eviction order would render the occupier homeless, the implications for owners if the eviction is delayed, details of all engagements it has had with the occupier, and whether there is scope for a mediated process; under section 7 of PIE or otherwise.[5]
22. The City must provide the occupiers with suitable temporary emergency accommodation. It is appropriate that an order be made that such accommodation be at a location as near as possible to the area where the property is situated. The City has to ensure that the occupiers are treated with dignity and care when choosing an appropriate location. The City should consider the occupier's places of employment, children's schooling, hospitals, transportation, and other important amenities that their relocation may require. The vulnerabilities of the occupiers must be considered.
23. The Appellant submits that despite the real threat of homelessness, the Magistrate found it just and equitable for the Appellant to vacate the apartment. The order was given with no or inadequate information available. The Appellant relied upon sections 4(7) and 4(8) of PIE and concluded that the Magistrates Court failed to come to a just and equitable decision to evict the Appellant and her two minor daughters despite knowing that such an eviction order would

leave the Appellant and her two minor daughters homeless.

24. The Respondents submit that the prolonged period of the Appellant's occupation of the apartment is an ongoing violation of their rights and places an extended burden upon them. The Appellant's pattern of non-compliance and delay has contributed to a protracted legal process and unfairly prejudiced the Respondents. The Appellant's failure to complete the questionnaire appears to have been a strategic manoeuvre to delay the process further. The Magistrate acted within his discretion and correctly refused to grant a further postponement as the Appellant demonstrated a consistent disregard for court orders, failed to act in good faith and exhibited a pattern of attempting to delay the proceedings. The Court's refusal aligns with the interests of justice, upholding the principle that while procedural fairness is essential, it should not be exploited to the detriment of the Respondent's rights. The Appellant had not alleged that she would be left homeless should the eviction be granted. She testified with certainty that she would obtain employment as of 1 April 2024.

EVALUATION

25. The Appellant has occupied the apartment with her two minor daughters since 17 August 2022 and in unlawful occupation since December 2022. The Appellant has, by deduction, not paid any rent for the whole period of occupation except for the first two weeks. The longer-term lease has since been cancelled. There were two applications for eviction, the second being the subject of this appeal. The Appellant, in addition, charged one of the Respondents for harassment.
26. An attorney represented the Appellant on the first day of the hearing. When the matter resumed on 4 March 2024, the Appellant was unrepresented. The Magistrate asked about the absence of the attorney representing her on the first day. The Appellant answered that she had a 'bad relationship' with him. The Appellant sought a postponement of the hearing for five weeks to obtain a suitable attorney. The Respondents objected. This Court shall briefly deal with this aspect as it arises from reading the transcript. The Appellant has not raised the refusal of a postponement as a ground of appeal. The section 4(2) notice to inform the occupier requires the owner or person in charge of the occupied accommodation to inform the occupier of their rights to legal representation. The Appellant did not waive that right for the rest of the hearing, protesting intermittently that she required legal representation when asked certain questions.

27. This Court considered the circumstances which led to the Appellant being unrepresented. She had received Legal Aid-funded representation in her previous appearances and then engaged the services of private attorneys; the Appellant had sought a postponement on two previous occasions when her attorney had withdrawn. The Appellant testified that she approached other attorneys who could only take her matter in two to three months as they were busy. She had asked for a postponement of five weeks. The Respondent opposed postponing the matter primarily because it would delay the relief they sought to evict the Appellant from the apartment. The Magistrate was informed that the Appellant's previous attorney had withdrawn as the Appellant would not cooperate in complying with the Court's orders, including completing the housing questionnaire. The Applicant's disinclination to complete the questionnaire featured largely in the questioning that led to the Magistrate denying her a postponement for want of legal representation. An assessment of the circumstances leading to the

Appellant being unrepresented, the conduct of the hearings where the Appellant was unrepresented, the interests of the Respondents and ultimately that this was not raised as a ground of appeal or a review leads this Court to conclude that absence of legal representation did not amount to a miscarriage of justice.

28. Onto the grounds of appeal formulated by the Appellant. The City issued a housing report dated 5 February 2024, which protested the lack of personal information relating to the Appellant. The final paragraph of the report invited the Appellant to provide the completed housing questionnaire or affidavit containing her personal circumstances before the City would have been able to issue and file a comprehensive report. The Appellant repeatedly waived her right to emergency or alternative accommodation the City could offer. The Appellant repeatedly declined to complete the questionnaire. The Respondent's attorney informed the Court that the questionnaire had been provided to the Appellant's attorney and that the Appellant's attorney had withdrawn from the case as the Appellant was, among others, unwilling to complete the questionnaire. On the first day of the hearings, the Appellant's attorney reminded the Magistrate that he was obliged to have the housing report from the City even though the Appellant had waived her right to emergency or alternative housing by the City. The motivation for obtaining the report was to prevent it from becoming an issue on appeal, as the report formed part of the considerations involved in determining whether it was just and equitable to order the Appellant's eviction.
29. The Appellant contends that the Magistrate erred in denying the Appellant time to accept or reject the report. The Appellant asserts that the Respondents obtained the report on 28 February 2024, whereas

the Appellant received it on the 4th or 5th March 2024. The Magistrate had set a timetable that allowed the parties to consider the City's report and included their

responses to it in the affidavits they were yet to file. The Appellant had not complied with the order. The Magistrate indicated

that he could not force the City to compile a report if the Appellant declined to complete the questionnaire.

30. The Appellant then contended that by denying the Appellant the right to respond to the report, he would have rendered the Appellant homeless once the eviction order was granted. The Appellant contended

further that the Magistrate had erred by failing to appreciate that it was unconstitutional to render the Appellant homeless by granting the eviction order. The Appellant's testimony was to the contrary. She had declined the City's assistance and was actively searching for alternative accommodation. There is, thus, no merit in these grounds of appeal.

31. The following grounds of appeal relate to the provision of temporary housing; the Appellant contended that the Magistrate had erred in failing to order temporary housing for the Appellant that was located close to the apartment in Blouberg, and the choice of which did not infringe her dignity. The Appellant asserted that the Magistrate had failed to direct the City to provide appropriate accommodation to cater for prospective places of employment, the children's

schooling, hospitals, transportation, other important amenities, and the Appellant's vulnerabilities. These nuanced

grounds of appeal attack every conceivable angle relating to the provision of emergency or alternative accommodation. These grounds of appeal are raised without any appreciation of the Appellant's evidence, the inquiry conducted by the Magistrate, and his efforts to address these issues. The response has to be that the Appellant repeatedly waived the assistance of the City to provide emergency or alternative accommodation, failed to complete the personal housing questionnaire and was actively searching for accommodation confined to the beachfront area. These grounds of appeal have to fail as well.

32. The remaining grounds of appeal concern the City's alleged obligation to provide the Appellant with emergency or alternative accommodation in circumstances where she declined assistance. The Appellant contended that the Magistrate erred by failing to provide the City with reasonable time to find temporary emergency accommodation for the Appellant. The Appellant further contends that the Magistrate erred by not extending the eviction date to enable the City to provide accommodation. These grounds suffer a similar fate to the preceding ones. They are raised in the abstract, devoid of

association, reliance, or relevance to the inquiry and the evidence elicited. They have no merit.

33. The transcript of the hearings indicates that the Appellant was questioned about the duration of her occupation of the apartment, the period over which she did not pay any rent, the termination of the lease, and the notice of eviction. All of the foregoing proved that the Appellant was in unlawful occupation of the apartment over a protracted period.

34. The Magistrate assumed a proactive role in the inquiry. He ensured compliance with the requirements of section 4(7) of PIE before he concluded that it was just and equitable to order the Appellant's eviction. He facilitated the provision of a report from the City. The Magistrate did everything that was required of him to enable the Appellant to seek the assistance of the City. The Appellant had repeatedly declined to provide the requisite information and waived any assistance from the City. The Magistrate, assisted by the Respondent's attorney, conducted a detailed inquiry into the Appellant's search for alternative accommodation. The Magistrate enquired about the minor children. They were healthy and had no special needs. The Magistrate enquired about the Appellant's employment prospects and was assured by the Appellant that there was a job interview in the offing. He considered that the Appellant headed her household. He also considered the Respondents' interests before finding that it was just and equitable to order the eviction of the Appellant.
35. The Magistrate complied with section 4(8) of PIE. The Appellant did not raise any valid defence against the application for her eviction. She could not, as the procedural requirements were satisfied, the lease was terminated, she had not paid rent over a prolonged period, she received notice to vacate the apartment, and there were no defects in the procedure followed to evict her legally. This was the second application for an eviction, the first ending in a technicality that may have been decided incorrectly against the First Respondent as it had from being in charge of the apartment, the necessary locus standi under PE to seek the eviction of the Appellant. The Magistrate gave the Appellant eight weeks to vacate the apartment, failing which, she would have been evicted by the Sheriff a week later. These periods are eminently reasonable.
36. Almost nine months have elapsed since the eviction order was granted. The 2024 school year is about to end. The Appellant has had ample time to secure employment and can attend to her children's schooling

if they need to be relocated to another school. This Court does not have to pronounce on extraneous matters, like whether the Appellant

had abused the Courts in delaying her eviction, to decide this appeal.

37. This appeal has no merit, and it falls to be dismissed with costs. The appropriate order follows.

ORDER

1. The appeal is dismissed with costs.

Bhoopchand AJ

I agree, and it is so ordered.

Nuku J

Judgment

was handed down and delivered to the parties by e-mail on 29 November 2024.

APPEARANCES

For Plaintiff : Mr Bonakele Dlova

Instructed by : Messrs Dlova Attorneys

For Defendant : Adv. Celeste Tait

Instructed by : Messrs Lindsay & Waters Attorneys

[1] Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (CCT108/16)

[2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017) (“Berea De Wet”)

[2] City of Johannesburg v Changing Tides 2012 (6) SA 294 (SCA) at para 25

[3] Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another (CCT108/16)

[2017] ZACC 18; 2017 (8) BCLR 1015 (CC); 2017 (5) SA 346 (CC) (8 June 2017) at para 48

[4] Berea De Wet at para 51

[5] Changing Tides at paras 39-40

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