



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

Appeal case number: A209/2024

Magistrate's Court case number: 8449/2023

In the matter between:

C[...] D[...] O[...]

Appellant

and

AHMED MUNZOOR SHAIK EMAM

First respondent

CITY OF CAPE TOWN

Second respondent

JUDGMENT DELIVERED ON 10 FEBRUARY 2025

VAN ZYL AJ:

Introduction

1. On 26 April 2024 the Cape Town Magistrate's Court granted an eviction order (at

the first respondent's behest) in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), ordering the appellant and all persons holding title under her to vacate the premises situated at 2[...] T[...] Close (Erf 6[...]), Parklands, Western Cape by 31 July 2024. Written reasons for the order were furnished on 30 May 2024.

2. The first respondent purchased the property at a sale in execution that was held on 31 January 2023, pursuant to an order previously granted¹ in the High Court on 22 July 2021, in an action instituted by Nedbank Limited, as bondholder, against the appellant's husband, who was the registered owner of the property at the time. I shall refer to this order as the Nedbank order. In terms of the Nedbank order, the property was declared specially executable so as to pay the amount outstanding under the mortgage bond registered over the property.
3. Transfer of the property was registered in the first respondent's name on 20 April 2023.² The eviction application was instituted in June 2023.
4. The appellant lodged a notice of appeal against the eviction order on 5 July 2024, just short of a month prior to the date upon which she was to vacate the property.

Condonation

5. At the outset, there was an application for condonation of the late delivery of the first respondent's heads of argument, as well as of the delivery, at the last minute, of the appellant's heads of argument in relation to the application for postponement. There was no opposition in either case, and condonation was duly granted.

The appellant's application for postponement of the appeal hearing

6. Shortly before the hearing of the appeal the appellant indicated that she would

¹ Under case number 4423/2022 in this Court.

² There was an initial objection to the first respondent's *locus standi*, but the issue was duly dealt with by the magistrate in the context of section 4(1) of PIE, read with the definitions of "owner" and "person in charge" in section 1 of PIE.

seek a postponement of the appeal hearing. A formal application for postponement was delivered three days before the hearing.

7. The reason for the postponement was that the appellant wished to appeal against the Nedbank order, as the appellant was of the view that that order had been granted in error. The appellant argued that a successful appeal against that order would mean that the eviction order granted by the magistrate's court could no longer stand. As the appellant's attorneys put it, *"the ownership of the immovable property in question is predicated upon the Rule 46A judgment and the subsequent sale in execution authorized thereby"*.
8. There are several difficulties with the appellant's proposed application for leave to appeal in respect of the Nedbank order, assuming that an appeal against the order is competent in the circumstances.
9. The first is that the application for leave to appeal is long out of time – almost three years late. Although an application has been brought for condonation of the delay in the institution of the application for leave to appeal, the appellant's justification for seeking leave to appeal only at this juncture rings hollow. It is clear from the documents filed of record in the eviction application that the appellant had known in 2021 already that the property would have to be sold because it was no longer affordable. A private sale between the appellant's husband and the first respondent at that stage was interdicted, whereafter Nedbank called up the bond.
10. It appears from the applications for postponement and for condonation that, in fact, the appellant was in court on the day that the Nedbank order was granted. The appellant states that she was unrepresented at the time, but it is not in dispute that she thereafter acquired legal representation for the purposes of various bouts of litigation between her and her husband, and also that she had legal representation prior to the date of the Nedbank order for the same purpose. There is no acceptable reason on record to explain why the possible appeal (or rescission) of the Nedbank order was not debated at an earlier stage, especially as the property seems to have been a persistent bone of contention between the

appellant and her husband both before and after the grant of the Nedbank order. To say, as counsel did in argument, that it “*did not occur to her that she had to deal with it*” is not sufficient.

11. The second problem is that, although the appellant argues that the presiding judge who granted the Nedbank order on 22 July 2021 “*failed to apply the requisite judicial oversight mandated by the proviso to Rule 46(1)(a)*”, no reasons had been given for the order at the time, and the appellant has not subsequently sought reasons. The appellant can therefore not specify which aspects the presiding judge had failed to consider. The appellant states that she had delivered an affidavit opposing the grant of the Nedbank order, and had raised oral objections in open court at the time. Presumably, therefore, the presiding judge had in fact taken the information contained in the opposing affidavit as well as the appellant’s oral objections into account in granting the Nedbank order. There is simply no telling in which (if any) respects the presiding judge had erred. The order stands. It is therefore not so that, as the appellant argues, the current appeal is not ripe for hearing because the court erred in 2021 in granting the Nedbank order.
12. The third problem is that there is as yet no indication as to how or when the application for leave to appeal will be dealt with, and by whom. The judge who granted the Nedbank order is no longer serving on the Bench. Counsel did not indicate that any steps had been taken to resolve the way forward. Any postponement granted in relation to the present appeal will therefore have to be *sine die*. This is not a satisfactory position.
13. A fundamental issue, to which I have alluded, is that the appellant was not a party to the Nedbank litigation, and she did not apply for leave to intervene in those proceedings. Counsel for the appellant submitted with reference to the matter of *Bestbier and others v Nedbank Ltd*³ that, because the appellant

³ 2024 (4) SA 331 (CC) at para [70]: “Rule 46A(3)(b) requires that every application to declare residential immovable property executable shall be on notice to the judgment debtor and “to any other party who may be affected by the sale in execution”, including the entities referred to in rule 46(5)(a), provided that the court may order service on any other party it considers necessary”.

received notice of the Nedbank application under Rule 46A(3)(b) of the Uniform Rules of Court, she thereby derived a right to appeal the grant of the Nedbank order. This is not correct. The reason why notice to occupiers is required where sales in execution are on the cards is because those occupiers' rights of access to housing are worthy of protection, and should be considered together with all of the other factors that are relevant in determining whether execution is the appropriate route to follow. Rule 46A(2) provides that a court "*shall not*" authorise execution unless "*all relevant factors' have been considered*". The giving of notice did not, however, clothe the appellant, as a non-party to the underlying application, with the right to appeal the Nedbank order. She may have had other remedies in relation thereto, but an appeal was, and is, not one of them.

14. In *National Police Service Union and others v Minister of Safety and Security and others*⁴ the Constitutional Court restated the well-known principles underlying applications for postponement as follows:

"The postponement of a matter set down for hearing on a particular date cannot be claimed of right. An applicant for a postponement seeks an indulgence from the court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of

⁴ 2001 (8) BCLR 775 (CC) at para [4].

justice to grant the postponement.”

15. In the circumstances of the present matter, the prospects of the application for leave to appeal are slim. I do not regard it is just and equitable that the first respondent should be compelled to wait for an indefinite period to hear whether he may take possession of his property. In *Snyders (Mputsoe) v Elizabeth Conradie School*⁵ the Court held as follows in relation to an application for the indefinite postponement of the hearing of an application for leave to appeal:

“... it would be unduly burdensome on the present respondent and severely prejudicial to it, if an indefinite postponement is granted to the present applicant. Litigants, who hold a judgment in their favour are entitled to expect that any proposed or contemplated appeal moves forward within a reasonable period. Even in extra-ordinary cases a litigant could never expect an indefinite delay in an application for leave to appeal. I believe such an indefinite delay is clearly unduly prejudicial to the present respondent.”

16. These sentiments are apposite in circumstances of the present matter. In my view, the application for a postponement should accordingly be refused.

The merits of the appeal

17. When the possibility of a postponement was first raised, the appellant’s legal representatives were cautioned nevertheless to be ready to make submissions on the merits of the appeal. This was because the Court, not having considered the postponement application, could not at that stage tell whether it was to be granted or refused – should it be refused, then the appeal would proceed. The other possibility was that the Court would prefer to hear argument both on the issue of postponement and on the merits of the appeal, and thereafter decide the fate of the postponement application.

18. At the hearing of the appeal, after addressing the Court on the postponement, the

⁵ [2025] ZANCHC 3 (23 January 2025) at para [12].

appellant's counsel indicated that she was not in a position to make submissions on the merits. This was unfortunate, given the express warning given by the Court that the parties should be ready to argue the merits of the appeal. The appellant's legal representatives failed, too, to deliver heads of argument on the merits. Counsel was nevertheless invited to make submissions in relation to the merits of the appeal.

19. In this regard the Court's task was eased because of the detailed judgment written by the magistrate. I deal briefly with the various grounds of appeal raised in the notice of appeal. None of the grounds has merit. The appellant has, moreover, sought to resurrect grounds in the notice of appeal in relation to aspects relating to points of law that had expressly been abandoned by the appellant in the magistrate's court. The appellant can for obvious reasons not argue that the magistrate's court erred or misdirected itself on points abandoned by the appellant's legal representative at the hearing of the eviction application.

The first ground of appeal: The magistrate erred in not calling for the joinder of the appellant's husband to the proceedings, and holding that he did not have a direct and substantial interest in the proceedings

20. In the magistrate's court the appellant initially sought the postponement of the eviction application to allow for the joinder of her estranged husband. This point was expressly - and sensibly - abandoned at the hearing of the eviction application by the first respondent's attorney. The magistrate's judgment records the position as follows: *"First respondent abandoned a dilatory plea to join her estranged husband to the proceedings as he has duty of support owed her and their minor children."*
21. The appellant is therefore not at liberty to resurrect the issue on appeal.
22. The judgment nevertheless records the magistrate's view on the issue of joinder. The magistrate correctly held that *"it is not the estranged husband whose rights are being decided as he is not an occupier of the property"*. This reasoning cannot be faulted. In *Judicial Service Commission and another v Cape Bar*

*Council and another*⁶ the Supreme Court of Appeal held as follows in relation to joinder:

“It has by now become settled law that the joinder of a party is only required as a matter of necessity — as opposed to a matter of convenience — if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one ...”

23. The Constitutional Court in *Snyders and others v De Jager*⁷ has confirmed what is considered as a "direct and substantial interest":

“A person has a direct and substantial interest in an order that is sought in proceedings if the order would directly affect such a person's rights or interest. In that case the person should be joined in the proceedings. If the person is not joined in circumstances in which his or her rights or interests will be prejudicially affected by the ultimate judgment that may result from the proceedings, then that will mean that a judgment affecting that person's rights or interests has been given without affording that person an opportunity to be heard. That goes against one of the most fundamental principles of our legal system. That is that, as a general rule, no court may make an order against anyone without giving that person the opportunity to be heard.”

24. Any rights that the appellant may have against her estranged husband are to be pursued by her in a different forum. The eviction application related to the unlawful occupation of the property by the appellant and those holding title under her. Her husband is not an occupier. It would have been irregular to order the joinder of the husband when he does not reside at the property, and has no interest in the outcome of the eviction application.

⁶ 2013 (1) SA 170 (SCA) at para [12].

⁷ 2017 (5) BCLR 604 (CC) at para [9].

The second ground of appeal: The magistrate erred in applying the provisions of section 4 of PIE specifically insofar as it relates to the appellant's husband's duty of support owed to the appellant and their minor child

25. This issue is linked to the one discussed above, and was also abandoned by the appellant in the magistrate's court. The appellant's attorney addressed the magistrate as follows: *"All right. Your Worship, then in terms of section 4(1) and 4(2) we have conceded those points in limine as well as the joinder. I think the Cape Killarney makes a provision that sufficient. So we are not going to pursue that point"*.
26. The appellant is accordingly not entitled to raise the issue on appeal.
27. This ground of appeal is, in any event, lacking in specificity. The appellant has failed to identify any particular aspect of section 4 of PIE in which the magistrate is alleged to have erred. It is therefore not possible to consider it in any detail.
28. Insofar as the appellant's husband's common law duty of support had initially been raised as a defence to the eviction application, the matter of *Shezi v L.V.L and another*⁸ is instructive. This was an application brought by the applicant, the purchaser and registered owner, for the eviction of the first respondent from the property in question. The first respondent claimed that she was the customary law wife of the seller and, as such, she had a right to remain resident in the immovable property. The Court held as follows:

"There is no merit in the argument that the respondent is the co-owner of the property in terms of her marriage to the seller, Mr M., and therefore she is entitled to remain in occupation of the property because her consent to sell the property was not sought by Mr M.. If she was married to Mr M. as contended, the proprietary rights of her marriage are to be determined by the divorce court and once so determined, she may have recourse against her husband. The applicant

⁸ [2023] ZAGPJHC 373 (24 April 2024) at para [13].

*is on record that he is opposing the application to be joined in the divorce proceedings for he has no interest in those proceedings. It cannot be right that an innocent and lawful purchaser of the property from its rightful owners in terms of a title deed and through a deed of sale, the applicant in this case, should be burdened with the marital problems of an unlawful occupier of his property - that would be tantamount to the expropriation of the land or property of a lawful private owner.*⁹

29. This stance is a sensible one. The first respondent cannot be held liable for the alleged failure by the appellant's husband to support her and the minor child – the existence and consequences of any such failure are issues that should be determined in an appropriate forum upon relevant evidence. The papers in the eviction application that served before the magistrate did not widen the scope of the enquiry to the extent where a fully-blown maintenance inquiry was warranted.

The third ground of appeal: The magistrate erred in finding that the appellant's husband's duty of support owed to the appellant and the minor child was irrelevant to the exercise of his discretion under section 4 of PIE. In doing so, the magistrate “had no regard to the scope and content of the appellant's husband parental duties towards the minor child, which are fundamental to eviction proceedings”

30. This ground, linked to the previous one, is similarly vague and irrelevant. The magistrate's court was not tasked with determining the duties and liabilities of the appellant's husband. What the appellant is effectively arguing is that a court in an eviction application should order a husband to provide alternative accommodation.

31. There is no merit in this argument, which was quite correctly not entertained by the magistrate.

The fourth ground of appeal: The magistrate failed to have regard to the relationship between the appellant and her husband, and the probability that an eviction application

⁹ Emphasis supplied.

would lead to homelessness. In doing so, the magistrate “misconceived the scope of his discretion and the fact-finding powers available to him”

32. The basis for this ground of appeal is unclear, as is the issue of how the relationship between the appellant and her husband relates to homelessness. As indicated, the appellant and her husband are estranged. The latter does not occupy the property any longer. I have dealt with the fact that the appellant has remedies to pursue against her husband in respect of his maintenance obligations towards her and their minor child. She is not entitled to hold the first respondent’s property hostage, so to speak, in an attempt to enforce her claims against her husband.
33. The first respondent purchased the property at a sale in execution held following the obtaining of the Nedbank order – Nedbank having been the bondholder. The appellant conceded that she was an unlawful occupier, and it accordingly stands to reason that the issue of the just and equitability of her eviction from the property would have to be determined.¹⁰ This the magistrate duly did.
34. The appellant was an unlawful occupier for less than six months at the time of the institution of the eviction application. The magistrate’s court therefore dealt with the matter in accordance with sections 4(6) and 4(8), read with section 4(9), of PIE, which do not expressly refer to alternative accommodation as a factor to be taken into account in considering whether to grant an eviction order. These sections provide as follows:

“(6) If an unlawful occupier has occupied the land in question for less than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.

...

¹⁰ If it is held to be just and equitable that the occupier be evicted, then the terms and conditions of such eviction fall to be determined: *Transcend Residential Property Fund Ltd v Mati and others* 2018 (4) SA 515 (WCC) at para [3].

(8) If the court is satisfied that all the requirements of this section have been complied with and that no valid defence has been raised by the unlawful occupier, it must grant an order for the eviction of the unlawful occupier, and determine-

- (a) a just and equitable date on which the unlawful occupier must vacate the land under the circumstances; and*
- (b) the date on which an eviction order may be carried out if the unlawful occupier has not vacated the land on the date contemplated in paragraph (a).*

(9) In determining a just and equitable date contemplated in subsection (8), the court must have regard to all relevant factors, including the period the unlawful occupier and his or her family have resided on the land in question.”

35. Notably, section 4(7) of PIE provides (albeit in relation to persons who have been unlawful occupiers for more than six months) as follows:

“If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including, except where the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of the unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.”¹¹

36. Smith *Eviction and Rental Claims: A Practical Guide*¹² states as follows in this regard:

¹¹ Emphasis supplied.

¹² Lexis Nexis online version (updated to May 2023) para 3.9.

"The availability of alternative land does not have to be considered if the land is sold in a sale of execution pursuant to a mortgage. The exemption in section 4(7), excluding the consideration of alternative land where the eviction is subsequent to an execution sale, is also not limited to instances where the former mortgagor is the occupier whose eviction is being sought. All evictions subsequent to sales in execution are included in the exemption."

37. Accordingly, the issue of alternative accommodation being available to house the appellant did not expressly arise. In *Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and others*¹³ the Court emphasised that to elevate the factor of alternative accommodation to a precondition for an eviction order would have far-reaching and chaotic consequences which could never have been envisaged by the legislature. It is but one of many factors that have to be taken into account.
38. In the present matter, the appellant would in any event not have been rendered homeless, as the first respondent had tendered to pay a deposit for her to rent an alternative residence, as well as to pay for two months' rental. This was after the appellant had stated in her answering affidavit that she would be rendered homeless if she did not have a deposit and two months' rental payments.

The fifth ground of appeal: The magistrate failed to adopt the "pro-active approach" used in the exercise of the equitable discretion conferred by section 4 of PIE, in that the magistrate failed to consider a reasonable time period within which the appellant was to vacate the premises having regard to "the personal and financial circumstances of the appellant being a woman-headed household and the sensitivity of the minor child who has resided in the premises all her life"

39. It is unclear what the appellant means by the "pro-active approach". It is, however, trite that an appeal court has a restricted discretion. It can interfere only if the lower court has not exercised its discretion judicially: *"This means that a court of appeal is not entitled to interfere with the exercise by the lower court of*

¹³ 2001 (4) SA 759 (E) at 769C-F.

its discretion unless it failed to bring an unbiased judgment to bear on the issue; did not act for substantial reasons; exercised its discretion capriciously, or exercised its discretion upon a wrong principle or as a result of a material misdirection".¹⁴

40. In *Grobler v Phillips and others*¹⁵ the Constitutional Court highlighted that the discretion lies at the magistrate's court that deals with the eviction application:

"This matter commenced in the Magistrates' Court and it was that Court that had the discretion. When it was heard on appeal by the High Court, that Court had to determine whether the Magistrates' Court had exercised its discretion properly. The Supreme Court of Appeal dealt with the matter as if the High Court was the court that had the discretion to determine whether it was just and equitable to grant an eviction order and it erred in this regard."

41. I agree with the first respondent's submission that the period granted to the appellant to vacate the property cannot be faulted. The order was handed down on 26 April 2024, with the date to vacate being 31 July 2024. This was a period of more than three months for the appellant to vacate the immovable property. The appellant had been residing unlawfully at the property since March 2023.

42. As indicated, the appellant would not have been homeless on vacating the immovable property as the first respondent had tendered a deposit and two months' rental to the appellant for the acquisition of alternative accommodation.

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43. It is clear from a consideration of the magistrate's judgment that, in determining the period to vacate, the magistrate had regard to the interests of the minor child, as well as to the appellant's income, the fact that the appellant had not paid towards any rental at the occupied property, and the paucity of relevant information as to why the appellant was not in a position to find alternative

¹⁴ *Malan and another v Law Society, Northern Provinces* 2009 (1) SA 216 {SCA} at para [13].

¹⁵ 2023 (1) SA 321 (CC) at para [24]. Emphasis supplied.

¹⁶ The appellant having stated in her answering affidavit that she would be rendered homeless as she would not be able to afford a deposit and two months' rental.

accommodation.

44. The magistrate's court pointed out that the appellant had failed to provide any information about her ability to rely on friends and family for assistance, as well as her failure to provide any proof of a maintenance order or recent bank account to support her averments. The magistrate referred to *Mayekiso and another v Patel and others*,¹⁷ which the Court held that the parties had a duty to place all relevant information before the Court for the purposes of consideration of the eviction application. Where a party failed to do so, an eviction order was justified where the evidence indicated that the occupation was unlawful and that an eviction would not result in homelessness.
45. The magistrate's court further expressly considered the fact that, apart from the appellant's own income, the appellant's son who resided with her earned R8 000.00 per month, and that the appellant lived with her adult partner, with no information as to the latter's income. It appeared to the court that the appellant wanted to stay at the property until her estranged husband provided her with maintenance. In this regard the court stated: "... *this underlies her view that applicant¹⁸ must wait to exercise his proprietary rights until her matrimonial rights to support and maintenance are enforced and alternative accommodation is provided or arrear maintenance is paid in full.*"
46. In the circumstances, the magistrate's court found the appellant's assertion that she would be rendered homeless to be "*unpersuasive and not credible*". On a consideration of the papers as a whole, I cannot fault this finding.
47. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and another*¹⁹ the Constitutional Court held that: "*Of course, a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period.*"

¹⁷ 2019 (2) SA 522 (WCC) at paras [65]-[66].

¹⁸ I.e., the first respondent in this appeal.

¹⁹ 2012 (2) SA 104 (CC) at para [40].

48. In a similar vein, the Supreme Court of Appeal in *Ndlovu v Ngcobo; Bekker and another v Jika*²⁰ held that: *"The effect of PIE is not to expropriate the landowner and PIE cannot be used to expropriate someone indirectly and the landowner retains the protection of s 25 of the Bill of Rights. What PIE does is to delay or suspend the exercise of the landowner's full proprietary rights until a determination has been made whether it is just and equitable to evict the unlawful occupier and under what conditions. Simply put, that is what the procedural safeguards provided for in s 4 envisage."*

49. In *Grobler supra* the Constitutional Court dealt with the issue as follows:²¹

"In determining the competing interests of both parties to eviction proceedings, due regard must be had to the considerations of Justice' and 'equity' as required by PIE. In Hattingh this court said:

In my view the part of [section] 6(2) that says: balanced with the rights of the owner or person in charge calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry.'

*Claytile, as well, reminds us that there has to be 'some give by both parties' . In essence, when balancing the interests, compromises have to be made by both parties, in order to reach a just and equitable outcome. A disturbing feature in this matter is that very little effort was made by Mrs Phillips to seriously consider the several offers of alternative accommodation made by Mr Grobler. She also did not make any counter-offers in response to the generous offers of alternative accommodation made by Mr Grobler."*²²

50. *Grobler* rejected the notion that the respondent's personal notion of where she

²⁰ 2003 (1) SA 113 (SCA) at para [17].

²¹ At paras [39]-[40].

²² At paras [39]-[40].

wanted to stay was a relevant criterion for consideration:

*"A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored. And it does not mean that the wishes or personal preferences of an unlawful occupier are of any relevance in this enquiry."*²³

51. In the present matter the magistrate's court duly had regard to the personal circumstances of the minor child too, and correctly remarked that the child's condition was due to the ongoing disputes between her parents. Allowance was made for the fact that the child was being home-schooled, and that the move to other accommodation should not unreasonably disrupt her. Sufficient time was therefore allowed in the setting of the date to vacate for the minor child to be emotionally prepared for a move to a new home environment.
52. The appellant stated that a housing kit and communal units in Delft were not suitable options for her and her children. Smith *Eviction and Rental Claims: A Practical Guide* summarises the law in respect of homelessness as follows:

"In the matter of Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers of the Newtown Urban Village Willis J dealt with the interpretation of the word 'homeless' and remarked that neither the Constitutional Court nor the SCA has ever defined 'homeless' nor does PIE define the word. Willis J defined 'homeless' as:

'Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property to the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is (a) of a comparable or better standard to and (b) at a similar rental to and (c) within reasonable proximity to that of the property from which the eviction is sought.'

*A person is therefore not automatically rendered 'homeless' by an eviction order or as a result of execution against immovable property, nor is the right to adequate housing necessarily compromised in every such instance. The mere fact that a debtor loses his home as a result of a sale in execution and/or an eviction, does not necessarily mean that he or she is thereby deprived of their right of access to adequate housing. Questions of employment and earning capacity are relevant - debtors may be able to afford other adequate housing, even if they have to rent other property."*²⁴

53. In the circumstances of the present matter there was no reason to accept that the appellant would be rendered homeless, given *inter alia* her income and the income of those living with her. The magistrate's court dealt fully with the relevant facts.

The sixth ground of appeal: The magistrate "mistook his powers available to him and deprived himself of the information and techniques necessary to fashion a just and equitable outcome"

54. It is, again, not clear what the basis of this ground of appeal is. The magistrate's judgment clearly sets out the facts taken into consideration together with the law that informs the reasons for the order ultimately granted.

The seventh and eighth grounds of appeal: The magistrate erred in the exercise of his discretion in finding that the appellant should be liable for the costs of the proceedings, by ignoring the appellant's personal circumstances and the fact that she was represented by Legal Aid, and

The magistrate erred in finding that it was just and equitable for the appellant to pay the costs of the proceedings as a result of her refusal to vacate without the first respondent having to resort to formal eviction proceedings, and ignored the appellant's rights as envisaged in PIE and the Constitution of the Republic of South Africa, 1996

²⁴ Op cit at pp 194-196.

55. These two grounds of appeal relate to the costs order that was granted in favour of the first respondent. The appellant was ordered to pay the costs of the application on the party-and-party scale.
56. The magistrate had regard to various facts which informed the exercise of his discretion on costs. These considerations were, amongst others, the the appellant's refusal to move despite being offered financial assistance to vacate, and the various opportunities provided to the appellant to vacate the immovable property without the need for the institution of an eviction application. The appellant had simply refused to consider these options. It is clear from the affidavits filed of record that the appellant had been present at the sale in execution of the property, and had approached the first respondent after the sale to introduce herself and to tell him that she was aware of the fact that she would have to vacate the property.²⁵
57. The first respondent reminded the appellant on several occasions thereafter about the need to vacate the house, and to make arrangements for her to start paying rental given the extended period she remained in the property. He also required access to the property for maintenance and renovations. There was no response to these communications. During March 2023 and April 2023 the first respondent caused formal notices to vacate to be served on the appellant, which also went unanswered. By the time that the first respondent deposed to the founding affidavit in the eviction application, in June 2023, the appellant had still not communicated with him.
58. The matter was thereafter postponed on several occasions to enable the appellant to obtain legal representation, and for the City of Cape Town to furnish a housing report. The eviction application was finally determined only in April 2024. During all of that time the appellant had the use of the first respondent's property. She did not pay anything towards the rental or upkeep thereof.

²⁵

It was common cause on the papers that the appellant was an unlawful occupier.

59. It is trite that the purpose of an award for costs is *"to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation as the case may be"*.²⁶ In the absence of any statutory provision or other just and sufficient reason to the contrary, a successful party is in law entitled as of right to costs.
60. The first respondent has not had the benefit of his immovable property since January 2023. He is prejudiced by having had to pay more than R21 000.00 per month in respect of the property since transfer, without having had the use and enjoyment thereof.
61. It appears, further, that the belated attempt at postponing the hearing of the appeal was aimed at delaying the inevitable. Given the time lapse between the grant of the Nedbank order and the hearing of this appeal, as well as the circumstances in which the Nedbank order had been granted and the appellant's own acknowledgement of her position as unlawful occupier over many years, she could not have been under any illusion as to the prospects of success of her case.

Conclusion

62. The appellant has not raised any substantive point that would justify the setting aside of the magistrate's court's the order.
63. In the premises, the appeal falls to be dismissed.
64. In light of the lapse of time since the grant of the eviction order in the magistrate's court, it is necessary to provide for a new timetable for the vacation of the property by the appellant or, should she fail to vacate, for her eviction therefrom. In my view a period of two and a half months would be reasonable in the circumstances.

²⁶ Herbststein & Van Winsen *The Civil Practice of the High Courts of South Africa* p. 951.

Costs

65. There is no reason why costs should not follow the result. Given the circumstances of the matter, and in the exercise of my discretion under Rule 67A I am of the view that the appellant should pay the first respondent's costs of the appeal on a party and party scale, with counsel's fees taxed on Scale A.

Order

66. In the circumstances, I would recommend that the following order be granted:
- 66.1. The application for postponement of the appeal is dismissed, with costs, including counsel's fees taxed on Scale A.
- 66.2. The appeal is dismissed, with costs, including counsel's fees taxed on Scale A.
- 66.3. The appellant and all those occupying through her ("the occupiers") are ordered to vacate the immovable property situated 2[...] T[...] Close (Erf 6[...]), Parklands, Western Cape, by no later than Monday, 28 April 2025.
- 66.4. Should the occupiers fail to vacate the property by the date set out in paragraph 66.3, the Sheriff of this Court or the Sheriff of the Magistrate's Court or their deputies are authorized and directed to evict the occupiers by Wednesday, 30 April 2025.

VAN ZYL AJ

I agree, and it is so ordered.

Appearances:

For the appellant: Ms Seria, instructed by Daryn Thomas & Associates

For the first respondent: Mr Abass, instructed by Parker Attorneys

No appearance for the second respondent