THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 23189/2011

In the matter between: Not Reportable

DAPHNE MARGUERY ROSEMERIEN OCTOBER	**FIRST APPLICANT**
DAPHNE MARGUERY ROSEMIRIEN OCTOBER N.O.	**SECOND APPLICANT**

And

CARMEL VANIA HENDRICKS	**FIRST RESPONDENT**
KEVIN HENDRICKS	**SECOND RESPONDENT**

Coram: **ROGERS AJ**

Heard: **29 JANUARY 2013**

Delivered: **31 JANUARY 2013**

JUDGMENT

ROGERS AJ:

Introduction

[1] In this application the applicant seeks the eviction of her daughter, Carmel, and the latter's husband from her house situated at 26 Scrabble Crescent, Alpine Park, Beacon Valley, Mitchell's Plain ('the property' or 'the house').

[2] The applicant's late husband, to whom she was married in community of property, died on 17 November 1995. His estate is being administered in accordance with a joint will in terms of which the parties massed their estates and appointed the survivor of them as the executor. The applicant has thus been appointed as the executrix. The will bequeaths the property to Carmel and another daughter, Edlyn, subject to a life usufruct in favour of the applicant. The applicant brings this application in her personal capacity and as executrix. The delay in the winding-up of the deceased's estate is not fully explained in the papers but seems to be attributable to the applicant's relative lack of sophistication and limited means to get professional help.

[3] In the will the parties stated that their daughters were to vacate the property upon getting married (even though they might by that stage be joint owners of the property). This provision was presumably inserted because of the strained relationship that existed between the applicant and Carmel.

[4] There are factual disputes regarding the events following the applicant's husband's death in 1995. Since the applicant seeks final relief the respondents' version must be accepted. The respondents' allegations are not so far-fetched or implausible that I could reject them on the papers. I emphasise, though, that much of what follows is disputed by the applicant.

The facts

[5] On the respondents' version the applicant ejected Carmel from the property in 1997, even though Carmel was not yet married. Carmel was then 21 years old. She had a daughter, Kaylen, who was a few months old and suffered from cerebral palsy. The applicant's sister later asked the applicant to allow Carmel back into the house for the sake of Kaylen's health. Carmel moved back onto the property for about six months before leaving again in 1998 due to tension with the applicant.

[6] In March 1999 Carmel married the second respondent with whom she has had three further children.

[7] Carmel only learnt of her late father's will in 2005 when she was consulted by attorneys who were attending to a purported sale of the property by the applicant. The sale was impermissible in the light of the terms of the will and did not proceed.

[8] In March 2006 the applicant's brother and sister asked Carmel to move back into the house because the applicant was suffering from diabetes and had collapsed on several occasions. They wanted Carmel to be in the house to assist the applicant. This was with the applicant's blessing. Carmel, her husband and their children thus took up occupation in the house.

[9] The applicant and the respondents agreed that the latter would pay rent of R400 per month. The respondents paid this rent for about a year. They then stopped paying rent because they were paying for water, electricity and groceries for the household, such payments exceeding R400 per month.

[10] The strained relationship between the applicant and Carmel did not abate. In April 2007 the applicant moved out of the house following an incident relating to the purchase of a new stove. Although the

circumstances of the incident are disputed, it is common cause that the incident was the straw that broke the camel's back. The applicant could no longer bear to stay in the house with Carmel. The applicant moved in with her other daughter, Edlyn.

[11] From April 2007 until the present time the applicant has been living with Edlyn. The applicant was not happy about being forced out of the house (this is how she saw it). In May 2008 she brought an eviction application in the Mitchell's Plain Magistrate's Court. On 23 July 2008 that court found that on the version asserted by the respondents they 'may have a valid defence'. The court thus declined to grant an eviction order. (According to the respondents there had been an earlier attempt at eviction, also unsuccessful, but no further particulars have been provided.)

[12] During 2011 the applicant obtained the *pro bono* services of her current attorneys. On 28 June 2011 her attorneys wrote to the respondents briefly recording the applicant's version of events and giving the respondents notice to vacate the property by 27 July 2011. The respondents having failed to vacate, the present application was launched on 1 December 2011.

[13] The applicant paid the bond instalments on the property until 2009. The rates are deducted from her monthly pension. The respondents have paid for utilities though arrears have from time to time accumulated.

Unlawful occupation

[14] The first disputed question is whether the respondents are 'unlawful occupiers' as defined in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the Act'). For present purposes the enquiry is whether the respondents are persons who occupy the property 'without the express or tacit consent of the owner or person in charge, or without any other right in law to occupy such [property]'.

[15] At all times material to this application the owner of the property has been the executrix of the massed estate, namely the applicant in that capacity. What should long since have occurred is the transfer of the bare dominium of the property to Carmel and Edlyn in equal shares subject to a life usufruct in favour of the applicant in her personal capacity.[1] Upon such registration the applicant would, in my view, become the 'person in charge' for purposes of the definition of 'unlawful occupier'. Where someone other than the registered owner is the 'person in charge' (ie the person with the right to determine who stays on the property), it is the consent of such person rather than the registered owner which is in my view relevant. It follows that the holder of bare dominium could be an unlawful occupier if he or she occupied property without the consent of the usufructuary.

[16] The question is thus whether the respondents are occupying the property with the consent of the applicant, whether in her capacity as executrix or as usufructuary. It is common cause that the respondents had such consent when they moved back into the house (on the respondents' version, this was in March 2006). At least for a time thereafter their occupation was lawful.

[17] The applicants' version is that the respondents were only invited back into the house for a period of two months. The applicant puts this in 2005, not 2006, and alleges that it was a favour to the respondents. She denies that they moved into the house in order to look after her. The respondents, while advancing a contrary version, do not allege that there was an agreement that they could stay in the house for a specific period (for example, ten years) or for as long as they pleased.

[18] I thus consider that the respondents' right to stay in the house was terminable by the applicant on reasonable notice. This is so whether

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[1] Cf Corbett *et al The Law of Succession in South Africa* 2nd Ed at 440-443.

one treats the arrangement as a *precarium*[2] or as a lease of indefinite duration.[3]

[19] On the respondents' version, the purpose for which they were invited to return to the house in March 2006 fell away and failed by April 2007 when the applicant moved out of the house owing to continuing conflict with Carmel. The respondents do not claim that any new arrangement for their occupation was reached at that stage. They also stopped paying rent at about this time. Although they thereafter paid for utilities and groceries, this was of no benefit to the applicant, since she was no longer residing there. The respondents simply continued to remain in residence rent-free. If their right of occupation did not terminate in April 2007 by virtue of the manifest failure of the intended purpose of the permission which the applicant had granted for them to reside in the house and with their decision to stop paying rent, the applicant made her intentions clear when in May 2008 she launched proceedings to evict them. Although that application failed, the applicant on 28 June 2011 through her attorneys gave an explicit notice to the respondents to vacate by 27 July 2011.

[20] Mr Fisher, who appeared for the respondents and who made his submissions with admirable realism, did not feel able to submit that the respondents were currently occupying the house with the permission of the owner or person lawfully in charge. He felt bound to concede that the right to occupy was terminable and had been terminated. He did not argue that the notice of 28 June 2011 was unreasonably short (one month). Even if the notice was unreasonably short, the current application was issued more than five months after the giving of notice to vacate. That was more than reasonable in all the circumstances.

[21] I have assumed that the respondents were (on their version) entitled to reasonable notice. Quite possibly summary termination would have

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[2] *Adamson v Boshoff & Others* 1975 (3) SA 221 (C) at 229A-B.
[3] *LAWSA* 2nd Ed Vol 14(2) para 64

been permissible. If the respondents had a right of indefinite occupation terminable on reasonable notice, such right on their version was subject to their paying monthly rent of R400. By ceasing such payments in April 2007 they repudiated the contract, which repudiation the applicant could accept, thus bringing the arrangement to an immediate end.

[22] I thus find that at the time the application was issued the respondents were 'unlawful occupiers' and that they are still unlawful occupiers.

Just and equitable

[23] The next question is whether it is just and equitable to order the respondents' eviction as contemplated in s 4(7) of the Act. In this regard I must take into account, among other things, that Carmel's eldest daughter, Kaylen, who is now 15, suffers from cerebral palsy and is wheelchair-bound. Section 4(7) requires the court to have regard to the rights and needs of disabled persons.

[24] As against this, the applicant, who wants to move back into the house, is now 73. Though she suffers from diabetes, she says she can look after herself and no longer wants to be an imposition on Edlyn. Section 4(7) requires the court to take into account the rights and needs of the elderly, a category into which the applicant falls.

[25] Although neither the applicant nor the respondents are persons of substantial means, they would not be rendered homeless if the court refused or granted an eviction order as the case may be. The applicant could probably continue living with Edlyn, though whether as a pensioner she could afford to rent a house if Edlyn was no longer willing to have her is by no means clear.

[26] Carmel's husband has gainful employment with the Department of Justice. Although his income is not stated in the papers, the

respondents say that at the time they were asked to move back into the house in March 2006 they were in a 'fixed comfortable rented property'. They do not say that their financial affairs have deteriorated since then. They also allege that they have offered to buy the property, which must mean that they have sufficient resources to service a mortgage bond.

[27] Mr Fisher urged me to take into account that it was at the request of the applicant's siblings and with the applicant's blessing that the respondents gave up their previous rented accommodation and moved back into the house in March 2006. While this is a feature which, in assessing what is just and equitable, might have been of some significance in the earlier stages of the respondents' occupation, it is a consideration which has over time diminished in importance. As I have said, the purpose for which the respondents were invited to stay in the house had altogether failed by April 2007. The respondents have known since then, and at least since May 2008, that the applicant did not want them there. They have, against the applicant's wishes, continued for some years to have the benefit of rent-free accommodation.

[28] While the court would not want to cause distress to Kaylen or the respondents' other children, I do not consider that it would be just and equitable to withhold an eviction order. The respondents, so it appears, should be able to find and afford comfortable rented accommodation (assuming they choose not to buy a house). I see no reason why they should not be able to create a suitable and loving environment for their children in Mitchell's Plain in reasonable proximity to the schools they attend.

[29] Mr Fisher also placed emphasis on the fact that Carmel and her sister have a right to joint ownership of the property. I do not regard this consideration as advancing the contention that it would be just and equitable to allow the respondents to remain in unlawful occupation. The interest which Carmel and her sister have is a right to obtain bare

dominium of the property from the deceased's estate. They do not have a right, pending the expiry of the applicant's usufruct, to occupy the property.

[30] I thus consider that it would not be just and equitable to allow the interests of the respondents to prevail over those of the applicant, who is the person with the legal right to occupy the property, who wishes to occupy it, and who is an elderly pensioner. Normally it would be just and equitable to grant an eviction order where the owner is a private party who needs the property and where the occupier has no right to remain on the property.[4] The respondents' eviction will thus be ordered.

Date for vacation and enforcement of eviction

[31] In terms of s 4(8) the court must determine [a] a just and equitable date on which the respondents must vacate the property; and [b] the date on which the eviction order may be carried out if the respondents have not vacated the property by the first-mentioned date.

[32] Although the respondents have been in unlawful occupation against the applicant's wishes for four to five years and do not themselves have a strong argument for indulgence, the interests of their children dictate that a generous period be afforded for the respondents to find alternative accommodation. In my view three months would suffice. This was the period I put to counsel. Mr Fergus for the applicant initially submitted that six weeks would be appropriate but did not resist the lengthening of the period to three months. Mr Fisher, while submitting that a period of up to five months should be considered, did not contend that three months would be unjust.

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[4] See *The City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others* [2012] ZASCA 116 paras 18-19.

[33] I thus propose to allow the respondents three months to vacate. I see no reason to provide a lengthy period thereafter for the eviction to be put into effect if the respondents should fail to vacate.

[34] In terms of s 4(12) the court can vary the conditions of an eviction order on good cause shown. If the respondents, despite diligent endeavour, are unable to secure suitable accommodation within a period of three months, they will be entitled to approach the court for an extension on good cause shown.

Res Judicata

[35] The final aspect which was briefly touched upon by Mr Fisher in his heads of argument was whether the present application was barred on grounds of *res judicata*, having regard to the unsuccessful eviction proceedings in the Mitchell's Plain Magistrate's Court. He advanced the argument tentatively, did not cite legal authority and did not press the point in his oral submissions.

[36] The magistrate's decision of 23 July 2008 was not fully reasoned and the ultimate conclusion was expressed somewhat curiously. The magistrate held that the respondents 'may have a valid defence' and he therefore declined to grant an eviction order. This is not the language of a court finally deciding the rights of the parties. To the extent that the order was in substance one dismissing the eviction application, it would I think fall into that class of dismissal which the courts would equate to absolution from the instance. Such an order does not render the matter in question *res judicata*.[5]

[37] I may add that the case which the magistrate's court was called upon to decide was not necessarily the same as the current application. In the current proceedings the applicant relies on an event which

[5] *MV Wisdom C, United Enterprises Corporation v STX Pan Ocean Co Ltd* 2008 (3) SA 585 (SCA) paras 6-10; *Vena v Vena & Others NO* 2010 (2) SA 248 (ECP) para 8.

occurred after the magistrate's court gave judgment, namely the giving of notice by her attorneys to the respondents on 28 June 2011. It does not appear that the magistrate was called upon to decide, or did decide, whether or not an indefinite permission to occupy had been terminated on reasonable notice.

[38] Since in my view the defence of *res judicata* cannot succeed on its merits, it is not necessary to decide whether the argument is procedurally open to Mr Fisher, having regard to the fact that the defence was not squarely raised in the answering papers.

Costs

[39] The applicant's attorneys and counsel are representing her *pro bono*. Relying on a judgment of the Labour Court,[6] Mr Fergus argued that I could nevertheless order the respondents to pay the applicant's costs. I must add that Mr Fergus stated that he would in any event not be charging a fee. He said, however, that the applicant's attorneys had incurred certain disbursements and he did not know whether they might wish to charge a fee if a costs order were made in the applicant's favour.

[40] I do not intend to decide whether the case cited by Mr Fergus was correctly decided. Given the limited means of the parties and the regrettable rift that already exists between the applicant and Carmel, I do not think I should make matters worse by granting a costs order where the applicant's legal representatives have, commendably, undertaken to assist her for no charge.

The order

[41] I make the following order:

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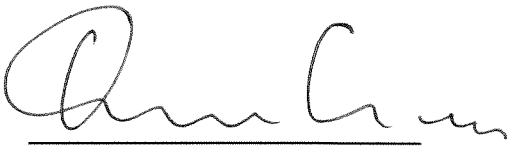
[6] *Zeman v Quickelberge & Another* (2011) 32 ILJ 453 (LC).

[a] The respondents and all those holding under them are to vacate the premises known as 26 Scrabble Crescent, Alpine Park, Beacon Valley, Mitchells Plain ('the property') by not later than Tuesday 30 April 2013.

[b] If the respondents and those holding under them fail to vacate the property by Tuesday 30 April 2013, the eviction order may be carried out on or after Monday 6 May 2013.

[c] There will be no order as to costs.



ROGERS AJ

APPEARANCES

For Applicant:	S Fergus
	Instructed by:
	Edward Nathan Sonnenbergs
	Cape Town
For Respondents:	W Fisher
	Instructed by:
	Equilore
	Cape Town