THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 284/2023

In the matter between:

LEON DE KOCK	**APPELLANT**
and	
WANDA LUUS DU PLESSIS	**FIRST RESPONDENT**
ANDRE DU PLESSIS	**SECOND RESPONDENT**
DU PLESSIS (BOLAND)	
WELLINGTON ATTORNEYS	**THIRD RESPONDENT**
CITY OF CAPE TOWN MUNICIPALITY	**FOURTH RESPONDENT**

Neutral citation: *De Kock v Du Plessis and Others* (284/2023) [2024] ZASCA 117 (24 July 2024)

Coram: MAKGOKA, MABINDLA-BOQWANA and GOOSEN JJA and BAARTMAN and SEEGOBIN AJJA

Heard: 6 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal

website, and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 24 July 2024.

Summary: Eviction – Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) – defence – right to occupation in terms of oral agreement – alleged agreement cancelled in action proceedings – aggrieved party not permitted to approbrate and reprobate – contractual defence extinguished by cancellation – just and equitable order considered.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Dolamo, Kusevitsky and Nziweni JJ sitting as court of appeal):

1 The appeal is upheld.

2 The order of the full court is set aside and replaced with the following:

'1. The appeal is upheld.

2. The order of the court of first instance under case number 6374/2020 is set aside and replaced with the following order:

'1. The applicant's supplementary replying affidavit is admitted.

2. The first and second respondents (respondents) and all those claiming occupation through and under them are evicted from erf 4629, Wellington, with street address 9 Muscadel Street, Wellington (the property), subject to the conditions set out below.

2.1 The applicant shall lease a residential unit at a retirement home, which provides frail-care facilities and/or otherwise provides and/or contracts in medical services for ailing residents, for occupation by the respondents (a unit).

2.2 The monthly rental of the unit shall not exceed R20 000 per month, exclusive of any additional costs levied by the retirement home in respect of frail care or medical treatment actually afforded to the second respondent, which are not included in the monthly rental of the unit and which are not covered by the existing medical aid scheme(s) of the respondents, provided that:

(a) The applicant shall pay such additional costs which are not so included or covered.

(b) If the respondents select a unit which exceeds R20 000 per month in rental, they shall reimburse the applicant any amount exceeding R20 000, immediately upon the applicant's written demand.

2.3 The respondents shall within 30 calendar days of this order select a unit which is available to be occupied by them on or before the date on which they are obliged to vacate the property for a monthly rental not exceeding R20 000 and notify the applicant of its particulars, whereupon the applicant shall lease that unit for residential occupation by the respondents: Provided that in the event that the respondents fail to select a unit as contemplated above and/or inform the applicant, the applicant may either:

2.3.1 pay an amount of R20 000 per month to the respondents, jointly and severally, as a contribution to such residential accommodation as they may wish themselves to hire, which payments shall be a complete discharge of the applicant's obligations to the respondents; or

2.3.2 call upon the respondents within 10 calendar days thereafter, to rank the retirement homes mentioned below, in descending order of their preference:

(a) Huis Vergenoeg (in Main Road, Paarl);

(b) Rusthof Old Age Home (in Klein Nederburg Street, Paarl);

(c) Huis Perelberg (in Botha Street, Paarl);

(d) Rusoord Old Age Home (in Divine Street, Paarl);

(e) Sherwood Nursing Home (in Kenilworth, Cape Town);

(f) Libertas Retirement Home (in Goodwood, Cape Town);

(g) Oasis Retirement Home (in Century City, Cape Town);

(h) Pineland Place (in Pinelands, Cape Town);

(i) Trianon Care Centre (in Plumstead, Cape Town);

(j) Eureka Retirement Village (in Oakdale, Cape Town);

(k) La Recolte Retirement Village (in Richworth, Cape Town);

(l) De Plattekloof Lifestyle Estate (in Plattekloof, Cape Town).

2.4 In the event the applicant selects the option in 2.3.2 above, he shall lease an available unit not exceeding R20 000 per month at the highest-ranking retirement home in the above list for occupation by the respondents on or before the date of which the respondents are obliged to vacate the property.

2.5 The respondents and all those claiming occupation through and under them shall vacate the property by no later than 90 calendar days of this court's order.

2.6 In the event that the respondents and all those claiming occupation through and under them fail to vacate the property on the date appointed in the preceding paragraph or to which that date has been postponed by the applicant, the sheriff with jurisdiction or his/her lawful deputy is authorised and directed to carry out the eviction on the court day immediately following the date to vacate the property or the postponement date by the applicant.

2.7 The respondents shall in good faith give all reasonable cooperation to the applicant in securing a unit for residential occupation by them, including, without limitation, attending any interviews appointed for them at retirement homes.

2.8 In the event that a unit has been secured for residential occupation by the respondents and it is for any reason not reasonably practicable for the respondents to occupy that unit on the date on which they are obliged to vacate the property, the applicant may by written notice postpone the date on

which the respondents are obliged to vacate the property, to a specified or determinable later date, without further legal process. Such a notice shall be *prima facie* proof that the specified or determinable later date has been appointed by the applicant.

2.9 In the event that the respondents should wish to store any of their household furniture and effects upon vacating the property, the applicant shall pay the reasonable cost of such storage for a period of two months, reckoned from the date on which the respondents are obliged to vacate the property or from the specified or determinable later date to which the applicant has postponed the date on which the respondents are obliged to vacate the property.

2.10 All communications which may be necessary between the parties shall be effected by email exchange between themselves or their legal representatives, as the case may be, which emails shall be deemed to have been received at 08:00 on the Court day following the day on which they were dispatched.

2.11 These obligations on the applicant shall be effective and enforceable for a period of one year from the date of this order.

3. There is no order as to costs'.

JUDGMENT

Mabindla-Boqwana JA (Makgoka and Goosen JJA and Baartman and Seegobin AJJA concurring):

Introduction

[1] The appellant, Mr Leon de Kock, appeals with the special leave of this Court, against an order of the full court of the Western Cape Division of the High Court, Cape Town (the full court). That court had dismissed his appeal against an order of a single judge, which had dismissed Mr de Kock's eviction application against the first and second respondents.

[2] On 4 June 2020, Mr de Kock launched an application in the Western Cape Division of the High Court, Cape Town (the high court), for the eviction of the first and second respondents from the residential property situated at erf 4629, 9 Muscadel Street, Wellington (the property), in terms of s 4(6) alternatively s 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act).

[3] Mr de Kock is a businessman and the current owner of the property. The first respondent, Mrs Wanda Luus du Plessis and the second respondent, Mr Andre du Plessis are retired. They are married and reside in the property. The property was previously owned by Mrs du Plessis until she sold it to Mr de Kock. Mr du Plessis practised as an attorney at the property until he ceased to practice.

[4] Mr de Kock was married to Mr and Mrs du Plessis' daughter, Nicquelette de Kock (Nicquelette) in 2006, until her passing on 26 September 2018. Mr de Kock and Nicquelette had twins born of their marriage, a boy and a girl, who are currently 11 years old (the minor children). The relationship between Mr de Kock and his in-laws was initially very warm, caring and loving. For all intents and purposes Mr and Mrs du Plessis regarded Mr de Kock as their own son.

[5] During 2015 Mr de Kock and Mrs du Plessis started discussing the possibility of Mr de Kock purchasing the property. At the time, the property was subject to a mortgage bond of about R1 000 000 in favour of ABSA Bank. The parties differ as to what led to these discussions. Mr de Kock's version is that his in-laws were experiencing financial difficulties and the property had become a financial burden that the couple increasingly could no longer afford. Mrs du Plessis, on the other hand, alleges that it was Mr de Kock, who proposed buying the property so he could obtain finance for his business as he did not own immovable property.

[6] On 6 May 2016, the parties concluded a deed of sale in terms of which Mrs du Plessis agreed to sell the property to Mr de Kock at the purchase price of R4 500 000. Mr de Kock secured a loan of R3 375 000 from ABSA Bank against the registration of a mortgage bond over the property, which is 75% of the R4 500 000 purchase price. The property was registered in Mr de Kock's name on 5 September 2016. Mrs du Plessis was paid an amount of R3 500 000 as consideration for the sale.

[7] From the proceeds of the sale Mrs du Plessis paid R1 000 000 to ABSA Bank to discharge the existing mortgage bond over the property. She then by agreement

with Mr de Kock, advanced the remaining balance of R2 500 000 to him. It was agreed that Mr de Kock would repay the loaned amount, in monthly instalments of R52 085, over a period of 48 months (loan agreement). Mr de Kock also agreed to pay 48 instalments of R25 000 per month, which he alleges represented a fixed interest of 10% per month on the loan capital. Mrs du Plessis, on the other hand, understood the amount to have been a contribution towards hers and Mr du Plessis' living expenses, since Mr de Kock enjoyed the benefit of the full proceeds of her property.

[8] After the sale and transfer, Mr and Mrs du Plessis remained in occupation of the property with Mr de Kock's consent. According to Mrs du Plessis the agreement was that she and Mr du Plessis could continue to reside at the property rent-free until the full amount was paid; namely, repayments for the R2 500 000, 48 monthly payments of R25 000 and the R1 000 000 shortfall outstanding in terms of the agreement. In mid-2019, Mr de Kock's relationship with his in-laws started to deteriorate. The source of the fall-out was Nicquelette's estate and access to the minor children. The detail of that dispute is however not relevant to the determination of this appeal.

[9] Mr de Kock engaged the services of an attorney who advised him that the loan agreement between him and Mrs du Plessis was a credit transaction as contemplated in s 8(4)*(f)* of the National Credit Act 34 of 2005 (the NCA) and thus a credit agreement as defined in s 1 read with s 8(1) of the NCA. The loan agreement was, accordingly, unlawful because Mrs du Plessis was not registered as a credit provider. On that advice, Mr de Kock ceased to make payments.

[10] As at the end of October 2019, of the R52 085 monthly instalments, Mr de Kock had paid R1 927 145. In respect of the R25 000 monthly payments, his version is that he had paid R925 000 while Mrs du Plessis alleges that he had only paid R875 000.

[11] On 14 October 2019 and 23 October 2019, Mr de Kock's attorneys sent letters to Mr and Mrs du Plessis notifying them of Mr de Kock's intention to sell the property and required them to vacate the property by 31 January 2020. A further notice was sent on 21 February 2020.

[12] Mr and Mrs du Plessis refused to vacate the property resulting in Mr de Kock filing the PIE application in the high court on 4 June 2020. Mr de Kock alleged that the parties had entered into two distinct oral agreements. The first agreement was that, after acquiring the property, Mr and Mrs du Plessis would remain in occupation of the property, indefinitely and rent free, subject to them paying for the amenities used and the necessary maintenance. He was advised that the arrangement was not a proper lease and was therefore terminable at reasonable notice.

[13] The second agreement was the loan agreement discussed above. ABSA Bank was prepared to advance a loan of 75% of the purchase price of the property to him. The R4 500 000 that was stipulated in the deed of sale was a simulated purchase price, which at 75% would yield a mortgage loan of R3 375 000. He would be required to only invest R125 000 of his own capital in the property.

[14] In defence to the PIE application, Mrs du Plessis alleged that the parties entered into a single oral agreement constituted of two parts (composite agreement).

According to her, because ABSA Bank was only prepared to offer mortgage financing of only R3 375 000, she agreed to accommodate Mr de Kock by allowing the property to be transferred to his name against the payment of R3 500 000. The balance of R1 000 000 of the purchase price would, upon transfer, remain due by Mr de Kock to her. Mrs du Plessis therefore agreed to lend Mr de Kock R2 500 000 of the balance of the proceeds of sale actually paid upon transfer. The remaining balance of R1 000 000, making up R3 500 000, was due by Mr de Kock. As already stated, the R2 500 000 would be repaid in 48 monthly instalments of R52 085 per month and the R1 000 000 would be repayable after the first component of R2 500 000 was fully paid.

[15] Accordingly, until such time the R3 500 000 had been repaid in full, Mr and Mrs du Plessis would remain in the property free of rent. Mr de Kock could not freely deal with the property. Full payment of the money and the restoration of the property, according to Mrs du Plessis, were reciprocal. Because the full loan account had not been fully redeemed, she retained the right to remain in occupation of the property in terms of the composite agreement. She regarded the attempt to evict her and Mr du Plessis from the property as a repudiation of the agreement, which she refused to accept and elected to approbate and enforce it.

[16] The eviction application served before De Villiers AJ on 9 March 2021. At the hearing of the matter, Mr de Kock's counsel sought to introduce a supplementary replying affidavit (the affidavit). The purpose of the affidavit was to draw to the courts' attention that Mrs du Plessis had, on 4 November 2020, instituted action in the high court, against Mr de Kock in which she averred that she had cancelled the oral agreement between her and Mr de Kock. Mr de Kock's counsel assumed that

the affidavit was part of the record. Upon becoming aware that it was not, he made an application to introduce it to the record.

[17] The high court ruled against admitting the affidavit on the strength of the submissions made by Mr and Mrs du Plessis' counsel and ordered the expungement of the affidavit from the record. The submissions advanced in support of the refusal were, firstly, that no leave was sought from the court to admit the affidavit nor was any agreement obtained from the other party to introduce the affidavit, it was simply slipped into the court file. This being done without allowing Mr and Mrs du Plessis an opportunity to deal with the affidavit. Secondly, the affidavit introduced a new cause of action with no amendment sought to the notice of motion. Thirdly, 'the new cause of action' was entirely unsustainable on the facts and the law. In this regard, counsel for Mr de Kock delved into the merits, which was not necessary in determining whether the affidavit should be admitted.

[18] The high court proceeded to deal with the PIE application and accepted Mr and Mrs du Plessis' version and dismissed the application. It found, inter alia, as follows:

'As a result, I find that the sale agreement of the property, the loan and the agreement in terms of which the first and second respondents occupy the property, are inseverable and constitute one agreement.'

[19] It further found that the agreement was fraudulent void *ab initio* as the deed of sale was inflated by R1 000 000. On Mr de Kock's version this was done to maximise the amount of the mortgage bond that he could obtain from ABSA Bank. The court also found the loan agreement to be in breach of s 89(2) read with s 90 of the NCA, as it was not an arm's length transaction. It subsequently dismissed an

application for leave to appeal, which was granted by this Court to the full court of the Western Cape Division of the High Court, Cape Town.

[20] The full court dismissed the appeal. As the court of first instance, it dismissed the application to introduce the affidavit. Prior to the hearing of the appeal, the parties' attorneys had agreed on documents that would form part of the appeal record. Mr de Kock's counsel discovered that the affidavit was not included. Upon becoming aware of this omission, he made an application, at the hearing of the appeal, to introduce the affidavit to the record. He explained to the court that when preparing the index and the bundle for the hearing, Mr de Kock's attorneys inadvertently omitted to include the affidavit as part of the documents.

[21] The full court remarked that '[o]n appeal, the appellant is bound by the four corners of the record and must argue thereon'. It regarded Mr de Kock's application to supplement the appeal record as 'tantamount to an application to receive further evidence but without meeting the requirements for such an application'. It further found that the agreement by the parties as to which parts of the record should be included in the record of appeal was binding. The full court proceeded to deal with the appeal without the affidavit.

[22] In dealing with the merits of the appeal, the full court applied the *Plascon-Evans* rule[1] and accepted Mrs du Plessis' version that it was Mr de Kock, who approached them and requested a loan through a scheme that he had hatched. In the court's view, Mrs du Plessis' version was easy to explain, and not unusual. It found

[1] As formulated in *Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634-635. The rule is to the effect that where there are disputes of fact, the matter must be decided on the respondent's version unless it is so far-fetched or uncreditworthy that it can be rejected out of hand.

that the property was sold for R4 500 000 and not R3 500 000 as contended by Mr de Kock. Further, that the loan agreement was valid and would endure until the amount owed was fully paid. It concluded that the 'purported' cancellation by Mr de Kock did not bring the agreement to occupy the property to an end. Aggrieved by the full court's judgment, Mr de Kock approached this Court for special leave to appeal, which was granted on 6 March 2023.

Issues on appeal

[23] The first issue to determine is whether the court of first instance and the full court erred by refusing to admit the affidavit. Secondly, if the affidavit ought to have been allowed, what would be its impact on the defence given by Mr and Mrs du Plessis in the PIE application. Thirdly, if it is found that their right to occupy the property terminated by virtue of Mrs du Plessis' cancellation of the oral agreement in the particulars of claim, whether it is just and equitable to evict them in terms of the PIE Act.

Admission of the supplementary replying affidavit

[24] It is settled that a court has a discretion whether to permit the filing of further affidavits, which discretion must be exercised 'against the backdrop of the fundamental consideration that a matter should be adjudicated upon all the facts relevant to the issues in dispute'.[2] This Court in *Dickinson v South African General Electric Co (Pty) Ltd*,[3] said:

'The application had to be approached in the light of all the issues raised and, at least in respect of the *beneficia*, a proper adjudication would require an answer by the appellant to the matters raised

[2] Van Loggerenberg *Erasmus Superior Court Practice* (2d ed 2022), Vol 2, D1-68.
[3] *Dickinson v South African General Electric Co (Pty) Ltd* 1973 (2) 620 (A) at 628F-G.

by the respondent. In my view the filing of the further affidavit should have been allowed, and the present enquiry will proceed upon the assumption that it has been admitted.'

[25] In considering whether to admit a further affidavit, the court would ask the following questions: firstly, whether a proper and satisfactory explanation as to why the new information in the affidavit was not placed before the court at an earlier stage, had been given; secondly, whether any prejudice will be caused by the admission of the affidavit, which could not be limited by an appropriate costs order; and thirdly, the relevance and importance of the evidence to the issues it has to determine.

[26] It is so, that a party may not simply file an additional affidavit without first applying for permission from the court. The form the application should take depends on the circumstances and the nature of the application. Nothing is amiss, in appropriate cases, with bringing an application from the bar. The kernel of the procedure is that an application should be brought to the court. The determining factor being whether the other party would suffer prejudice and how that prejudice is to be ameliorated.

[27] In this instance, it is common cause that the affidavit was not filed by way of the long form prior to the hearing of the matter. It was served and filed without a notice of motion on 17 November 2020. That is three months before the hearing of the PIE application.

[28] Mr de Kock's legal representatives may be criticised for proceeding on the basis that the filing of the affidavit was sufficient. His counsel, however, informed the court that he was not aware that the affidavit did not form part of the record. He

moved for leave to introduce it from the bar. The court ought not to have elevated form over substance. It should have considered the application against the principles discussed above. Fundamentally, it should have looked at the allegations in the affidavit, their purpose and relevance to the issues before it, and whether Mr and Mrs du Plessis would be prejudiced by its introduction, if so, how that potential prejudice could be cured.

[29] The affidavit simply sought to place the fact that Mrs du Plessis had instituted action, which had an impact on the application before it. This allegation could not have been made in the founding affidavit because it occurred after the filing of the PIE application. That fact was important and central to the issue in dispute. There would be no prejudice suffered by Mr and Mrs du Plessis that could not be dealt with, as the affidavit simply sought to bring to the attention of the court an existing fact. What the court makes of what was contained in the affidavit is a different matter.

[30] The affidavit did not introduce a new cause of action. Mr de Kock's case was that Mr and Mrs du Plessis had no right to occupy the property. He had sent them notice to terminate the right to occupy and having refused to vacate the property, Mr and Mrs du Plessis became unlawful occupiers in terms of the PIE Act. The issue of whether there was a valid agreement as alleged in Mrs du Plessis' defence, which gave her and Mr du Plessis the right to occupy the property, until the amount allegedly owed was fully paid, remained the issue in dispute. Accordingly, the court of first instance should have admitted the affidavit.

[31] The full court did not adequately deal with this issue. It ought to have considered whether the affidavit was properly excluded by the court of first instance, from the record. It erred in how it approached the matter. The affidavit simply sought to place all the facts before the court.

[32] Given the fact that Mrs du Plessis was aware of the affidavit a few months before the hearing, its omission was clearly erroneous. The agreement by the attorneys did not bar the court from admitting the affidavit. The attorneys clearly committed an error. Despite their agreement, the full court was permitted by rule 49(9) to call for the whole record to be placed before it. With these considerations, the affidavit ought to have been admitted and I proceed on that basis.

The impact of the averments in the action proceedings

[33] In the affidavit, Mr de Kock referred to paragraph 21 of the particulars of claim where Mrs du Plessis made the following averment:

'21. The Defendant's breach and repudiation has been ongoing and in the circumstances, the Plaintiff has elected to accept the Defendant's repudiation, and has cancelled the Loan Agreement, alternatively hereby cancels same.'

[34] In contract law, an innocent party is entitled to cancel an agreement on grounds of misrepresentation or breach of contract. Such party must exercise an election between two inconsistent remedies, whether to cancel or to abide by the contract.[4] An election to cancel necessarily involves an abandonment of the right of enforcement. A party can therefore not both approbate and reprobate.[5] She may cancel and sue for damages or abide by the contract and claim performance. Once

[4] *Thomas v Henry and Another* 1985 (3) SA 889 (A) at 896A.
[5] *Spheris v Flamingo Sweet (Pty) Ltd and Another* [2008] 1 All SA 304 (W) at 309.

cancelled, a contract may not be unilaterally revived. In *Thomas v Henry and Another*,[6] this Court held:

'Once the innocent party has decided to cancel - and has communicated his decision to the other party - he has, of course, exercised his election. He then no longer has a choice of remedies and may not, without the consent of the other party, undo his decision. The concept of election is therefore not appropriate in regard to conduct which appears to be in conflict with an intention to rely on the chosen remedy.'

[35] When the aggrieved party, however, decides to abide by the contract, but the other party persists with the breach, the aggrieved party may change their mind and cancel, in terms of the repentance principle. 'Persistence should be understood as a further indication of intention to repudiate after having been given an opportunity to reconsider.'[7]

[36] In the present matter, Mrs du Plessis relied upon the composite agreement that she would lend money to Mr de Kock, which Mr de Kock agreed to repay, as stated above. Mr de Kock agreed to let her occupy the property, until the money was repaid in full. In other words, the property would only be restored to him once he had paid all the money loaned to him by Mrs du Plessis.

[37] In the PIE application, Mrs du Plessis decided to abide by the contract to preserve her right to occupation and enforce it. Later, in her particulars of claim, she elected to cancel the contract as she was entitled to do. This means Mrs du Plessis' right to receive payments in the manner prescribed in the agreement with the reciprocal obligation on Mr de Kock to allow her to occupy the property until

[6] *Thomas* fn 4 at 896D-E.
[7] *Primat Construction CC v Nelson Mandela Bay Municipality* [2017] ZASCA 73; 2017 (5) SA 420 (SCA) para 25.

payment was made in full, were extinguished. Her right, resulting from the cancellation of the contract, is to receive damages as she may be able to prove.

[38] Mrs du Plessis' counsel submitted that reliance should not only be placed on paragraph 21 of the particulars of claim where Mrs du Plessis avers cancellation of the agreement but also to paragraph 22.3 which states:

'The Defendant tenders vacant occupation of the property against payment of the amount of R1 897 935 …together with interest…a *tempore morae*.'

[39] From this paragraph, he argued, Mrs du Plessis' claim was one of restitution and not damages. As a result, until Mr de Kock tenders the return of the total amount loaned to him, he cannot claim the return of what she had delivered, as the rights and the concomitant obligation are reciprocal in terms of the agreement. Therefore, in the absence of that tender, Mr and Mrs du Plessis are not in unlawful occupation of the property.

[40] Apart for there being no authority for this proposition, it is untenable. Mrs du Plessis cannot insist on retaining occupation of the property in terms of the agreement, having cancelled the contract, which entitles her to sue for damages. Had Mrs du Plessis' claim been for restitution upon cancellation, she would have been obliged to tender restitution of what she had herself received. Considering these principles, it is evident that, had the court of first instance and the full court considered the affidavit, the outcome might have been different. They both erred in how they approached the matter.

[41] By virtue of her cancelling the contract, Mr and Mrs du Plessis, unfortunately, no longer enjoyed the contractual right to remain in occupation of the property. This

finding disposes of the defence of lawful occupation. Having come to that conclusion, the next question to determine is whether it is just and equitable to grant an eviction order.

Just and Equitable order

[42] In terms of s 4(7) of the PIE Act, a court may grant an eviction order:

'*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 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.' (Emphasis added.)

[43] Mr and Mrs du Plessis are an elderly couple. Mr du Plessis is an octogenarian who is sickly. He was diagnosed with a hospital bacterium in 2007, following which he underwent numerous medical procedures. In 2015 he was diagnosed with cancer and his health has since deteriorated. Given his ill-health, he had to retire from practise at the age of 67 due to the stress associated with it. His poor state of health requires continuous care, including intensive medical care. Recently, it has been indicated that Mrs du Plessis is also of poor health, although the nature of her illness has not been specified. It is also alleged that the couple's financial position has deteriorated since Mr de Kock discontinued all the payments in 2019.

[44] Mr and Mrs du Plessis also allege that eviction would leave them without a home, or the means to buy a home, or to finance its purchase, while Mr de Kock would have had five years free credit with the bonus of evicting his parents-in-law. They allege that they trusted Mr de Kock as family and had it not been for that

reason, Mrs du Plessis would have sold the property in a normal sale and invested the money for hers and Mr du Plessis' benefit. She would not have loaned the money to anyone. The loan made them dependent on Mr de Kock as they used the repayments to finance their expenses.

[45] This is an unfortunate case involving people who once regarded each other as family and enjoyed a loving relationship. The arrangement they made is evidence of that. The reality however is that Mrs du Plessis sold the property and Mr de Kock is the owner. She cancelled the agreement as indicated above and can no longer enforce the alleged right to occupation on the basis of the agreement.

[46] Mr de Kock alleges that he still owed ABSA Bank R3 100 000 for the property. He pays regular monthly instalments of R32 403.34 to service the loan by ABSA Bank. He is desirous of realising his investment in the property by selling it. He made various offers to settle the matter including paying for alternative accommodation. His counsel advised the Court that some of these offers still stand. Since the offers made, were contained in different parts of Mr de Kock's papers, the Court requested that a consolidated document be filed detailing the terms of the offer.

[47] On 16 May 2024, Mr de Kock filed a 'with prejudice' offer to settle, comprising two alternative parts 'with the view to satisfying [this Court] that it is just and equitable . . . to evict [Mr and Mrs du Plessis]'. Mr and Mrs du Plessis responded to these with a counteroffer.

[48] From the two alternative offers made by Mr de Kock, one that appears relevant to the just and equitable enquiry is the second alternative offer. In it, Mr de Kock offers to 'hire a residential unit at a retirement home, which provides frail-care facilities and/or otherwise provides and/or contracts in medical services for ailing residents, for occupation by [Mr and Mrs du Plessis] at R20 000 per month, plus additional costs levied for medical treatment or frail care'.

[49] In their counteroffer, Mr and Mrs du Plessis state that any resolution of the dispute should involve a clean break and absent any continued connection or interdependence between the parties. They submit that it would be just and equitable for them to be paid R1 897 935 to secure alternative housing and care. They and the other people that claim occupation through them would vacate no later than six months of the order of this Court. They however state that Mr de Kock should pay all the expenses, charges, levies, water and taxes.

[50] The parties did not settle the matter. The court cannot force a contract on the parties. Fundamentally, no duty rests on Mr de Kock as a private land owner to provide alternative accommodation to Mr and Mrs du Plessis. In *Grobler v Phillips and Others*,[8] the Constitutional Court emphasised that in determining what is just and equitable, the rights of both parties must be balanced and 'compromises have to be made by both parties'.[9] Mr de Kock is the owner of the property, which is mortgaged, and he continues to make loan repayments to ABSA Bank. He is trying to sell the property but cannot do so with Mr and Mrs du Plessis in occupation. He has offered to pay for alternative accommodation and any additional costs levied for

[8] *Grobler v Phillips and Others* [2022] ZACC 32; 2023 (1) SA 321 (CC); 2024 (1) BCLR 115 (CC).
[9] Ibid para 40. See also para 44.

frail or medical care. The tender will be made an order of court to the extent that is just and equitable.

[51] Mr de Kock also offered to pay for the relocation costs. It is important to note that Mr and Mrs du Plessis will not be rendered homeless should an order granting their eviction be made. Taking into account and balancing the interests of all the parties, an eviction order will be just and equitable.

[52] As to the eviction date, while the parties have given their own preferences based on their offer and counteroffer, the court retains the discretion, weighing all the circumstances. A period of three months is reasonable, in my view. It will provide Mr and Mrs du Plessis with an opportunity to select a unit at a retirement home which provides frail care facilities, they so prefer or from the list provided by Mr de Kock, subject to the amount offered by Mr de Kock's for payment of the unit. Given the circumstances of this case and these being eviction proceedings, it seems unjust to award costs against Mr and Mrs du Plessis.

[53] The following order is, accordingly, made:

1 The appeal is upheld.

2 The order of the full court is set aside and replaced with the following:

'1. The appeal is upheld.

2. The order of the court of first instance under case number 6374/2020 is set aside and replaced with the following order:

'1. The applicant's supplementary replying affidavit is admitted.

2. The first and second respondents (respondents) and all those claiming occupation through and under them are evicted from erf 4629, Wellington,

with street address 9 Muscadel Street, Wellington (the property), subject to the conditions set out below.

2.1 The applicant shall lease a residential unit at a retirement home, which provides frail-care facilities and/or otherwise provides and/or contracts in medical services for ailing residents, for occupation by the respondents (a unit).

2.2 The monthly rental of the unit shall not exceed R20 000 per month, exclusive of any additional costs levied by the retirement home in respect of frail care or medical treatment actually afforded to the second respondent, which are not included in the monthly rental of the unit and which are not covered by the existing medical aid scheme(s) of the respondents, provided that:

(a) The applicant shall pay such additional costs which are not so included or covered.

(b) If the respondents select a unit which exceeds R20 000 per month in rental, they shall reimburse the applicant any amount exceeding R20 000, immediately upon the applicant's written demand.

2.3 The respondents shall within 30 calendar days of this order select a unit which is available to be occupied by them on or before the date on which they are obliged to vacate the property for a monthly rental not exceeding R20 000 and notify the applicant of its particulars, whereupon the applicant shall lease that unit for residential occupation by the respondents: Provided that in the event that the respondents fail to select a unit as contemplated above and/or inform the applicant, the applicant may either:

2.3.1 pay an amount of R20 000 per month to the respondents, jointly and severally, as a contribution to such residential accommodation as they may

wish themselves to hire, which payments shall be a complete discharge of the applicant's obligations to the respondents; or

2.3.2 call upon the respondents within 10 calendar days thereafter, to rank the retirement homes mentioned below, in descending order of their preference:

(a) Huis Vergenoeg (in Main Road, Paarl);

(b) Rusthof Old Age Home (in Klein Nederburg Street, Paarl);

(c) Huis Perelberg (in Botha Street, Paarl);

(d) Rusoord Old Age Home (in Divine Street, Paarl);

(e) Sherwood Nursing Home (in Kenilworth, Cape Town);

(f) Libertas Retirement Home (in Goodwood, Cape Town);

(g) Oasis Retirement Home (in Century City, Cape Town);

(h) Pineland Place (in Pinelands, Cape Town);

(i) Trianon Care Centre (in Plumstead, Cape Town);

(j) Eureka Retirement Village (in Oakdale, Cape Town);

(k) La Recolte Retirement Village (in Richworth, Cape Town);

(l) De Plattekloof Lifestyle Estate (in Plattekloof, Cape Town).

2.4 In the event the applicant selects the option in 2.3.2 above, he shall lease an available unit not exceeding R20 000 per month at the highest-ranking retirement home in the above list for occupation by the respondents on or before the date of which the respondents are obliged to vacate the property.

2.5 The respondents and all those claiming occupation through and under them shall vacate the property by no later than 90 calendar days of this court's order.

2.6 In the event that the respondents and all those claiming occupation through and under them fail to vacate the property on the date appointed in

the preceding paragraph or to which that date has been postponed by the applicant, the sheriff with jurisdiction or his/her lawful deputy is authorised and directed to carry out the eviction on the court day immediately following the date to vacate the property or the postponement date by the applicant.

2.7 The respondents shall in good faith give all reasonable cooperation to the applicant in securing a unit for residential occupation by them, including, without limitation, attending any interviews appointed for them at retirement homes.

2.8 In the event that a unit has been secured for residential occupation by the respondents and it is for any reason not reasonably practicable for the respondents to occupy that unit on the date on which they are obliged to vacate the property, the applicant may by written notice postpone the date on which the respondents are obliged to vacate the property, to a specified or determinable later date, without further legal process. Such a notice shall be *prima facie* proof that the specified or determinable later date has been appointed by the applicant.

2.9 In the event that the respondents should wish to store any of their household furniture and effects upon vacating the property, the applicant shall pay the reasonable cost of such storage for a period of two months, reckoned from the date on which the respondents are obliged to vacate the property or from the specified or determinable later date to which the applicant has postponed the date on which the respondents are obliged to vacate the property.

2.10 All communications which may be necessary between the parties shall be effected by email exchange between themselves or their legal representatives, as the case may be, which emails shall be deemed to have

been received at 08:00 on the Court day following the day on which they were dispatched.

2.11 These obligations on the applicant shall be effective and enforceable for a period of one year from the date of this order.

3. There is no order as to costs'.

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N P MABINDLA-BOQWANA

JUDGE OF APPEAL

Appearances

For appellant:	S P Rosenberg SC with T Tyler
Instructed by:	Snijmann & Associates Inc, Cape Town Honey Attorneys, Bloemfontein
For first and second respondents:	R W F MacWilliam SC with A J van Aswegen (heads of argument prepared by G Walters and A J van Aswegen)
Instructed by:	Spamer Triebel Inc, Bellville Symington De Kok Inc, Bloemfontein.