THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

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

Today the Supreme Court of Appeal (SCA) upheld an appeal against the decision of the of the full court of the Western Cape Division of the High Court, Cape Town (the full court).

The facts underpinning the appeal are as follows. On 4 June 2020, the appellant, Mr Leon 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 respondent, Mrs Wanda Luus du Plessis and the second respondent, Mr Andre du Plessis, 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).

Mr de Kock is a businessman and the current owner of the property. Mr and Mrs 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. 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. The relationship between Mr de Kock and his in- laws was initially very warm, caring and loving.

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. 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.

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 alleged 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.

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. In mid-2019 Mr de Kock's relationship with his in-laws started to deteriorate.

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. 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.

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. 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.

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. 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. 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.

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 court's 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.

The high court ruled against admitting the affidavit on the strength of the submissions made by Mr and Mrs du Plessis' counsel. It proceeded to deal with the PIE application and accepted Mr and Mrs du Plessis' version and dismissed the application. It subsequently dismissed an application for leave to appeal, which was granted by the SCA to the full court.

As the court of first instance, the full court dismissed the application to introduce the affidavit and proceeded to deal with the appeal without the affidavit. In dealing with the merits of the appeal, the full court 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. It found 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 the SCA for special leave to appeal, which was granted on 6 March 2023. On appeal, the SCA had to firstly determine 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 the Court found that Mr and Mrs du Plessis' right to occupy the property terminated by virtue of Mrs du Plessis' cancellation of the oral agreement in the particulars of claim, whether it was just and equitable to evict them in terms of the PIE Act.

The SCA found that the affidavit simply sought to place the fact that Mrs du Plessis had instituted action, in which she averred her cancellation of the agreement. That fact was important and central to the issue in dispute. It had an impact on the application before the court. This allegation could not have been made in the founding affidavit because it occurred after the filing of the PIE application. 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. The full court did not adequately deal with this issue. As a result, it erred in how it approached the matter.

The SCA held that Mrs du Plessis could not insist on retaining occupation of the property in terms of the agreement, having cancelled the contract. She was now entitled to sue for damages. She could not both approbate and reprobate. She may cancel and sue for damages or abide by the contract and claim performance. According to the Court, in considering these principles, it was 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.

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. Having come to that conclusion, the next question for the Court to determine was whether it was just and equitable to grant an eviction order.

Mr de Kock filed a ‘with prejudice’ offer to settle, comprising two alternative parts with the view to satisfying the Court that it is just and equitable to evict the Mr and Mrs du Plessis. In one of the offers, Mr de Kock offered to hire a residential unit at a retirement home, which provides frail-care or medical facilities 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. He also tendered to pay for relocation costs.

In their counteroffer, Mr and Mrs du Plessis submitted that it would be just and equitable for them to be paid R1 897 935 to secure alternative housing and care. Additionally, that they would vacate no later than six months of the order of the Court and Mr de Kock should pay all the expenses, charges, levies, water and taxes. The parties did not settle.

The SCA reiterated that no duty rested on Mr de Kock as a private landowner to provide alternative accommodation to Mr and Mrs du Plessis. However, Mr de Kock had made an offer. It was important to note that Mr and Mrs du Plessis would not be rendered homeless should an order granting their eviction be made. Taking into account and balancing the interests of all the parties, the SCA concluded that an eviction order would be just and equitable. It granted an order incorporating the offer of alternative accommodation made by Mr de Kock and as to the eviction date, it found a period of three months from the date of the order, reasonable.

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