



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

Case No: 14885/2022

In the matter between:

FRANCOIS ZEELIE

First Applicant

ELSA ZEELIE

Second Applicant

and

JOHANNES GERHARDUS ZEELIE

First Respondent

JENINE ZEELIE

Second Respondent

**ALL OTHER PERSONS OCCUPYING
1[...] F[...] AVENUE, SOMERSET WEST,
CAPE TOWN**

Third Respondent

CITY OF CAPE TOWN

Fourth Respondent

Heard: 14 March 2023, 23 May 2023, 29 August 2023, 30 October 2024, 26 April 2024, 31 May 2024, 25 July 2024 and 20 November 2024

Delivered: 18 November 2024 (delivered electronically to the counsel)

JUDGMENT

Henney J:

[1] This is an application in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE") wherein the applicants seeks an eviction of the first and second respondents ("the respondents") and any other occupants cited as the third respondent from their immovable property known as Erf 4[...] situated at 1[...] F[...] Avenue, Somerset West, Cape Town ("the property"). Although the applicants as well as the respondents carry the same surname, they are not related to each other. The applicants are the lawful and registered owners of the property.

The Applicants Case:

[2] In or about 19 December 2011, the applicants entered into written lease agreement with the respondents. The relevant terms of the lease agreement between the parties were as follows:

- a) that the respondents would lease the property from the applicants for the period 1 January 2012 to 31 December 2012;
- b) that the respondents pay monthly rental in the amount of R6000;
- c) that no alterations should be made to the property without the written consent of the landlord; and
- d) should the respondents fail to comply with any of the terms of the lease agreement, the applicants would be entitled to cancel the agreement immediately and take possession of the property.

[3] The respondents took occupation of the property in January 2012. According to the applicants, the lease agreement was renewed on the same terms as set out in the written lease agreement, save for the fact that the rental amount increased, and the parties would give each other one month's notice should they wish to terminate the lease agreement.

[4] On 26 January 2022, an email was addressed to the second respondent wherein the applicants gave them one calendar month notice to vacate the property. This notice to vacate was based on the contention of the applicants, that the respondents are in breach of the lease agreement by performing renovations and alterations without their prior consent.

[5] In an email dated 4 February 2022, the applicants informed the respondents that at no time was permission given in writing or verbally that construction or alterations could be done to the property, for instance, demolishing or revamping part of the bathrooms, floor or any part of the property. This was followed up by a further email addressed to the respondents on 23 March 2022, wherein they were advised that they were given notice to vacate the property before, but not later than 28 February 2022 and that sufficient time had been given for them to obtain another property.

[6] The respondents were further advised that the applicants wish to sell the property, and they would need access for prospective buyers from the following week. A report was provided by the rental agent dated 23 July 2022, wherein she stated that she held an inspection of the property on 22 July 2022. Therein, she indicates that there were still no signs of the respondents intending to vacate, even though they had been asked to vacate the premises on multiple occasions from 26 January 2022.

[7] She further noted that there was rubbish and rubble which violates clause 27 of the lease agreement. The applicants submit that despite the lease agreement having been terminated and the respondents being given notice to vacate, they failed to do so.

[8] Accordingly, they submit that the respondents and all those holding title and/or occupying the property through and/under them are in the unlawful occupation of the property. This is based on the fact that the lease agreement has been terminated between the parties after the applicants have requested the respondents to vacate the property on more than one occasion, which they refused to do.

The Respondents' case

[9] The respondents opposed the application and during the hearing of the application, the respondents raised a point in limine, in which they aver that the proceedings cannot be concluded because of a dispute of fact, based on their version of the events as set out in the opposing affidavit.

[10] According to the respondents, while the agreement was for 12 months from the period 1 January 2012 to 31 December 2012 without an option to renew such agreement with the respondents agreeing to pay rental in the amount of R6000 per month\ the said agreement of lease was only renewed in December 2012 and again in December 2013. It terminated on 31 December 2014 when the parties concluded a further oral agreement of lease (during December 2014) which commenced on 1 January 2015 for an indefinite period, alternately for at least 10 years, with material terms being:

- a) that the first respondent repairs the (structural) faults to the leased property at his own cost and as and when he was financially able to do so; and
- b) that in return for this service, the applicants would charge the respondents rental of R7260 per month plus electricity and utility charges in respect of the leased property during the said lease period.

[11] The respondents further aver that the present monthly rental (and in at least October 2022) was still R7260 which is the same rental which they commenced paying in January 2015 in terms of the said oral agreement of lease. They further submit that notwithstanding the denial of this allegation by the letting agent, Brink, in her replying affidavit, there is no evidence by the applicants or Brink with regard to the current monthly rental in respect of leased property. Furthermore, that Brink in her replying affidavit states that the leased property was increased to R7260 from 1 August 2018.

[12] The respondents submit that even on the applicants' version, it is probable that respondents are still paying a rental of R7260 per month, and it is significant that neither the applicants nor Brink has given an explanation as to why the applicants have not increased such monthly rental during the period from at least 2019 to 2023.

[13] According to the respondents, the reasons why they are still paying a rental of R7260 per month is because the applicants agreed not to increase this amount as a quid

pro quo for the structural improvements which the first respondent undertook to attend to at the leased property during the lease period, which commenced on 1 January 2015 in terms of the said oral agreement of lease.

[14] The applicants as per Brink, solely rely on the alleged breach of paragraph 7 and 11 of the said written agreement of lease by the respondent so as to justify the cancellation or termination of the said agreement by the applicants. The respondents deny that they are in breach of the contract and contend that they were given express permission by the applicants to repair the structural faults at the applicants' property at their own costs and that in return, the rental of R7260 per month would not be increased during the remaining period of the oral agreement of lease i.e. from 1 January 2015 to 31 December 2024.

[15] The respondents set out the grounds upon which they oppose the application for eviction in paragraph 9 of their opposing affidavit which forms the basis upon which they contend that there is a material dispute of fact on the papers. In paragraph 9 of the opposing affidavit, they state the following:

'9.5 During or about December 2014 the Applicants, who reside overseas, visited us. The Second Respondent and I informed the Applicants that we enjoyed residing in their property but that there were a large number of faults and that if they intended escalating the rental for 2015, we would expect them to repair these faults.'

9.6 The Applicants informed the Second Respondent and myself that as their children were at school overseas, they would not be returning to reside in South Africa for the next twenty (20) years.

9.7 I enquired from the Applicants whether they were interested in selling the property. They informed me that they were not and the Applicants and the Second Respondent and I then concluded an oral agreement of lease in terms of which it was agreed:

9.7.1 that we could rent the Applicant's said property from 01 January 2015 for an indefinite period, alternatively for at least the next ten (10) years;

9.7.2 *that I would repair the faults to the property at my own costs and as and when I was financially able to do so;*

9.7.3 *that in return for my work and the materials supplied in repairing the said faults to the property, the Applicants would not increase the monthly rental of R7 260,00 during the said lease period.'*

[16] During the hearing of the matter on the opposed matter roll on 14 March 2023, the respondents' case was clearly based on paragraph 9 of the answering affidavit in terms of which they contend that an oral agreement was concluded between them and the applicants in December 2014. This was vehemently denied in their replying affidavit as well as in argument by the applicants, which led to a finding of the court during those proceedings that there is a dispute of fact on the papers in respect of the question whether an oral agreement was concluded between the applicants and the respondents in December 2014.

[17] The court was requested by the respondents therefore, to refer the matter to oral evidence in terms of the provisions of rule 6(5)(g) which states:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[18] It is well established that the court will only refer the matter for oral evidence on specified issues with a view of resolving the dispute of fact within this narrow compass that can be expeditiously disposed of. Since the hearing of oral evidence is intended to be on specified issues only, it is desirable that the court states in its order which issues will be determined by the hearing of oral evidence and defines who may be called as witnesses.

'The court must be on its guard not to formulate its order in such a way that the hearing of oral evidence is, perhaps unintentionally, converted into a trial. The fact that the court orders oral evidence does not enlarge the scope of the enquiry'.¹ By agreement the matter was postponed to Tuesday, 23 May 2023 for the hearing of oral evidence with regards to the following specified issues:

- a) whether the parties concluded an oral agreement of lease during or about December 2014; and
- b) whether the terms of the lease agreement are those as set out in paragraph 9 of the first respondent's opposing affidavit.

[19] The hearing of oral evidence proceeded on 23 May 2023, when the evidence of the second applicant was heard and thereafter postponed, to hear the evidence of the first applicant. However, after the completion of the evidence of the second applicant, the respondents lodged an application for the amendment of the opposing affidavit. This was after the hearing on 23 May 2023, when the respondents then informed the applicants' counsel just before the second applicant was about to testify, that there was an error regarding the date in the oral agreement, which according to them was concluded in December 2019 and not December 2014.

[20] This application was heard and disposed of on 30 October 2023 when the respondents sought either to amend certain dates in the opposing affidavit alternatively, to place the correct dates before the court in the first respondent's opposing affidavit as set out in paragraphs 9.5; 9.7.1; 12.2.1; 16.3; 19.5 and 23.2.2. The purpose of this application was to amend all the references made in the opposing affidavit from December 2014 to December 2019 and from January 2015 to January 2019, in the relevant paragraphs referred to.

[21] The main reasons for dismissing that application was that firstly, the respondents have failed to make out a case why the amendment should be granted; secondly, that the granting of the amendment would be limited to the hearing of oral evidence on the grounds that an order was made and agreed to by the parties which clearly limited the issues that had been referred to for oral evidence; thirdly, it would be prejudicial to the applicants

¹ Erasmus: Superior Court Practice; Van Loggerenberg RS23, 2024 at D1 Rule 6-42/43

which would amount to a party impermissibly enlarging the scope of the enquiry. In *Wepener v Norton*² it was held that ‘...*The fact that the Court orders oral evidence does not enlarge the scope of the inquiry . . . (T)he fact that oral evidence was ordered does not give either party the right to a roving commission and to put before the Court any facts which that party thinks it would like the Court to be aware of.* In *Lekup Prop Co No 4 (Pty) Ltd v Wright*³ the Supreme Court of Appeal held as follows:

‘A referral to trial is different to a referral to evidence, on limited issues. In the latter case the affidavits stand as evidence, save to the extent that they deal with dispute(s) of fact; and once the dispute(s) have been resolved by oral evidence, the matter is decided on the basis of that finding together with the affidavit evidence that is not in dispute.’

The Oral evidence:

[22] The matter was postponed for the hearing of oral evidence on 23 May 2023, and the second applicant, Elsa Zeelie testified in terms of the provisions of section 37C of the Superior Courts Act 10 of 2013, via an electronic platform from England, specifically in relation to the issues that had been referred for oral evidence. She denied that they ever entered into an oral agreement with the respondents in December 2014, where the terms of the agreement as set out in paragraph 9 of the opposing affidavit was agreed to. She denies that they were in South Africa in December 2014 as claimed by the respondents in their answering affidavit. As proof of this she presented copies of their passports, which clearly showed that they did not enter the Republic of South Africa during that period as claimed by respondents.

[23] She furthermore specifically denied the allegations of the respondents as set out in paragraph 9.5; 9,6 and 9.7.1 of the opposing affidavit.⁴ According to her, the monthly rental was not increased because the respondents struggled to pay the rent, and it was not in anyone’s interest to insist that the rental amount be increased.

[24] She furthermore denies that there was an agreement that the respondent repair any faults and they were never given permission to make any renovations to the property. The

² 1949 (1) SA 657 (W) at 659

³ 2012 (5) SA 246 (SCA) at 258

⁴ Paragraph 15

first time that she was made aware of the renovations done at the property was when Brink, the letting agent, visited the property. It was put to her in cross examination that when the water pipe burst, the tenant had to break up the floor to have it repaired, she did not deny this but, she stated that permission was not given for them to undertake these repairs and that an emergency plumber could have been called to assist.

[25] They also never approved any building plans that were submitted to the municipality. She further denied when it was put to her by the respondent's attorney that the oral agreement was not concluded in December 2014, but in December 2019 when they were in South Africa.

[26] She admitted that they were in South Africa in December 2019 but denied that they visited the property during that time. They were in Cape Town as her mother was undergoing chemotherapy and her son was being privately assessed in Cape Town for autism. She only spoke to the second respondent telephonically. During this conversation at no time was permission given that construction or alterations to the property would be done, or that revamping part of the bathrooms and floor on any part of the property could be undertaken.

[27] She admits that the plans were given to the first respondent in 2013 as he was interested in looking at them because he admired the beautiful house, but it was not given for them for the purposes of effecting any renovations. She testified that the last time she had visited the property was in 2016. The main reason for the cancellation of the agreement was because the respondents were making extensive renovations to the property.

[28] The first applicant, Mr Francois Zeelie also testified via an electronic platform in terms of the provisions of section 37C of the Superior Courts Act 10 of 2013. He testified that the property was fairly well maintained, and it was in a fairly good state because the previous tenant as well as his father-in-law, who is a plumber by trade, fixed everything before the respondents moved in. They also never received a list of matters to attend to from the respondents when they moved in as required in terms of clause 5 of the lease agreement.

[29] There was a procedure that had to be followed as explained by Brink, when repairs had to be done to the property or if there were any faults that had to be attended to. When there were major problems, the insurance was contacted to deal with it. No invoice was submitted to him by the respondents. Before the respondents moved into the property, it had only one suite bathroom, but it seems on the evidence a further suite bathroom was constructed of which they have not been informed.

[30] He furthermore denied that any oral agreement had been entered into in 2014 and also denied that he agreed to the terms of the alleged oral agreement. He confirmed that they were not in South Africa in 2014. He would also never have agreed to enter into a lease agreement for such a long period as alleged by the respondents.

[31] He furthermore confirmed that an email dated 19 February 2022 from Brink that was sent to the respondents, informing the respondents that it was their intention to evict the respondents because of the alterations and or damages to the house that they had undertaken. He further confirmed that they have given Brink permission to cancel the lease agreement on their behalf and that they gave the respondents one month's notice.

[32] He furthermore testified that he never signed the building plans for renovations and that he was not aware of any municipal approval obtained from the municipality in respect of that building plans. The respondents also never provided them with any tile or paint samples or pictures for their approval. He also does not have any knowledge of the boundary wall falling down because if that had happened, they would have claimed it from the insurance. The invoices for the erection of the boundary wall were never discussed with him.

[33] He furthermore testified during cross examination that any major repairs like the replacements of carpets or the fixing of burst pipes would have been claimed from the insurance if he had known about it. He also denies that they had spoken to the first and second respondents in 2019 and said that while they planned to go to the property, they did not do so because of his mother-in-law's ill health and consequently they did not have time to do so. It was only when they received photographs from Brink about the condition of the property when they decided it could not carry on like this. The last time he believes that he was at the property was in 2016 but at that time he did not observe any renovations.

[34] The second respondent thereafter testified and stated that the applicants came to look at the property in 2016 and that there was no discussion with them about what needs to be done. In fact, the applicants thanked them for the work that they had done to the property and thanked them for being such good tenants. They also said that the rental would not increase as they have already spent so much money on the house.

[35] She further testified that the terms of the oral agreement were that they can stay there by paying the same rent for a period of 10 years in terms of the oral agreement, and in turn they were required to fix the property. It was an oral agreement entered into between them and the applicants. This oral agreement never took place in December 2014. When asked certain questions by the court she testified that they never obtained permission from the applicants to build a boundary wall.

[36] She furthermore confirmed during cross-examination that she had read and understood the terms of the written lease agreement that formed part of the documents before the court. When she was referred to clause 5 of the agreement, she confirmed that they elected to accept the property in the state that they found it. She furthermore confirmed that they never sent a list of faults to the applicants as required in terms of clause 5 of the agreement.

[37] She further stated that she received an email from Brink dated 30 May 2013, which stated that the rental agreement would be renewed on a month-to-month basis in the same terms as the previous agreement. She conceded that there is a difference between repairs and renovations to the property. She conceded that no oral agreement was entered into in 2014 and that she could not dispute that the applicants were not in the country in 2014 as their passports reflect that they were not.

[38] She furthermore conceded that there was never any oral agreement in respect of renovations that could be done to the property even on their own version. Furthermore, she conceded that the rental amount was only increased to R7260 on 1 August 2018. She could not say and was not sure if any municipal approval was obtained for the renovations made to the property and that her husband would be able to answer that.

[39] When it was put to her that the applicants could not have seen any renovations when they visited the property in 2016 as there were no such renovations or alterations in 2016, she conceded that there were no such renovations, but that repairs were done when they fixed and replaced the carpets. She was not able to testify about the invoices that formed part of the record to show that repairs and renovations were done because her husband would be able to answer questions in respect of those invoices. But he was never called to testify.

Evaluation:

[40] This matter falls to be determined on the issue of whether an oral agreement was concluded between the parties as stated in paragraph 9 of the opposing affidavit of the respondents. That was the factual issue in dispute in terms of which this matter was referred to oral evidence. From the onset the case of the respondents was that an oral agreement was concluded in December 2014 as set out in paragraph 9.5 and 9.6 of the answering affidavit. The first respondent stated in paragraph 9.7 that they concluded an oral agreement of lease between them and the applicants in terms of which it was agreed that they could rent the property from 1 January 2015 for an indefinite period, alternately for at least 10 years. The first respondent would repair the faults to the property at his own costs as and when he was financially able to do so; in return for his work and materials supplied in repairing the said faults to the property, the applicants would not increase the monthly rental of R7260 during the lease period.

[41] It is clear that the version proffered by the respondents in their answering affidavit is inconsistent with the evidence given by the second respondent and the surrounding facts of this case. This was conceded by Mr. Smith who appeared for the respondents. The first respondent who deposed to the opposing affidavit elected not to testify in order to assist the court to resolve the dispute of fact he raised on the papers.

[42] According to the second respondent, the first respondent was in a position to shed more light on certain aspects of their case where she was unable to do so, especially on the question as to how the plans for the renovations were approved by the municipality without the consent of the applicants; why major renovations were undertaken where there was supposedly an oral agreement based on his affidavit that he was given permission only to repair some of the faults to the property.

[43] In my view, the court is entitled to draw an adverse inference from a party who deposed to an answering affidavit which raises a dispute of fact in motion proceedings on a crucial aspect where that party fails to present him or herself to give oral evidence after a referral. This is in line with the well-established rules of evidence.

[44] During the application by the respondents to amend certain paragraphs as pointed out in their opposing affidavit, I have given reasons as to why I found it improbable that the date of December 2014 during which the oral agreement was concluded as stated by the respondents in their opposing affidavit, was not as a result of an error made by the first respondent or their attorney. I wish to restate why I said that and why I say that the respondents' version that the oral agreement was concluded in December 2014 was a fabrication, after it was overwhelmingly proven by the applicants that they were not in South Africa in December 2014. It seems that when the respondents were caught out and when the shoe was pinching, they tried to pursue a different version, which is that the oral agreement was concluded in December 2019 and not in December 2014.

[45] If regard is to be had to the chronology of events as set out in paragraph 9 of the opposing affidavit which happened before December 2014, it is clear as to how the respondents arrived at the date of December 2014, on which they say that the oral agreement was concluded. It is in line with the series of occurrences that happened during 2013 and 2014 prior to December 2014. This is in answer to an allegation made in paragraph 7 of the applicants' founding affidavit where the applicants through Brink, stated that the material terms of the lease agreement entered into between them and the respondents were firstly, as stated under paragraph 7.1 that: *'the first respondent leased the premises for a period of 12 (twelve) months commencing from 1 January 2012 and terminating on 31 December 2012'*. Secondly under paragraph 7.2 that *'the lease was extended by agreement in writing between the parties'*.

Under paragraph 9 of the opposing affidavit in answer to this allegation made by the applicants that there was a written lease agreement that was extended in writing between the parties after 31 December 2012, the respondents denied the existence of such a written agreement.

[46] The first respondent further states that on 31 December 2012 there was an intention of the first respondent to extend the agreement for the whole period of 2013. Further, that they requested that the agent of the applicants furnish them with the new written lease agreement, which the agent failed and/or refused to do so. Soon thereafter, during or about 2013 the geyser in the roof burst and certain ceilings, walls and floors were damaged. The first respondent states that they suggested to the applicants that he install the new geyser on the outside of the house. To do this, the applicants gave him the money to attend to the repairs which he did.

[47] The first respondent further states that prior to 31 December 2013 he again informed the applicants' agent that they wish to extend the lease of the property. They were then advised by the applicants' agent that the rental will be increased by 10% and the rental for 2014 would be R7260. They agreed to this and once again, they requested the applicants' agent to furnish them with the new written lease agreement which she once again failed or refused to do.

[48] In paragraph 9.4 of the opposing affidavit the first respondent states that during or about September 2014, the applicants' agent inspected the property and recorded certain faults set out further in that paragraph. During December 2014, he states in paragraph 9.5 they were visited by the applicants. It was also at that time that they stated to the applicants that they enjoyed residing in their property, but there were a large number of faults and if they intended to increase the rental amount, that the respondents would expect the applicants to repair these faults. It was also during this time as stated in paragraph 9.7 that there was an agreement between them that they could rent the property from 1 January 2015 for an indefinite period, alternately, for at least 10 years. Secondly the first respondent would repair the faults the property at his own costs as and when he was financially able to do so. Thirdly, in return for his work and materials supplied in repairing the property, the applicants would not increase the monthly rental of R7260 during the said lease period.

[49] Given this chronological and factual account as laid out by the respondents in their opposing affidavit, it seems the period to which he referred to in paragraph 9 in application of the case that there was no written lease agreement, runs from 31 December 2012, through to 2013 and up to September 2014 which culminated in the alleged oral agreement being concluded during December 2014. Given the factual matrix as set out by

the respondents, there was no oral agreement after 31 December 2012. This, despite attempts being made by them to engage the assistance of the agent of the applicants to present them with the new written agreement on more than one occasion during 2013.

[50] In paragraph 9.2.7 the first respondent says that prior to 31 December 2013 he again informed the applicants' agent that he wishes to extend the lease of the property. They were informed that the rental for 2014 would be increased to R7260 per month. Once again, they requested the applicants' agent to furnish them with a new written lease agreement. Which she failed or refused to do. Thereafter, during 2014 when an inspection was held and certain faults were pointed out, once again nothing happened.

[51] The next date as pointed out earlier which they stated was in December 2014, when they interacted directly with the applicants where they concluded the oral agreement. On the version of the respondents, as set out from paragraph 9.1 up to paragraph 9.5 about what transpired in the months prior to December 2014, they concluded that the oral agreement was allegedly concluded in December of 2014. Therefore, I find that it is highly improbable given the facts as set out by the respondents, on their own version, that the oral agreement could have been concluded in December 2019. It seems what the respondents attempted to do was to close a gap in their case by introducing a new fact which did not comfortably fit in with the facts upon which they initially laid as a basis for the allegation they made as to the exact date when the oral agreement had been concluded.

[52] The date of December 2019 does not fit in, and it is inconsistent with the factual matrix as set out by the respondents in their opposing affidavit as I referred to above. It seems that it was only after it was belatedly shown to them that the applicants could not have been in South Africa based on their travel documents in December 2014, that they changed tack and adapted their version that the oral agreement was concluded in December 2019, when it became known to them that the applicants were indeed in South Africa during that time.

[53] On either version of the respondents, whether it was December 2014 which was contradicted by the evidence provided by the applicants because they have conclusively shown that they were not in South African in December 2014, and on their own version of the events leading up to the supposed conclusion of the oral agreement in 2014, no oral agreement could have been concluded in December 2019.

[54] Apart from the respondents being inconsistent and not able to show whether an oral agreement was concluded in December 2014 or December 2019, on the facts and evidence presented by the respondents themselves, they contradict their own version as to the exact terms of the supposed oral agreement. In this regard, the first respondent on more than one occasion stated that the agreement was and more particularly in paragraphs 9.7.2 and 9.7.3 and in other parts of paragraph 9, that he would repair 'the faults' to the property at his own costs.

[55] It however seems, that the respondents undertook major renovations to the property for which they needed plans to be approved. They renovated a bathroom, erected a wall and have redone some from flooring of the property, which is far more than the repairing of mere faults. The evidence and the version they put up by showing what massive costs was incurred by them in doing this work, clearly shows that they were not busy with mere repairing of faults but with full-scale renovations, which only the owners of a house would normally do.

[56] If indeed there was such an oral agreement, they failed on their own version to comply with the terms of the alleged oral agreement, by making major renovations and not merely effecting repairs. For all of these reasons, the respondents have failed to make out a case that there was an oral agreement as alleged in paragraph 9.7 of their opposing affidavit, which permitted them to repair the faults and make renovations without their permission of the applicants.

[57] I therefore agree with the applicants, by doing so they failed to comply with clause 7 and clause 11 of the written agreement, by effecting alterations without their express permission. They have caused extensive damage under the guise of alterations and breached clause 5 of the lease agreement. They were bound by this agreement and the applicants was entitled on notice to cancel the contract as they did on 4 February 2022.

[58] On 23 March 2022 a further email was addressed to the respondents wherein they were advised that they had been given notice to vacate the premises. Despite the lease agreement having been terminated and the respondents having been given notice to vacate, they failed to do so.

Just and Equitable to Evict

[59] The next question to consider is whether it would be just and equitable to grant and order for the eviction of the respondents in terms of section 4(7) of PIE. In terms of this provision, a court may grant an order for the eviction of an unlawful occupier, if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances. Such circumstances would include the availability of other accommodation for the unlawful occupier. The court should also consider the rights and needs of the elderly, children disabled persons and households headed by women in considering the circumstances.

[60] In this particular case, the first respondent stated in their affidavit that at the time of the institution of these proceedings, that he and the second respondent have two children. One of the children no longer resides with them. The second respondent's youngest child M[...], a female has been positively diagnosed with an autism spectrum disorder (ASD) which is permanent and regressive in nature, and which renders her unable to earn any sufficient income with which she can maintain herself. She also suffers from asthma, and that she has difficulty to adapt to any change in her circumstances. She attended the A[...] D[...] [...] school for learners with special needs from 2007 until 2015.

[61] The first respondent further states that he performed renovations to the property that amounts to approximately R980,000. That he and the second respondent have saved approximately R390,000,00 by not having to pay any increase in the rental amounts since 2014. He contends however, that whilst the property of the applicants has increased in value substantially, they have been impoverished. And he has expended approximately R590,000 of his own money on building materials and labour, more than the total amount which they have saved.

[62] He submits that alternative accommodation is substantially more expensive than the monthly rental for which they are paying at present. He furthermore cannot understand why the applicants are not prepared to sell the property to him and the second respondent. The first respondent further states in his affidavit that he is a building contractor, and it seems at the time when he deposed to this affidavit, he could not earn a proper living, because of the Covid 19 pandemic.

[63] No further information other than what was stated in the affidavit of the first respondent regarding their circumstances or changed circumstances has been placed before the court. Except for that in his address to this court, at the conclusion of the proceedings, Mr. Smith stated that the applicants conceded they can afford to pay rent of R7260 and that they have funds to complete the building. He further submitted that should the court grant the order, it would be very difficult to find alternative accommodation.

[64] Mrs Bosman appearing for the applicants, submitted that the respondents seem to be by the means to afford to rent, for alternative accommodation, given the amount of money they have spent on renovations. They also stated in their affidavit that they are able and can afford to fix the property. She submitted that the respondents had been given sufficient time to make alternative arrangements for accommodation. During the court proceedings, this matter stood down for them to consider making alternative arrangements.

[65] The owners of the property have for a period of 2 years since the start of the proceedings not been able to do what they want with the property. They want to sell the property, but not to the respondents. They are further being prejudiced because they cannot sell the property because of its current state and will have to spend some more money to do the necessary repairs and renovations in order for them to sell it.

[66] In considering the circumstances of this case, it is clear that the respondents treated the property as if it was their own, by doing some major renovations without the applicants' consent. Their conduct is akin to having taken over the property by making it their own, without having proper regard for the rights of the lawful owners thereof. From the amount of money they spent based on their own version, they have spent approximately R980,000 on renovations to the property which includes the cost of materials. They are able to pay an amount of rental in the amount of R7620 and they have managed to save R390,000 by not paying the increased monthly rental as from 2014. These are not small amounts and clearly it seems that the respondents are not indigent. They are able to fend for themselves and have the necessary means to do so. It is also not clear what the monthly income of the first respondent is, but it should be more at this stage than the R8000 he says he managed to earn during the Covid period as a building contractor, which has since long passed. Given all these circumstances, I am of the view that it is just and equitable to grant an order for the eviction of the respondents.

Costs

[67] Regarding costs, Mr Smith argued that this was a simple eviction matter which could have been dealt with in the Magistrates' court in Somerset West. He submitted that the court should therefore grant party and party costs on the Magistrates' court tariff on Scale A.

[68] Mrs Bosman submitted that the respondents should pay the costs of the eviction application as well as the costs of the court appearances in respect of the oral lease agreement on Scale B on the High Court tariff of costs. She argued that the respondents elected to persist with allegations that there was an oral agreement and the terms thereof despite the court dismissing their application to file a further affidavit to amend the date of the alleged oral agreement.

[69] She further submitted that they still persisted with their application despite the court reminding them that these are eviction proceedings and not proceedings in which they claim for damages based on a claim for unjustified enrichment against the applicants in different proceedings. She submits that they were made aware of their possible claim for unjustified enrichment as far back as February 2023 when this was raised in the applicants replying affidavit. She submits that a costs order on Scale B is warranted in this matter as it has not been a simple eviction application, but one requiring multiple appearances and interlocutory applications.

[70] Furthermore, Mrs Bosman submitted that it is evident that the first and second respondents have perjured themselves in this matter by referring to an alleged oral agreement which took place in 2014, alternatively, they have attempted to mislead the Court. For this reason, the Court should not hesitate to show its displeasure and order the first and second respondents to pay the costs of this application as well as all the appearances.

[71] I agree with Miss Bosman, especially after the respondents had conceded that the property does not belong to them and that the applicants were no longer willing to lease their property to them, which meant that at some stage, they had to vacate the property. Notwithstanding this, they persisted with their claim that they were justified to occupy the

property. The applicants went to considerable costs and effort to bring this application in this court and should be granted their costs as the successful party as requested by Mrs Bosman.

[72] Given all the circumstances, I am of the view that it is just and equitable to grant an order for the eviction of the respondents. In considering the time and date of the eviction I firstly, consider the interests of M[...] who suffers from ASD, and secondly that given that we are almost at the end of the year and entering the festive period, the proper course of action would be to delay any eviction until January 2025.

Order

[73] In the result, I make the following order:

- 73.1 that an order for the eviction of the first and second respondent and all other persons holding title under the first and second respondent is granted;
- 73.2 that the first and second respondents are ordered to vacate the property known as 1[...] F[...] Avenue, Somerset West, Cape Town, by no later than 15 January 2025, failing which the eviction may be carried out by the sheriff's deputy on 20 January 2025;
- 73.3 the first and second respondents are ordered to pay the costs of this application, such costs to include the costs of the proceedings on 30 October 2023, on the High Court Scale B.

R.C.A. Henney
Judge of the High Court

Counsel for Applicants : *Adv L Bosman*
Instructed by : *Brenda Munro Attorneys*

Counsel for the Respondents : *Mr John Smith*

Instructed by : John Smith & Associates