

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: 2025-145152

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO


SIGNATURE

DATE 22 September 2025

In the matter between:

JAMES ALVIN WILLY MULEBEKE

First Applicant

JOYCE NANSEMBE MULEBEKE

Second Applicant

BHEKAYIPHI BENEDICT NZUZO MAPHUMULO

Third Applicant

ADELADE NOTHANDO MAPHUMULO

Fourth Applicant

and

CEST LA VIE CONSTRUCTION (PTY) LTD

First Respondent

MICHAEL GRAHAM KING

Second Respondent

**COMPLEX MANAGEMENT OF DERBY VILLAS
ESTATE (HOMEOWNERS ASSOCIATION)**

Third Respondent

CHRISTOPHER RICARDO

Fourth Respondent

SCHEPTER SECURITY COMPANY

Fifth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date for hand down is deemed to be 22 September 2025.

MAHON AJ:

Introduction

- [1] This is an urgent application in which the applicants, who are the registered owners of two stands in the Derby Villas Estate, Johannesburg, seek relief arising from building agreements concluded with the first respondent, Cest La Vie Construction (Pty) Ltd. They ask the court to confirm that those agreements have been validly cancelled and to grant interdictory relief securing their and their nominated contractors' free and undisturbed access to the properties so that building work may proceed under their own management.
- [2] The respondents oppose the application. They contend that the building agreements remain in force, that the applicants did not comply with the contractual provisions requiring a prior notice to remedy breach before cancellation, and that the applicants have not shown any unlawful denial of personal access to their properties, only that entry by unauthorised contractors has been regulated.
- [3] During the hearing the court raised, and counsel addressed, a further question: whether the statements on which the applicants rely as misrepresentations are, on a proper characterisation, promises of future performance rather than statements of existing fact. That question matters because a promise that

something will be done engages the law of contract and breach, whereas a misrepresentation concerns a false statement about an existing state of affairs and can support rescission without prior notice to remedy breach.

- [4] The application accordingly turns on three broad issues: whether the applicants' purported cancellations of their building agreements were legally effective; whether, in the light of the nature of the statements relied on, the alleged misrepresentations entitled them to bypass the contractual notice requirement; and whether the facts justify the final interdictory relief sought to compel access to the properties.

Background Facts

- [5] The applicants are the registered owners of two stands in the Derby Villas Estate, Johannesburg. The first and second applicants own erf 2971, and the third and fourth applicants own erf 2996. Each pair concluded a written building agreement with the first respondent, Cest La Vie Construction (Pty) Ltd, represented by its sole director, the second respondent. The agreements obliged the first respondent to construct homes on the stands for agreed prices and within specified periods.
- [6] For the first and second applicants, the history is protracted. They initially signed a building agreement in April 2020, which was superseded by a second agreement dated 7 August 2023. Their stand was registered in April 2024. They complain that construction progress was slow and beset by problems, including a collapse of part of a wall and concerns over the first respondent's registration with the National Home Builders Registration Council (NHBRC). Although

payments were made and dates for the houses to be complete were repeatedly promised, the works remained far from complete by mid-2025.

- [7] The third and fourth applicants concluded their building agreement on 7 May 2024. Their site was likewise registered with the deeds office later in 2024. They too experienced lengthy delays and raised concerns about the first respondent's NHBRC compliance. Despite additional payments for agreed variations, construction scarcely advanced beyond the foundations and was nowhere near complete.
- [8] By early July 2025 both sets of applicants had lost confidence in the first respondent's performance. Acting through their attorneys, they each addressed letters purporting to cancel their building agreements. The letters alleged persistent breaches, including failure to have the houses complete within the agreed periods, failure to remedy defective work, and misstatements about NHBRC registration. No prior notice to remedy breach was given in terms of clause 15.3 of the agreements, which requires written notice identifying the default and affording 21 days to remedy it.
- [9] The first respondent, through its director, disputed the validity of the cancellations and insisted that the agreements remained in force. It warned that owners who attempted to engage alternative contractors without its consent would be prevented from doing so and might face interdict proceedings. Security guards employed by the fifth respondent were instructed to deny access to contractors not authorised by the first respondent. The applicants

allege that this instruction extended to them personally, though the respondents maintain that owners were never barred, only their contractors.

[10] The applicants contend that they have suffered continuing harm in the form of delayed ability to have their homes complete and ready for occupation, financial losses on bonds and rental, and personal hardship to their families. They therefore seek confirmation of the cancellations and interdictory relief to ensure that they and their contractors may access the properties without interference.

[11] The respondents deny that any valid cancellation has occurred. They emphasise that the agreements contain a clear notice-to-remedy clause, that NHBRC registration was in place, and that the complaints of misrepresentation are not borne out. They further dispute that the applicants have been unlawfully excluded from their own properties.

Submissions and Exchanges at the Hearing

[12] The matter was argued as an urgent application. At the outset, the respondents challenged the appropriateness of entertaining the application urgently, relying primarily on alleged defects in service and the absence of an explanation in the founding papers for non-compliance with Rule 6(12)(b). It was pointed out that the fourth respondent initially received only a WhatsApp copy of the notice of motion and only later obtained the founding papers by way of a Dropbox link. Counsel argued that this fell short of the requirement that an applicant seeking urgent relief must set out fully the reasons for any failure to effect proper service, and that the court ought to strike the matter from the roll or, at the least, reserve the question of costs to reflect the irregularities.

- [13] The court engaged extensively on the issue of urgency. It was observed that, assuming the correctness of the applicants' version for this purpose, the deprivation of access to their own properties amounted to an ongoing harm that justified urgent intervention. The court noted that all parties who wished to participate had in fact received the papers and were represented, and questioned whether any real prejudice had been caused by the alleged procedural defects. Counsel for the respondents accepted that their clients were able to file answering papers and argue the merits, but maintained that the lack of formal service should not be overlooked, cautioning that a precedent might be set which would undermine the discipline required by Rule 6(12)(b).
- [14] In my view, this concern should not carry weight in the present matter. All respondents who wished to be heard were fully apprised of the application in time to instruct attorneys and file detailed answering papers. The substance of the rule, namely to ensure that respondents are informed and able to participate, was therefore met. This was not a case where non-compliance undermined the purpose of service or caused real prejudice. It was instead one where the practical realities of urgent motion practice justified condonation for what were, in context, formal defects in an application where ongoing harm can only be arrested through an urgent hearing.
- [15] Argument then turned to the merits. The respondents' principal submission was that the building agreements remain of full force and effect because clause 15.3 of each contract stipulates that, before cancellation for breach, the innocent party must give written notice identifying the default and allowing 21 days to remedy it. No such notice was given. On this basis, it was argued, the purported

cancellations of July and August 2025 were ineffectual and incapable of founding the declaratory or interdictory relief sought.

[16] The applicants accepted that no clause 15.3 notice was given but sought to justify their course on the footing that they were induced to contract by misrepresentations, particularly about the first respondent's NHBRC registration and ability to have the houses complete within agreed timeframes. They contended that these misrepresentations vitiated the agreements and excused the requirement of a prior notice to remedy breach.

[17] During argument the court raised the question whether the statements relied upon as misrepresentations were, on a proper characterisation, promises of future performance rather than statements of existing fact. Counsel were invited to address whether such promises, if not fulfilled, would amount to contractual breaches requiring notice to remedy, rather than actionable misrepresentations permitting cancellation without an obligation to provide for notice under clause 15.3. The applicants submitted that the respondents' statements about NHBRC registration and completion dates were presented as present compliance and therefore fell within the concept of misrepresentation. The respondents maintained that, even if some statements proved inaccurate, they were no more than undertakings as to what would be done in the future.

[18] A further aspect that emerged from the contractual framework is that, for as long as the building agreements remain extant, the applicants are contractually precluded from introducing their own contractors to perform the works or to gain site access for that purpose. Clause 3.1 expressly appoints the first respondent

as the builder and provides that it will supply all material and labour required for the works.

[19] Read with clause 15.3, which makes notice to remedy breach a condition precedent to cancellation, these provisions mean that the builder not only has the duty to construct the dwellings but also the right to regulate and control access to the site in order to perform and to assume the associated risks. Allowing outside contractors on site before a valid cancellation would undermine the builder's responsibility for NHBRC compliance, warranties and insurance, and would defeat the carefully defined cancellation procedure.

[20] Other issues received more limited attention. The respondents disputed that the applicants themselves had ever been refused access to their properties, contending that security personnel merely enforced restrictions on the entry of unauthorised contractors. The applicants, in reply, insisted that they and their contractors had in fact been excluded and that their proprietary rights were infringed. The court noted that these competing versions raised factual disputes which might engage the *Plascon-Evans* rule¹ if final interdictory relief were sought.

Cancellation and Misrepresentation

[21] The decisive question is whether the applicants were entitled to cancel their building agreements without giving the contractual 21-day notice contemplated by clause 15.3 of the agreements.

¹ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

[22] Clause 15.3 stipulates that the employer may cancel the agreement only if the builder defaults in one of three defined ways:

[22.1] without reasonable cause wholly suspends the works before completion,

[22.2] without reasonable cause refuses to proceed with the works with reasonable diligence, or

[22.3] without reasonable cause fails to comply timeously with local authority conditions,

and even then only if the default continues for 21 days after written notice specifying the default.

[23] This wording makes it clear that clause 15.3 is not a general cancellation clause for every conceivable breach. It is directed at defined defaults relating to the progress and legality of the works. If the employer relies on some other breach that does not fit these categories, cancellation might be governed by the common law rather than by clause 15.3. The first question is therefore whether the breaches on which the applicants relied fall within one or more of the defined categories.

[24] The applicants' notices of cancellation and founding papers emphasise persistent and lengthy delays in construction, periods when work ceased altogether, failure to have the houses complete within the agreed or promised timeframes, defective work including a collapsed wall, and misstatements about NHBRC registration and ability to perform.

- [25] Each of these complaints concerns either suspension of the works or a failure to proceed with reasonable diligence. They therefore fall squarely within the defaults enumerated in clause 15.3. There is no pleaded breach of a different character that could sustain a common-law right to cancel independently of clause 15.3.
- [26] It follows that the operation of clause 15.3 is engaged and that the 21-day notice to remedy default was a condition precedent to cancellation. It is common cause that no such notice was given. Unless the applicants can establish that their case falls within a different ground for rescission not subject to clause 15.3, the absence of the required notice is fatal.
- [27] The applicants sought to avoid the operation of clause 15.3 by characterising certain statements by the first respondent as misrepresentations. They contended that they were induced to contract, and later to persist with the agreements, by statements that the first respondent would be duly registered with the National Home Builders Registration Council (NHBRC), that construction would be complete within specified timeframes, and that adequate resources and contractors were in place to achieve those outcomes.
- [28] The legal distinction between a misrepresentation and a contractual promise is critical. A misrepresentation is a false statement of an existing fact, made before or at the time of contracting, which induces a party to contract and, if proved, may justify rescission without the need to comply with contractual notice provisions. A contractual promise, by contrast, is an undertaking to bring about a state of affairs in the future. Non-performance of such an undertaking does

not constitute a misrepresentation; it is a breach of contract, which must be addressed through the contract's own remedial mechanisms.

[29] Counsel were invited to identify any specific statement that was, at the time it was made, false as to an existing fact. None emerged. The undertakings relied upon - that the houses would be complete within six months, that project plans would be met, or that NHBRC registration would be secured - are, on their face, commitments about what would be done, not assertions of an existing state of affairs. Even on the applicants' version, these are promises of future performance and therefore part of the contractual bargain, not extraneous representations.

[30] At worst, there were delays in progressing individual NHBRC enrolments or inspections. That may constitute non-performance of a contractual undertaking to comply with statutory requirements, but it is not a misrepresentation of an existing fact at the time the contracts were concluded.

[31] The applicants also referred to alleged coercive demands for additional payments. Even accepting those allegations at face value, they do not transform the builder's promises into actionable misrepresentations. At most, they raise issues of performance and breach that remain subject to clause 15.3.

[32] The result is that no independent ground for rescission based on misrepresentation has been established. All the breaches on which the applicants rely either fall within clause 15.3 or are not established on the facts. The 21-day notice to remedy default was therefore a necessary condition to a valid cancellation, and the applicants' failure to give such notice is fatal to their

case. Their purported cancellations of July and August 2025 were invalid, and the building agreements remain in force.

Consequences for the Interdictory and Access Relief

[33] The principal relief sought by the applicants, apart from confirmation of cancellation, is a final interdict to secure their and their contractors' free and undisturbed access to the properties for purposes of carrying out their own work.

[34] That relief cannot be granted. The finding that the building agreements have not been validly cancelled means that those agreements remain of full force and effect. While they remain extant, the first respondent continues to hold the exclusive contractual mandate to construct the dwellings and to regulate access to the sites for that purpose.

[35] Clause 3.1 expressly records that the builder "will supply all material and labour required for the works". Read with clause 15.3, which provides the sole mechanism for termination, this confers on the builder not merely the duty to build but the correlative right to control the building site and to prevent the introduction of outside contractors whose presence could compromise safety, NHBRC compliance, warranties, insurance cover, and the integrity of the works. The applicants cannot, while the agreements endure, unilaterally appoint their own contractors or insist on their access for purposes of carrying out their own work without breaching the agreements.

[36] The factual dispute about whether the applicants themselves have been barred from entering their properties does not assist them. On the respondents'

version, which must be preferred where there is a genuine dispute of fact on final motion, the applicants have never been refused personal access. What has been regulated is the entry of third-party contractors not appointed by the first respondent. Indeed, the respondents have expressly undertaken not to deprive the applicants themselves of access to their properties. Even if there had been occasional interruptions or misunderstandings, those do not translate into a clear right to compel access for outside contractors when the contract itself forbids such access.

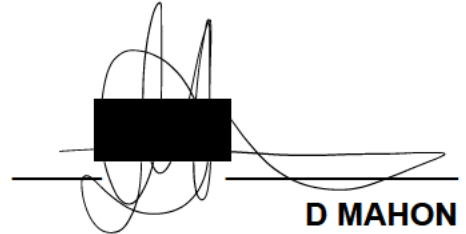
[37] Final interdictory relief requires proof of a clear right, an injury actually committed or reasonably apprehended, and the absence of an adequate alternative remedy. Because the applicants' agreements remain binding and give the first respondent exclusive rights over the construction works and associated access, the applicants cannot demonstrate the clear right that is the first and essential element. The remaining requirements therefore need not be considered in detail.

[38] Accordingly, the prayer for an interdict to secure unrestricted access for purposes of carrying out their own work must also fail. The contractual arrangements that they themselves concluded, and that have not been validly terminated, preclude such relief.

[39] As to costs, I do not consider there to be any compelling reasons why the ordinary rule should not apply, namely, that costs should follow the result. As for the scale of costs, I am of the view that Scale B is appropriate.

[40] In the circumstances, the following order is made:

1. The application is dismissed with costs on scale B.



D MAHON
Acting Judge of the High Court
Johannesburg

Date of hearing: 4 September 2025

Date of judgment: 22 September 2025

APPEARANCES:

For the Applicant: Adv J Brenkman
Instructed by: Wilkins Attorneys

For the First to Third Respondents: Adv A Bishop
Instructed by: Ricardo & Partners Inc

No appearance for the Fourth and Fifth Respondents