IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT RANDBURG

Case number: **LCC 2022/73**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

17 August 2023 .....

In the matter between: -

NALENG EMMA VAN ROOI First Applicant

VAN ROOI FAMILY Second Applicant

and

IZINYONI TRADING 271 (PTY) LTD First Respondent

HENDRIK WILLEM COETZEE Second Respondent

JUDGMENT

SPILG, AJP

INTRODUCTION

1. This matter came before me as one of urgency. The applicants alleged that on 10 January 2022 they were unlawfully evicted from the homestead they occupied.

In both the notice of motion and the founding affidavit the homestead was identified as being on Portion 1 of the Riversdale farm, 171 KP, Dwaalboom in Limpopo.

I will refer to the dwellings they occupied and the surrounding land they were utilising as the "*homestead*".

2. There is a dispute as to the correct cadastral description of the farm on which the homestead is located (i.e., as registered in the Deeds Registry) and whether or not the homestead lies between two separately registered pieces of land, there being no visible boundary line dividing the two. This is one of a number of difficulties that have arisen from the applicants' papers.

3. The applicants are members of the van Rooi family.

   Their matriarch is Naleng van Rooi who is over 83 years of age and is cited as the first respondent. She was born on the farm as was her late husband, Tsamanosi David van Rooi. Both their parents had also lived and worked on the farm.

   Accordingly since her birth and for over 80 years the first applicant has only known the farm as her residence.

   The second applicant is cited as the van Rooi Family. The first applicant identifies them as the "*family with whom I have been residing at* (the farm) *and my immediate family and/or relatives and/or children and/or grandchildren and/or great- grandchildren*".

   This description is most unsatisfactory. Later in the founding affidavit she identifies those who had been residing with her and also who had been evicted on the day in question. I will return to this later.

4. Of significance for the purposes of this case is the allegation made by the applicants that on 10 January 2022 six men came to their homestead, one of

whom claimed to be an attorney who said that he had a court order as well as an eviction letter entitling them to immediately remove the applicants from the farm.

5. One of the initial defenses raised was that the applicants had conceded the existence of a court order. That is patently not so. The first applicant had alleged in her founding affidavit that:

> "*Such Court order was not produced or given to any of my family members despite the fact that it was demanded several times from the man who alleged to be an attorney.*"

6. The applicants brought the case for unlawful eviction against the first respondent as the registered owner on whose farm they believed the homestead was situated.

   They also cited as the second respondent, a Mr. Hendrick Coetzee, in his personal capacity and also as a representative or director of the first respondent, or because he was the person in charge of the farm.

   According to the Deeds Office search conducted by the applicants' attorneys, the farm identified in the founding papers, i.e. Portion 1 Riversdale farm, 171 KP, Dwaalboom, was registered in the name of the first respondent, Izinyoni Trading 271 (Pty) Ltd ("*Izinyoni*").

   Insofar as Coetzee is cited in his capacity as a representative or director, it is therefore on behalf of Izinyoni.

7. The application was brought *ex parte* in mid- May 2022. It sought an interim order, operative immediately, to restore occupation of the homestead to the applicants.

8. I was however concerned that another court may have previously granted an eviction order against the applicants; particularly as they disclosed in the founding papers that the South African Police Service ("*SAPS*") had assisted in

the eviction by arresting and removing them from the homestead and then detained them at the Dwaalboom police station.

I will return to this when considering whether the court should turn a blind eye to other issues which fall outside the specific framework of the relief sought, and if not then in what manner they should be dealt with.

9. On considering the application and the fact that some four months had passed since the applicants were removed from their homestead, I was not prepared to grant any order before giving the respondents an opportunity to be heard. I however provided for an accelerated hearing on the ground that the allegations, if established, rendered the application sufficiently urgent to warrant it being dealt with outside the ordinary procedural Rules and time frames.

The order which was crafted *inter alia* provided that:

" *7. An on-line hearing will be held on Wednesday 1 June 2022 at 15:30;*

a. *in order to determine whether any interim relief sought in the Notice of Motion by the applicants can competently be granted pending the finalisation of the application*

b. *in terms of section 31 of the Restitution of Land Rights Act no 22 of 1994 (relating to pretrial conferences) as read with section 28O thereof, in order to give directions as to the procedure to be followed for the delivery of any further affidavits by the applicants, the delivery of notice of appearance, answering affidavits and replying affidavits."*

10. The second respondent brought an application to postpone the hearing set for 1 June. This was to enable him to file a comprehensive answering affidavit. The affidavit supporting the application for a postponement was deposed to by the second respondent. Although drawn somewhat vaguely, on analysis it is clear that the second respondent alleged that the applicants were evicted from a homestead which is not on the farm identified by them nor is the farm they were in fact evicted from owned by Izinyoni.

The second respondent averred that the applicants were evicted from a different farm which straddles two registered pieces of land both of which are owned by the Hans Coetzee Trust ("*the Trust*"). The second respondent also states under oath that he is one of its trustees and was responsible on behalf of the Trust for causing the applicants to be evicted. One of the questions which arises is if he knew whether the eviction was carried out lawfully or not.

11. The key allegations contained in the second respondent's affidavit of 31 May were that:

    a. He is not a director or manager of the first respondent (i.e. Izinyoni), nor does he have any knowledge of its existence.

       The second respondent therefore alleged that his citation was materially defective and that any order granted would be against an uninvolved party.

    b. Izinyoni was not the registered owner of the farm from which the applicants had been evicted. This has already been mentioned.

       The second respondent added that he was a farmer and a trustee of the Trust which owns the land from which the applicants were evicted.

       In his affidavit the second respondent did not identify the other trustees. Their names however appear in a sales agreement attached to the papers. They are Sanel du Plessis and Johannes Hendrikus Coetzee who turn out to be the second respondent's children whom he does not dispute also live on the farm.

    c. Mr. Theuns van Schalkwyk ("*van Schalkwyk*"), who the second respondent states was "*an attorney from Rustenburg*", had obtained an eviction order on behalf of the Trust against the applicants. The second respondent

added that the Trust had terminated his mandate and appointed Mr. Kapp as it's attorneys;[1]

d. The second respondent stated that van Schalkwyk had been his attorney at the relevant time and admitted that he never had a copy of the eviction order;[2]

e. Although they had paid legal fees of R60 000 to in respect of the eviction application, van Schalkwyk never furnished the trustees with a copy of the court order and the second respondent was therefore unaware of the case number or if the case was opposed.[3]

f. The applicants' homestead was in fact demolished after they had been evicted.

The second respondent alleged that this had been done on the advice of van Schalkwyk;[4]

12. The second respondent claimed in his affidavit of 31 May that there was a need to establish the exact owner and portion of land in issue before the matter could proceed.[5]

13. At that stage the second respondent's case, as set out in his affidavit of 31 May, was that van Schalkwyk had received instructions from the second respondent on behalf of the Trust to bring a court application for the applicants' eviction, that he

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[1] Id paras 23 and 24. The contents of these paragraphs read:

"Theuns van Schalkwyk ("van Schalkwyk"), an attorney from Rustenburg, obtained an eviction order against the applicant(s). This eviction was in January 2022, as confirmed by the applicants.

" The trust has since ended van Schalkyk's mandate and appointed Mr. Tienie Kapp ("Kapp") As my new attorney of record for this matter."

[2] Id para 36. The passage reads:

"Unfortunately, my erstwhile attorney never provided this order to me. I do not even have the case number. I cannot recall whether or not the application was opposed. I can however state that the trust paid an amount of R60 000-00 in legal fees for the eviction application."

[3] Id para 36.

[4] Id para 39

[5] Id para 34

had done so and advised the second respondent, presumably on being solicited, to go ahead and demolish the homestead.

As will be demonstrated, this version started unravelling in the next affidavit produced by the second respondent.

14. At the hearing of 1 June the case was postponed to 8 August and I issued directions that van Schalkwyk was to hand over all documents pertaining to the eviction of the applicants. I also directed that the applicants could supplement their founding affidavit after which the second respondent was to file an answering affidavit to which the applicants could then reply.

15. On 5 August the answering affidavit was delivered. In it the following allegations were made and issues raised:

    a. The second respondent persisted that his citation was fatally defective because he was not the owner of the property and any order that might be granted would be against a party who was not before the court:

    b. During 2021 the second respondent had been approached by the Department of Human Settlements ("*DHS*") with regard to the first applicant's deceased husband who was buried on an adjoining farm. The Trust is not the owner of this farm. It appears that the DHS was in possession of a court order. Although the order was never produced it may have related to the family attending the burial:

    c. The second respondent also persisted with the allegation that van Schalkwyk had obtained an eviction order against the applicants in January 2022[6]. He however claimed to have subsequently learnt that van Schalkwyk had been struck off the roll of practicing attorneys during 2010.

[6] Para 53 of the second respondent's answering affidavit dated 5 August

In the result the second respondent was no longer certain through which attorney the eviction order had been obtained.[7]

He however persisted that a valid eviction order had been granted against the applicants by a court of law and was subsequently duly executed against them on 10 January 2022.

d. The second respondent also claimed that the police were satisfied that a court order had been granted when they assisted in removing the applicants from the homestead.[8]

It is however unclear whether reliance was placed on the contents of the founding affidavit or whether the second respondent was claiming direct knowledge of this fact. I will therefore assume the former.

e. It was contended that the applicants had been aware of the eviction order since 10 January but failed to follow due process to have it rescinded nor had they disclosed the actions they took to do so, if any, prior to their application.

f. The second respondent then dealt with the fact that the applicants were staying with Mr. Verster, the son of the previous owner of the land on which the farmstead was situated, and averred that the family had sufficient housing and sufficient land for livestock. He also alleged that although the applicants had never launched a land claim, Hans van Rooi who is a son of the first applicant claims all the land in the area and has done so in an intimidating manner.

g. In a paragraph which is difficult to follow the second respondent contended that it would be.

> " *dangerous to accept that the farms are two different farms especially reference [sic] to the previous owners, with the possibility that the sale*

[7] Answering affidavit para 13
[8] Answering affidavit para 55

of the farms erroneously described in the sale agreements that portion 1 of the farm 171 KP, Dwaalboom Limpopo possibly to be involved in the transfer to the Hans Coetzee Trust."

The difficulty I have with the paragraph is that despite contending that the Trust had obtained a valid eviction order against the applicants (which would mean that the property from which they were evicted was correctly described) the second respondent appears to plead ignorance with regard to the exact location of the homestead. In short, it does not lie with him to plead ignorance concerning the identity of the property from which he, as one of the trustees, alleges the Trust had under a lawful court order successfully evicted the applicants.[9]

The second respondent does however refer to the applicant's late husband being buried on the land owned by Izinyoni[10]. This indicates that there was an area to which the applicants had access or utilised which was on the land identified in their founding affidavit. The second respondent also refers to litigation concerning the property which indicates that he would have been in the best position to enlighten the court as to which cadastral identified land the applicants resided on and had utilised.

Litigation is not a game and the second respondent was not entitled to approbate and reprobate in this fashion.

16. Much was made of Izinyoni not being properly served with the papers. This is a red herring since on the second respondent's averments the applicants were evicted from their homestead by the Trust from land it owned, not Izinyoni.

17. The second respondent submitted that the applicants had failed to satisfy the requirements for an urgent interim interdict in that *inter alia*;

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[9] in para 83 of the answering affidavit the second respondent confirms that the applicants were evicted on 10 January. He further alleged that a court order was "*introduced to them*" pursuant to an order for the first applicant's eviction being granted.

[10] AA para 80

a. a court order for the applicants' eviction had been obtained and that on their own version, SAPS members were satisfied that this was the case when they assisted with the applicants' removal;

b. the applicants have not sought to rescind or appeal the eviction order;

c. no reasonable explanation was provided for the four month delay before the application was brought.

He further submitted, *in limine*, that the applicants' claim to be restored is in respect of property the description of which is in dispute.

18. At the hearing of 8 August, the court was advised that van Schalkwyk had not delivered any documents and that Kapp attorneys, who represented the second respondent, were unable to obtain any information regarding the eviction order from him. They however established that he had been struck off the roll of attorneys many years before the eviction order had been granted.

van Schalkwyk did not attend this hearing.

19. The court indicated that it should not be difficult to establish the existence of the alleged eviction order from the records of the sheriff's office responsible for serving documents or from the courts within whose area of jurisdiction the land was situated.

20. It was however contended on behalf of the second respondent that the applicants had admitted the existence of the court order in paragraphs 30 and 37 of the founding affidavit. The court was satisfied that these paragraphs said no more than that the person or persons responsible for evicting the applicants claimed to have an eviction order, had represented to the police when they arrived that this was so, but when confronted failed to produce it to the applicants. For present purposes it suffices that in the context of the founding affidavit, the applicants

never accepted the existence of a court order and persisted that, despite calling for proof, none was provided.[11]

By this stage the court also raised the question of whether a court order obtained by a person who was not a practicing attorney could have any legal effect.

21. The parties agreed to postpone the matter to 5 October 2022 for a case management meeting. I ordered that the second respondent pay the costs and also required that;

    a. by 9 September van Schalkwyk hand over to the second respondent's attorneys all documents pertaining to the eviction of the applicants;

    b. van Schalkwyk attends the case management meeting on 5 October;

    c. the parties enter into discussions regarding the following issues:

        i. the correct description of the land from which the applicants were evicted;

        ii. the validity of an order obtained by an attorney who, at the time was already struck from the roll of practitioners.

        iii. the identity of the attorney who obtained the eviction order as well as the identity of the party who applied for the eviction order;

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[11] It is appropriate to provide chapter and verse;
In paras 30 to 31 and 36 to 38 of the founding affidavit the first applicant alleges;

"The attorney claimed that he has an eviction letter and a court order allowing him to evict me and my family from the farm premises.
"The Court order was not produced or given to any of my family members despite the fact that it was demanded several times from the man who alleged to be an attorney.
"Upon the police officers arrival they held a side caucus with the respondents attorney and the police officers started shouting that we should leave the farm premises immediately and that they are going to open a case of trespassing if we refused to leave our homestead.
"The police official further informed us that they were having a court order and must do their job of evicting us from our homestead.
"When we enquired about the court order, the respondents attorney informed us that the court order was in his motor vehicle and refused to give a copy of such court order."

iv. the correct citation of the Hans Coetzee Trust.

d. The second respondent's attorney was to show what steps it had taken to ascertain the whereabouts of the eviction order or the court file in question;

22. On 29 September Kapp deposed to an affidavit in which he set out the steps taken to provide the court with the necessary information regarding the eviction order on which the Trust relied as well as other information.

The contents of the affidavit reveal that;

a. the applicants were evicted from both Portion 1 of the farm Middelveld 170 and portion 959 of the farm Riversdal 171.[12]

b. Kapp had represented the Trust and the second respondent in litigation and also in respect of the transfer of the two farms from the previous owner, but due to outstanding fees at the time did not represent either of them when the applicants were evicted;

c. Kapp had communicated with the SAPS Station Commander at Dwaalboom on 17 August 2022 requesting information regarding the involvement of the police in the execution of the eviction order and the arrest and detention of the applicants on 10 January, but by 29 September he had received no response.

The affidavit states that during the conversation the station commander denied all of the applicants' allegations regarding the police and indicates that this appears from the letter that was attached. The letter makes no reference to such denial. On the contrary, it requests that SAPS provides "*copies of the occurrence book where entries have been made regarding the incident and the outcome of the alleged complaint" and* awaits the station commander's response;

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[12] Para 4 of Knapp's affidavit of 6 September

d. The Sheriff at Thabazimbi who would have been responsible for executing any eviction order advised Kapp that he had not executed such an order and was unaware of any eviction of the applicants;

e. The Magistrates' Courts at Northam in Rustenburg and at Thabazimbi had been contacted belatedly to provide information regarding any matter involving the eviction of the applicants and that replies were still awaited

f. It was accepted that the second respondent personally was to blame for not insisting on a copy of the eviction application or eviction order

Nonetheless it was alleged that the applicants should have obtained a copy of the order and brought a rescission application timeously.

This however overlooks the applicants' allegation that they asked for the court order to be provided at the time of their eviction but none was, that they would not know where to turn without being provided with the name of the issuing court, the case number and the attorneys of record.

g. Kapp had requested a meeting to try and resolve the matter but claimed that the applicants' attorneys did not demonstrate a willingness to do so.

In my view, until a court order could be produced, the issue is a rights issue and the applicants were entitled to attempt to resolve the matter only once the true facts which should have been known to the second respondent were provided to the applicants- otherwise they would be negotiating with one hand tied behind their back.

23. I now turn to the affidavit filed by van Schalkwyk. Its contents contradict the second respondent's allegations contained in his affidavit of 31 May.

In essence van Schalkwyk denies that he had represented the Trust as its attorney and denies that he ever obtaining an eviction order against the

applicants. This is to be contrasted with the second respondent's admission of the events of 10 January as related by the applicants (save of course for the vain attempt to read into their affidavit that an eviction order existed which with hindsight appears to have been a way of avoiding having to produce one at a time when the court would there and then have been able to dispose of the *rei-vindicatio*)

24. van Schalkwyk further claims to have no knowledge of the matter, has no documents pertaining to it and denies that he was in practice at the time in question. He claims never to have met any of the parties, has no information regarding any of the parties or the land, or any knowledge of the magisterial district involved and therefore was never in a position to obtain an eviction order.

    He concludes by stating that any party claiming that he had obtained an eviction order was misleading the court with false information.

    van Schalkwyk does however relate that he received a call in about May or June 2022 from a woman who alleged that someone was illegally staying on her father's farm. He told her that they could apply for an eviction order and that she should see an attorney. The woman advised that there was already an eviction order.

25. van Schalkwyk also claimed that he was entitled to a cost order immediately taxable and payable against the party who made the false allegations unless they were able to prove that he had obtained such an eviction order.

26. In the meanwhile the applicants' attorneys had been conducting their own investigations. Although not under oath at the time, attorney Nyoffu was able to produce a letter from the clerk of the court at Thabazimbe advising that there was no case on record involving the Trust, the second respondent or van Rooi. He was also able to obtain a letter from the Sheriff at Thabazimbe (who is responsible for both Magistrates' and High Court processes) confirming that the homestead from which the applicants were evicted would have fallen under his jurisdiction but that his office had not executed any such order.

27. At the hearing in October the applicants were given an opportunity to file a supplementary affidavit by 28 October if they so elected, to which the second respondent could respond, in which event the applicant could then reply. Costs were to be costs in the cause.

28. Nyoffu filed a supplementary affidavit in which he confirmed under oath the responses by the Sheriff at Thabazimbi, and the confirmation by the managers at the Northern Thabazimbi and Thabazimbi Magistrates' courts that no record existed of any such case or order for eviction against the applicants.

    He also pointed out that as a fact neither the court officials nor the Sheriff had been requested by the second respondent's attorneys to investigate their records. The conclusion sought to be drawn was that the second respondent knew that no such eviction order existed or could have been lawfully executed. I consider that the second respondent's attempt to read into the applicants' affidavit that they had accepted the existence of the order when that obviously was not the case reinforces this conclusion.[13]

29. Nyoffu's affidavit also dealt with a Deeds Office search conducted of the farms Riversdal and Middleveld. The search revealed that Riversdal had been divided into four portions and Middleveld into two portions. However on the ground, there was no physical boundary between portion 959 Riversdal and portion 1/ 170 Middleveld, both farms being occupied by the second respondent's family members. The second respondent himself was alleged to live on portion 959 Riversdal, while his son, Johannes, resided and managed the Middleveld farm on which the second respondent's daughter, Sanele also lives.

30. Nyoffu concluded that the applicants' homestead is in fact situated on Riversdal 171.

    The difficulty is that the homestead was not situated on portion 1 of Riversdal 171 as alleged in the founding papers but on portion 959 of farm number 171,

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[13] See the extracts from the founding affidavit cited in an earlier footnote)

Riversdal . In addition the homestead also extends into part of portion 1 of farm number 170, Middelveld.

31. The second respondent did not file a response to the supplementary affidavit. Accordingly all the applicants' allegations not previously contained in their founding affidavit remain undisputed.

ISSUES AT THE HEARING

32. At the hearing, *Adv Keet* who represented the second respondent did not concede that an eviction order did not exist; only that the second respondent is at a disadvantage because van Schalkwyk acted contrary to what was to be expected of a legal practitioner.

33. The second respondent persisted in challenging that the correct parties had been cited as the respondents, and contended that;

    a. because the citation is contained in the founding affidavit it cannot be amended;

    b. no steps were taken by the applicants to bring the correct parties before the court despite the issue being pertinently raised at an early stage.

34. Furthermore the second respondent disputed that all ten persons identified in the application had been evicted.

    He pointed out that in para 25 of the founding affidavit only five people were said to have occupied the premises at the time; namely, the first applicant, her son Hans, her daughter Sedireng, her daughter-in-law Naomie and her great grandchild Hendrik. However in paragraph 39 of that affidavit ten people were said to have been removed by the police, being the five already mentioned, the first applicant's three other grandsons and two other granddaughters all of whom were between 11 years to approximately one and a half years of age.

35. Finally the second respondent submitted that each party should pay its own costs since van Schalkwyk had turned out not to be a practicing attorney at the time he was instructed by the Trust to bring eviction proceedings.

INCORRECT CITATION

General

36. The defence that the incorrect respondents were cited raises three issues which the court is required to consider.

37. The first issue is whether the Applicants lived on the land identified in the founding affidavit. The next is who caused the applicants to be removed from their home. If it turns out that the Trust owned the land and caused the applicants to be evicted unlawfully then the final question is whether the applicants are entitled to obtain an order in respect of land other the one described in the founding affidavit or in respect of a person other than those cited in the founding affidavit.

Location of the applicants' homestead

38. In their founding affidavit the applicants claimed that the homestead was located on portion 1 of Riversdale farm, 171 KP, Dwaalboom in Limpopo, whereas the second respondent demonstrated through title deeds that this portion was registered in the name of Izinyoni. [14]

39. Although the second respondent stated that the homestead was in fact situated on both "*Farm number 959 Riversdal* " and "*Portion 1 of Farm number 170, Middelveld*"[15], he;

    a. did not identify which *portion* of farm 959 Riversdal was being referred to, nor did he provide the farm number, despite it being clear from Nyoffu's supplementary affidavit that farm Riversdal 171 is divided into four

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[14] See annexure RA5-1 to the answering affidavit of 5 August 2022

[15] Riversdal and Riversdale are used interchangeably on the official descriptions and diagrams. Accordingly nothing turns on that.

portions, being portion 1 of Riversdal 171 , portion 2 of Riversdal 171, portion RE/958 and portion RE/959 Riversdal 171;

b. did not file an affidavit, despite being given an opportunity to do so, disputing the allegation in Nyoffu's supplementary affidavit that portion 1 of Middelveld 170 was owned by the Trust;

c. revealed that farm number 959 Riversdal 171, on which he claimed the applicant's homestead extended into, was indeed owned by the Trust. The statement that the remainder of farm number 958 was owned by Izinyoni therefore became irrelevant.

40. Cutting through the tactical positions adopted by the parties it becomes quite evident that;

a. The Trust is not the owner of portion 1 of Riversdal 171 but of RE 959, which is another portion of farm Riversdal 171

b. The Trust is also the owner of Portion 1 of Farm Middelveld 170

and that the Trust expressly states that the homestead ingresses into both portions.

41. It is difficult to understand why the applicants did not simply amend the order sought.

On analysis it turns out that the homestead extends over two different registered pieces of land although, as stated in Nyoffu's uncontested averment, portion 959 of farm Riversdal 171 merged with portion 1 of farm Middelveld 170 and not portion 1 of farm Riversdal 171.

In other words; the founding affidavit incorrectly identified the farm from which the applicants were evicted as portion 1 Riversdal 171. However the affidavits as a whole reveal that it is undisputed that the homestead is situated on parts of

portion 959 of the farm Riversdal 171 and portion 1 of the farm Middelveld 170, with no boundary fence or other discernible feature separating the two.

Who removed the applicants from their homestead

42. While it is correct that the applicants claimed in their founding affidavit to have resided on portion 1 Riversdal 171, it is common cause on a reading of all the affidavits that they were evicted from their homestead pursuant to steps taken by the second respondent purporting to represent the Trust.

    In particular a reading of the applicants' founding affidavit as well as the second respondent's affidavits and that of Kapp reveal that the second respondent on behalf of the Trust had sought and secured the removal of the applicants from the homestead they occupied. The only question is whether it was done lawfully with a court order.

    Moreover the second respondent's affidavits and the supplementary affidavit of Nyoffu make common ground that the Trust owns both portion 959 of Riversdal 171 and portion 1 of Middelveld 170 and that they adjoin one another to create, *de facto,* one consolidated farm with no natural or physical boundary between them.

43. It is therefore clear from the papers that the parties are agreed that the applicants were removed from land owned by the Trust on instructions of the second respondent purporting to represent the Trust.

Whether failure to cite the Trust or describe the correct land in the founding affidavit is fatal

44. It is difficult to appreciate why the applicants did not join the Trust, more particularly when Nyoffu's supplementary affidavit confirmed that the only land from which the applicants could have been evicted, whatever its cadastral description was that owned by the Trust.

45. The applicants offered no argument for contending that an eviction order can be granted against a person who is not joined as a party to the proceedings.

The applicants' attorney in his initial heads of argument dated 3 August 2022 simply said that;

> "*There can be no doubt that the applicants in this matter were subjected to an arbitrary eviction by the respondents …* "

In his second set, dated 30 November 2022, the applicants' attorney accepted that one of the issues was whether the applicants "*resided at second respondents farm, Riversdale 171 KP*" and then, relying on the absence of a lawful court order evicting them and submitted that the applicants are entitled to the relief set out in the notice of motion- which in its terms directed the respondents to restore the applicants to their homestead. But the cited respondents are Izinyoni and the second respondent.

46. The applicants' attorney in his heads of argument also contended that the identity of the correct farm on which the applicants had resided is secondary to the issue of the lawfulness of the eviction, is a mere technicality and that once it is found that the eviction is unlawful, *"it follows that the applicants should return to the homestead which in fact is known by the parties in this matter*".

47. The difficulty with the applicants' contention that the identity of the land is irrelevant fails to take into account that in the present case the identity of the land is umbilically linked with the entitlement of the person against whom the order is sought to be heard and that this is a substantive right accorded not only under the common law but is protected under the Constitutional right to a fair hearing.

48. It is self-evident that no order can be granted against Izinyoni: No one on behalf of Izinyoni was responsible for the applicants' eviction and it is common cause that the applicants were not evicted from land owned by Izinyoni.

49. Nonetheless the substantive order sought is one directing two identified respondents to restore or reinstate the applicants to their homestead and this has not been amended. The first respondent, Izinyoni, is not at all involved and therefore the second respondent falls outside the net to the extent that he is cited in a *representative capacity* as acting on behalf of Izinyoni

50. The issues this raise concern whether the applicants are limited to the farm identified in the founding affidavit (and which has not been corrected) and if not, whether the second respondent can be made responsible in any of his other cited capacities to cause occupation of the homestead to be restored to the applicants without the need to join the Trust or its other trustees at this stage.

    In considering these issues a court cannot overlook the uncontested averment made by the second respondent that the homestead was demolished and that an order requiring the restoration of the applicants to their homestead may require that it be rebuilt.

51. Once again the applicants have placed the court in an invidious position which could readily have been obviated by amending the notice of motion to reflect the correct location of the homestead, joining the trustees and citing the second respondent in his capacity as one of them.

    Furthermore the court has not been assisted by any argument, let alone case law on these aspects. I have already indicated that the applicants contend that these are not matters of any moment once it is found that the eviction is unsupported by a court order.

52. However a court order must be effective, which means that it must be directed at someone, capable of compliance by the cited party and if it is not complied with then that party will be subject to sanction in the form of contempt proceedings. In the present case it should be the Trust, yet it is not properly before the court in its own right.

53. In my view a court should not be put into a corner;

a. where the issues concern legislation intended to provide for the protection of fundamental rights. In this case it is alleged to be the Extension of Security of Tenure Act 62 of 1998 ("*ESTA*") which in turn gives effect to the s 26(3) Constitutional right not to be evicted or have one's home demolished without a court order granted after considering all relevant circumstances; and

b. where a party would be required to start from scratch despite the possibility that a continuing wrong is being perpetrated by the second respondent who is already before the court, albeit in his personal capacity.[16]

54. The questions which then present themselves are whether the second respondent in his personal capacity is party to the perpetuation of a continuing wrong and if so whether the Trust as owner of the land on which the homestead is situated can be implicated by his actions, whether the court in the circumstances can competently correct the identity of the land in question, or should do so by reason of the conscious failure by the applicants' attorney to have done so, and looming large over all these issues is whether there is any prejudice to the second respondent, the Trust or its other trustees.

The second respondent's position

55. In terms of *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 to 635 the evidence on which a court is entitled to base its findings, where final relief is sought on motion and there is not a referral to evidence, comprises the averments alleged "*in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent*" unless circumstances exist where a denial by the respondent does not "*raise a real, genuine or bona fide dispute of fact … and the court is satisfied as to the inherent credibility of the applicant's factual averment ….* (or) …. *where*

[16] This leaves aside the second respondent being cited as the person in charge of the farm – without deciding what that may now mean since the farm remains incorrectly identified.

the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers ....". This then becomes the pool of evidence from which a court is entitled to draw inferences, based on the formulation contained in *Ocean Accident & Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B–D:

> *"As to the balancing of probabilities, I agree with the remarks of SELKE, J., in Govan v. Skidmore, 1952 (1) S.A. 732 (N) at p. 734, namely*
>
> > *". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on Evidence, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".*
> >
> > *I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable. (Oxford Dictionary, and Webster's International Dictionary).*[17]

For present purposes it suffices to consider the surrounding circumstances as forming part of the process involved in assessing the probabilities.

56. I proceed to canvass the facts set out in the papers which are not in dispute concerning the role played by the second respondent in facilitating the eviction of the applicants, whether he was party to their unlawful eviction and whether the Trust can be held accountable for his actions.

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[17] See also Coetzee J (at the time) in *African Eagle Life Assurance Co Ltd v Cainer* 1980 (2) SA 234 (W) at 237 – 238 where the court commenting on *Koster Koöperatiewe Landboumaatskappy v. S.A. Spoorweë en Hawens,* 1974 (4) S.A. 420 at p.425 observed that even in trial matters where there are mutually destructive versions the onus is discharged by reference to the probabilities , inherent or otherwise, even if it is not otherwise possible to find that the version of the party who bears such an onus is true and the other party's version is false

57. The second respondent does not dispute that on 10 January 2022 the first applicant was approached by six men unknown to her, one of whom introduced himself as an attorney. In fact the second respondent's first affidavit of 31 May claims that van Schalkwyk was responsible for obtaining an eviction order on behalf of the Trust, and in his second affidavit of 5 August does not dispute that a person purporting to be an attorney was present and does not suggest than anyone other than van Schalkwyk would have spoken to the first applicant on that day[18]. One would have expected him to dispute this or claim lack of knowledge of the events or being unaware of whether an attorney was present at the time of the applicants' eviction. He did none of this.

58. The second respondent also does not dispute that, despite claiming to have an eviction order, the attorney did not produce one despite it being demanded "*several times*" from him. It is also not disputed that the first applicant's son contacted the local police to come to the farm to intervene and that they arrived in a marked police car.

    Furthermore the second respondent does not dispute that two police officers, one of whom was named;

    a. spoke to the attorney pursuant to which they started shouting at the applicants to leave the farm immediately and that they would open a case of trespassing if this was not done;

    b. informed the applicants that there was "*a court order and must do their job of evicting us from our homestead*"

59. The second respondent also does not dispute the following further events which occurred;

    a. the applicants again asked about the court order to which the attorney, in the presence of the police, said that it was "*in his motor vehicle and refused to give a copy of such court order.*"

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[18] AA of 5 August at para 83.1 in response to paras 28 to 31 of the FA

b. The police officer then started manhandling the first applicant and her family, evicted them from the homestead, put them in a police van, arrested and then detained them for three days, releasing them only on 13 January.

   Those removed and detained were ten in number, of whom four were adults and six were young children ranging from one and a half , three, six, seven and eleven years of age. This would have been a traumatic experience for both the adults and the children. In the case of the first applicant, on arrival at the police station she started feeling sick, her knees weakened and she started vomiting. An ambulance was summoned and she was admitted to the Thabazimbi hospital, received medical treatment and was discharged two days later on 12 January. She claims that as a consequence of these events her health has deteriorated.

c. The applicants' personal property and belongings were removed from the homestead and left on the road. These were damaged during the eviction by those who had come with the so-called attorney. The applicants were unaware of what has happened to their possessions and whether they were disposed of by "*the respondents*", which would include the second respondent in one or other of the capacities in which he was cited (including in his personal capacity or as the person in charge of the farm);

d. The applicants livestock was also left in the open road. It however appears that the livestock was since recovered.

60. Nowhere does the second respondent claim that he was unaware of these facts as alleged by the applicants. He blows hot and cold. In one paragraph he expresses that it was shocking that the applicants were placed at the back of a police van and taken to the police station. In another paragraph he finds the allegations strange and that the applicants should have obtained corroborating affidavits from the police themselves. Clearly the police would not be the applicants' witnesses. But more significantly the second respondent, who was prepared to admit to the attorney arriving to evict with five other men, does not

himself deny the allegations made or claim lack of knowledge- only tries to sow doubt about the veracity of the allegations. [19]

61. The second respondent by his own admission had engaged van Schalkwyk and does not dispute being the most senior member of the family living on the farm and was apprised of the actions of all those he would have allowed on the farm to evict the applicants. In these circumstances the second respondent's affidavits amount to a concession of either active participation in the events, or of turning a blind eye to events of which he, on the probabilities to be derived from the unchallenged facts, was aware.

    At the least, on an application of *Plascon- Evans* the second respondent has not denied the factual matrix alleged by the applicants and it was for him to produce the court order.

62. This court is satisfied that a number of inferences can also be safely drawn from the probabilities if regard is had to the facts contained in the first applicant's affidavit and that of Nyoffu which the second respondent has not disputed as well as the failure to produce any real evidence despite being afforded an extended time to do so. Such evidence should have consisted of court documents relating to the alleged eviction proceeding under ESTA because the very nature of such a case would have left a paper trail not only at the court but also at the sheriff's office responsible for executing the order.

    More particularly, the second respondent's own affidavit implicates him directly in seeking to evict the applicants, in engaging a person who is not an attorney to do so, in being responsible for paying such person after claiming to have obtained an eviction order and, despite forcibly removing the applicants from their homestead, trying to make it impossible for them to return by having it demolished (on his version).

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[19] *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd,* 1949 (3) SA 1155 (T)

63. In addition the facts as revealed by the affidavits show that the second respondent himself held out the existence of a court order when, despite being given every opportunity to produce it, he is not able to or to produce a shred of evidence to identify any attorney who could have obtained such an order, any court which may have granted it or any sheriff who might have executed it.

64. It will be recalled that on the second respondent's version, an application for eviction, which was in respect of farmland, would have been granted pursuant to the provisions of ESTA. An ESTA application must be deposed to under oath and includes various notifications and the production of reports by the relevant authorities.

    The court process prior to the successful grant of an eviction order therefore would have first required a lawful termination of the right of residence (s 8) and then written notice of an intention to obtain an order of eviction must have been given to the applicants, to the municipality in whose area of jurisdiction the land in question is situated and to the head of the relevant provincial office of the Department of Rural Development and Land Reform (s 9 (2)(d)), after which the court must have requested and obtained a report from a probation officer which would have required the probation officer to interview the applicants (s 9(3))[20].

65. Furthermore a comprehensive affidavit would have to be drafted and then signed by the second respondent who on his own version at all times represented the Trust, and then the reports presented by the relevant authorities and any affidavits filed by the applicants would have to be considered by the legal representatives and the second respondent with the possibility of another affidavit being given to him for deposition.

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[20] The report in terms of s 9(3) must be ;

(a) on the availability of suitable alternative accommodation to the occupier;

(b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;

(c) pointing out any undue hardships which an eviction would cause the occupier; and

(d) on any other matter as may be prescribed

All this would have to occur prior to any court hearing, at which all the documentation would have been presented by a legal representative to the court and the matter argued- even if unopposed by the applicants.

66. It is also of some significance that he does not claim to have passed any resolution on behalf of the Trust to engage attorneys, does not claim to have received any correspondence or any communications with regard to the progress of any court proceedings that may have involved the eviction of the applicants.

If he had indeed engaged an attorney to evict the applicants, then aside from expecting to find some correspondence, the second respondent would have been given a founding affidavit to sign and would have signed such an affidavit and provided the relevant documentation in support of at least the property in question[21]. The only statement he made with regard to engaging the services of an attorney was that the attorney was van Schalkwyk and that van Schalkwyk was paid R60 000 by the Trust for his services.

67. Despite being given every opportunity over an extended period of time, the second respondent cannot produce one piece of paper, any communication from any lawyer or any other real evidence to support his allegations;

a. that a valid court order was obtained from a competent court of law entitling him on behalf of the Trust to lawfully evict the applicants;

b. that whoever forcibly removed the applicants on 10 January was a Sheriff or otherwise entitled to execute a court order for eviction;

c. that whoever represented to the police that there was a valid eviction order had been truthful. It was this representation which resulted in the police assisting the six men who came onto the Trust's property to forcibly remove the applicants and have them imprisoned.

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[21] The second respondent alleged that the eviction proceedings was by way of application. See para 36 of his 31 May affidavit

68. This court can also have regard to the fact that the only person who the second respondent claims to have instructed and paid to bring an eviction application against the applicants denies all these allegations and, despite this, the second respondent made no attempt to have him called to be cross examined. Nor did the second respondent produce corroborating evidence in the form of correspondence or even a statement of account, bearing in mind that he claimed to have paid van Schalkwyk R60 000.

    It is also significant that the second respondent does not even contend that the applicants were aware of any termination of residence or notice to obtain an eviction order, or had been approached by a probation officer before any court hearing.

69. The second respondent's allegations as to why he has not been able to locate any evidence to support the existence of a valid eviction order from a court, the existence of a practicing attorney who dealt with the matter or a person who can attest to the lawful execution of any eviction order if it did exist is "*so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers*". [22]

70. The court is therefore entitled on the papers before it to draw the necessary inference from what the second respondent has stated, what he has chosen to remain silent on and his failure to produce any evidence regarding eviction proceedings against the applicants that:

    a. No court order existed for the eviction of the applicants;

    b. The second respondent was knowingly a party to the eviction of the applicants under the pretext that there existed a lawful eviction order and was aware that the police were duped into believing that such a court order had been obtained;

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[22] *Plascon-Evans* at 635. See also *Room Hire Co. (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd*, 1949 (3) SA 1155 (T), at pp 1163-5

c. None of the six persons who entered the Trust's property to effect the forcible removal of the applicants had the power to do so since none of them was a sheriff or even a practicing attorney

d. The six persons would have had permission to come onto the Trust's farm to remove the applicants. Only the second respondent would have allowed entry for such purpose bearing in mind that he claims the eviction to have been regular. Once again, he cannot now approbate and reprobate. Moreover he admitted the allegations that six men came to evict the applicants on 10 January.[23]

e. All the representations made of the existence of a lawful eviction order were false to the knowledge of the second respondent. These misrepresentations had been made to the applicants and to the police, which the latter were induced to believe with the result that they had in fact assisted in the unlawful and forcible eviction of the applicants among whom were young children.

71. The court is therefore satisfied that the second respondent was directly involved in the forcible and unlawful eviction of the applicants from the property and that such removal without a court order constitutes a continuing wrong under the *rei vindicatio* for as long as they are not restored to occupation. He was also responsible for the removal of the applicants' possessions and the demolition of their homestead (if that is the case). The second respondent is therefore liable in his cited personal capacity for such actions.

Implicating the Trust

72. The second respondent was acting in the interests of the landowner which is the Trust. He claims to have been authorised to represent the Trust in evicting the applicants from its land. The uncontradicted evidence is that the second respondent's son and daughter, Johannes and Sanel[24], live on the land where

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[23] See the earlier footnote reference

[24] There was a typographical error in the spelling of Sanele

the homestead was situated. They would therefore have been aware of the eviction. They also could not have been oblivious to the demolition of the homestead if that in fact occurred as alleged by the second respondent.

73. The second respondent's son and daughter are also the other trustees as appears from an agreement which the second respondent attached to his affidavit. In these circumstances they, as the other trustees, appeared to have turned a blind eye to any of these events.

74. It is unnecessary at this stage to decide whether the second respondent is the *alter ego* of the Trust and has sufficient influence over his children to dictate the affairs of the Trust or whether their silence in the face of his conduct sufficiently clothes him with authority to have acted on behalf of the Trust.

75. The court earlier mentioned that by his own admission the second respondent was responsible for representing the Trust. It appears to have gained from his unlawful conduct and did not disassociate itself from such conduct.

76. It follows that the Trust would *prima facie* be vicariously liable for the unlawful removal of the applicants by the second respondent and, if it is the case, the demolition of the house and is obliged to remedy the situation.

Correcting the land description

77. In straightforward terms, whatever the piece or pieces of land are, it is common cause on the allegations made by the applicant and those made by the second respondent that the applicants were evicted from a homestead on land which is owned by the Trust and which can therefore only be on either one or both the cadastral lands identified in the deeds registry that had been sold to it by Ras. There is no prejudice to the second respondent or the Trust since clearly Izinyoni did not evict the applicants, only the second respondent did through the agency of the six persons who were allowed to come onto the Trust's land for that purpose.

78. Affidavits in application proceedings were described in *Swissborough Diamond Mines (Pty) Ltd and Others v Government and the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 323F – 324C to fulfil the dual role of pleadings and evidence. There is therefore nothing unalterable about its contents or the relief contained in the notice of motion which it supports. A party is entitled to explain an error in both and, provided the explanation is satisfactory and there is no prejudice that cannot be remedied by a costs order, the court will allow its introduction or amendment. Obviously cases involving the withdrawal of an admission will require greater circumspection. This is not such a case. At best there is ambiguity between the homestead from which the applicants were admittedly evicted and the cadastral description of the land on which it is situated. Moreover the second respondent effectively identified the correct land as the property owned by the Trust.

79. Accordingly the court is able to resolve the ambiguity on the common cause facts, as there is no longer an issue (i.e. *lis*) between them on this score that needs resolving. This may also be regarded as a *de minimis* situation adequately covered by the prayer for further or alternative relief. [25]

Whether relief competent against the Trust

80. Whereas correcting the cadastral description of the land on which the homestead is situated poses little difficulty, the Trust is not a party to the proceedings, the applicants did not seek to join it prior to judgment and it is inappropriate for the court to do so now without affording it an opportunity to be heard.

81. Since the court has made direct findings against the second respondent in his personal capacity in relation to the unlawful and forcible removal of the applicants and for causing the demolition of the homestead (if that is the case) the court is entitled to hold him accountable and find him responsible to secure that the Trust restores possession of the area of land occupied by the applicants to them.

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[25] See para 10 of the application

82. Should the second respondent fail to ensure that the Trust does these things then he holds himself subject to contempt proceedings if its requirements are satisfied. In addition the court can, on duly supplemented papers, join the other trustees, require an explanation as to why the applicants have not been restored to the property, produce evidence of how decisions by the Trust are in fact made and order that the Trust itself restores the applicants to the property without the necessity of the applicants being obliged to bring an application *de novo*.

83. Such a course also takes into account the possibility that the homestead has been demolished, in which event it appears necessary that the applicants be afforded an opportunity to approach the court on the same papers duly supplemented and the second respondent and the Trust be afforded an opportunity to respond on las and fact. In terms of s 14(1) of ESTA a person who has been evicted otherwise than in accordance with the provisions of the Act has the right to ask for an order of restoration of residence on and use of the land in question as well as reconstruction or replacement of buildings and compensation or damages for wrongful eviction.[26]

84. It bears mentioning that the second respondent claimed that the homestead was demolished on advice of van Schalkwyk and that the latter denies any

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[26] Section 14 (3) reads:

> In proceedings in terms of subsection (1) or (2) the court may, subject to the conditions that it may impose, make an order—
>
> (a) for the restoration of residence on and use of land by the person concerned, on such terms as it deems just;
>
> (b) for the repair, reconstruction or replacement of any building, structure, installation or thing that was peacefully occupied or used by the person immediately prior to his or her eviction, in so far as it was damaged, demolished or destroyed during or after such eviction;
>
> (c) for the restoration of any services to which the person had a right in terms of section 6;
>
> (d) for the payment of compensation contemplated in section 13;
>
> (e) for the payment of damages, including but not limited to damages for suffering or inconvenience caused by the eviction; and
>
> (f) for costs.

involvement in the matter. If van Schalkwyk is found to be correct then the explanation for demolishing would be untrue.

OTHER ISSUES

Urgency

85. Urgency is resolved on the basis that there is a continuing wrong which finds its genesis, on the facts which have been placed before the court despite the latitude given to the second respondent to procure any evidence of the existence of a lawfully obtained eviction order, in a perversion of justice.

86. It also needs to be mentioned that difficulties arise with the expeditious procurement of legal aid assistance in that there are a number of requirements which need to be satisfied before legal representation is provided; both in relation to an applicant and in relation to the attorney who comes to be appointed.

87. In the circumstances of this case the point taken on urgency is therefore not a good one.

Who is to be restored to occupation

88. At no stage did the second respondent contend that the first applicant or any of her family members could not reside on the premises.

89. That being so, it is not for this court to limit the family members who the first applicant or anyone else entitled to be on the property may or may not have on the property. In this case the only persons who exceed the initial five are family members most of whom are minor children. Their rights and who may look after them and has nurture them would first require consideration by a court bearing in mind that the interests of a child are paramount.

90. Accordingly this court is not in a position to exclude family of the first applicant from being entitled to return to the land on which the homestead was situated without a substantive application being brought by the Trust.

ESTA Rights

91. The applicants rely on rights under ESTA.

92. However the papers refer to an entitlement to occupy, which goes back over 80 years, derived from providing labour in return for grazing, cultivation and being able to bury family members.

93. This may support title of occupation derived as a farm labourer with the greater rights that affords.

94. For this reason the court makes no finding as to the extent of any of the applicants' actual rights of occupation or the entitlements that may arise from it.

    Suffice that whether under ESTA or under the Land Reform (Labour Tenants) Act 3 of 1996 this court enjoys exclusive jurisdiction to the exclusion of the ordinary High Couts to determine this matter having regard to the nature and locality of the land in question.

95. On the assumption that the applicants fall under ESTA (without deciding this) and noting the allegation that one of the applicants may have sought to acquire rights of occupation, although the second respondent contends that no such application has been made, if s 12 of ESTA applies then no lawful eviction would have been possible.

UNRESOLVED ISSUES

96. A number of issues remain unresolved. I have taken considerable time in considering whether there is enough before me to structure an appropriate order. I am afraid that I am unable to do so.

97. The unresolved issue is the question of what occurs if the homestead has in fact been demolished. The court is unable to anticipate, on the facts before it, what remedy may be available if any, and how it should be structured if that is indeed the case.

98. The court furthermore is reluctant to consider a *mandamus* order without the Trust itself being joined because of the possible financial consequences to it.

99. The applicants also appear to have left the question of the goods and possessions unresolved- that is if they have not yet been able to retrieve them.

100. In these circumstances, the court can only make an order that will allow the applicant to pursue such other relief as they may be entitled by supplementing these papers with leave to join the Trust insofar as they seek direct relief against it.

101. In order to ensure that all matters arising from the application and the order made in this case are finalised the court will direct that despite certain final relief being granted, until such time as all matters that have been identified are finally determined the matter as a whole will not be finalised unless the applicants deliver a notice to that effect or the court has finally determined or made a ruling on those issues. [27]

CONDUCT OF THE SOUTH AFRICAN POLICE OFFICERS

102. Neither SAPS nor the implicated police officers are aware of the allegations made by the applicants in their founding papers. It is however necessary, where a court has before it such serious allegations of conduct by the police that may require sanction if proven, that IPID be forwarded this judgment.

103. The contents of the applicants affidavit set out a serious invasion of the constitutionally protected rights afforded to an individual in relation to equality in the sense of equal protection and benefit of the law, human dignity, freedom and security of the person, privacy, eviction without a court order, the rights of children to be protected from degradation and not to be detained except as a

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[27] See *City of Ekurhuleni Metropolitan Municipality v Unknown Individuals Trespassing and Others* [2023] ZAGPJHC 265; [2023] 2 All SA 670 (GJ) at para 209 and the references to *London Borough of Barking and Dagenham and others v Persons Unknown* [2022] EWCA Civ 13 at paras 91, 92 and 107 and *Mankowitz v Loewenthal* 1982 3 SA 758 (A) at 767F to H

measure of last resort and to have regard to their best interests as of paramount importance.[28]

104. It is also of great concern that since no court order was produced to the applicants at the time of the eviction, that on the facts none would have been in the hands of the alleged attorney when he spoke to the officers and despite the applicants persisting that a court order be produced none was forthcoming.

105. The actions of the police in removing the applicants, arresting and detaining them and their young children for up to three days without a warrant indicates gross discrimination between perceived classes of persons. Since the issue of eviction was civil, it is difficult to appreciate how or why the police would or could act in such a draconian manner without first being satisfied, by being shown a court order or require the presence of the Sheriff. Ordinarily one would expect the sheriff to ask for police assistance, and even then it may require a court order to enable him or her to do so. Presumable the standing orders will inform the regularity of the conduct of the officers concerned.

106. The Registrar is requested to refer this judgment and the Founding affidavit and the other court papers filed of record to IPID for its consideration.

THE LEGAL PRACTICE COUNCIL

107. There are a number of unresolved issues concerning disputes between the second respondent and van Schalkwyk as to whether the latter held himself out as an attorney and if he was present when the evictions took place and if so whether he had held out to members of SAPS that he had a valid court order of eviction.

108. The Registrar is therefore also requested to refer this judgment and the papers filed of record to the responsible body of the Legal Practice Council for them to consider whether or not to undertake any investigation, more so in case

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[28] See ss 9(1), 10, 12(1), 14, 26(3) and 28(1)(d), (g) and 28(2) of the Constitution

this is not an isolated incident of circumventing the provisions of legislation concerning the evictions of ESTA occupiers or labour tenants under the guise of a validly obtained court order.

COSTS

109. This is not an ordinary matter. On the facts arising from this case, there has been a perversion of the course of justice. The second respondent cannot seek refuge behind the actions of an alleged attorney even if van Schalkwyk is untruthful when claiming not to know to the second respondent or anything about the eviction. A point is reached where a client is responsible for the actions of his representative. More so where there is an admitted failure to even know of the existence of a court order to evict persons from land on which he resides.

110. The second respondent was given more than enough opportunities to find the alleged court order. His attempts to do so and his explanation of how he came to van Schalkwyk are unconvincing. If van Schalkwyk is to be believed then even the second respondents claimed existence of an attorney who attended to the eviction, with no sheriff in sight, and who advised that the homestead could be demolished was contrived. A punitive costs order is therefore appropriate

111. The appropriate order is that the applicant should not be out of pocket by one cent. Even the incorrect citations and the failure to join the Trust holds no relevance when the second respondent, on the findings, was well able to reinstate the applicants and knew that he had to since the eviction was unlawful.

112. The applicants attorney may however only claim as a fee and may only charge the applicants for half of the daily fee taxable and allowed in respect of one of the days of argument before the court.

ORDER

113. It is ordered that:

1. The applicants are entitled to immediate restoration and reinstatement of the use and occupation of the area of land occupied by them immediately prior to 10 January 2022 (*the homestead*").

2. The homestead is situated on land owned by the Hans Coetzee Trust ("*the Trust*") on portions of one or more farms identified as portion RE 959 of the farm Riversdal 171 and portion 1 of the farm Middelveld 170, in the Limpopo Province

3. The eviction of the applicants from the said land is declared unlawful

4. The second respondent is interdicted and restrained from evicting the applicants from the said homestead, or from causing anyone else including the Trust, from doing so save under a court order duly obtained and issued in accordance with the applicable statute

5. The second respondent is to take all such steps as are necessary to ensure that the Trust complies with the terms of this order, including but not limited to forthwith making all the other trustees aware of this court order

6. The South African Police Service ("*SAPS*") is ordered and directed to assist the sheriff of the court in the execution of this order or any part thereof relating to it and to ensure that the applicants are relocated onto the homestead

7. The area of land that was occupied and utilised by the applicants is to be demarcated by agreement and failing agreement either party may approach the court on these same papers duly supplemented for the determination of such demarcation

8. A copy of this order is to be served on the Trust and on Sanel du Plessis and Johannes Hendrikus Coetzee in their capacity as trustees of the Trust

9. In the event of non-compliance with this order, the applicants shall join all the trustees of the Trust in their capacity as trustees to this application and shall be entitled to supplement these papers as well as the relief sought

10. In the event that the homestead or any other improvements on the said homestead have been demolished or otherwise not in the same condition in which they were immediately prior to 10 January 2022 then the applicants shall be entitled on the same papers, duly supplemented, to seek appropriate orders

11. In the event that the goods and possessions of the applicants have not been restored then the applicants shall be entitled to seek appropriate relief on the same papers, duly supplemented

12. Despite certain final relief having been granted in terms of this order, until such time as the matters set out above have been finally determined the matter as a whole will not be finalised unless the applicants deliver a notice to that effect or the court has finally determined or made a ruling on the issues set out in each of those paragraphs

13. Costs including all reserved costs to be paid by the second respondent in his personal capacity on an attorney and own client scale save that, in respect of one of the days of argument before the court the

applicants attorney may only claim half of the daily fee taxable and allowed or agreed.

SPILG, AJP

DATE OF ORDER	14 August 2023
DATE OF JUDGMENT	17 August 2023
FOR APPLICANTS	Mr. SJ Nyoffu
	Nyoffu Attorneys
FOR RESPONDENT	Adv. Keet
	Kapp Attorneys Inc