

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Application Number : 4398/2013

In the application between:-

RASELE JOHANNES RADEBE

Applicant

and

GRAHAM KARL HOBBS

1st Respondent

GRAHAM KARL HOBBS N.O.

2nd Respondent

MARGARET LOUISE HOBBS N.O.

3rd Respondent

WILLIAM ANTHONY CHRISTOPHER N.O.

4th Respondent

[In their capacities as trustees of the Tandjiesberg
Trust, IT8780/92]

HIGH COURT SHERIFF, HARRISMITH

5th Respondent

and

Application Number: 845/2013

In the application between:

RASELE JOHANNES RADEBE

Applicant

and

GRAHAM KARL HOBBS

1st Respondent

GRAHAM KARL HOBBS

2nd Respondent

MARGARET LOUISE HOBBS N.O.

3rd Respondent

WILLIAM ANTHONY CHRISTOPHER N.O.

4th Respondent

[In their capacities as trustees of the Tandjiesberg
Trust, IT8780/92]

MALUTI-A-PHOFUNG MUNICIPALITY

5th Respondent

CORAM:

VAN ZYL, J

DELIVERED ON:

21 FEBRUARY 2014

[1] As is evident from the heading of this judgment, it entails the adjudication of two applications. Due to the interwoven facts and relief sought in the applications, whilst involving the same parties, I deem it apposite to give one combined judgment in the two applications. I will refer to the applicant in both applications as “the applicant” and to first to fourth respondents in both applications as “the respondents”.

[2] In application number 4398/2013 (“the spoliation application”) the applicant is seeking a rule *nisi* with immediate effect in the following terms:

“2.1 Restoration of possession of the dwelling at Rooikraal Farm 1090, District Harrismith, Free State and erection thereof if demolished.

2.2 That Respondents remove all fences on the dwelling and grant applicant access to the property.”

The applicant is also seeking that the respondents be ordered to pay the costs of the application.

[3] In application number 845/2013 (“the rescission application”) the applicant is seeking the following relief:

“1. That the decision of the Honourable Court made by Honourable Acting Judge President Hancke in this matter on the 25th April 2013 be rescinded.

2. That any party who opposes his application pays the costs thereof.

3. Further and/or alternative relief.”

The founding papers filed in the rescission application were attached to the founding papers filed in the spoliation

application and hence they form part and parcel of the spoliation application.

THE PROCEDURAL COURSE OF EVENTS:

- [4] A concise exposition of the relevant events concerning one or the other or both the applications, are the following.
- [5] An eviction application was issued by the respondents on 4 March 2013 under application number 845/2013 (“the eviction application”). On 14 March 2013 the usual order authorising service in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, Act 19 of 1998 (“PIE”) was issued on an *ex parte* basis. The application and Court order were then served on the applicant personally on 4 April 2013. There was no timeous and proper opposition to the application, although I will return to this very important aspect. An order for eviction was consequently granted on an unopposed basis on 25 April 2013 (“the eviction order”), being the order which the applicant now seeks to be rescinded, and which order reads as follows:

- “1. The First Respondent and all others occupying through him is to vacate the farm Rooikraal 1090, district Harrismith, Free State Province (‘the property’) within 14 days from the date of this order;
2. The First Respondent and all others occupying through him is to remove any and all movable assets from the property within 14 days from the date of this order;
3. The First Respondent is to remove any and all livestock, including 12 cattle, 6 calves and a horse from the property within 14 days of this order;
4. Failing compliance with the order in paragraphs 1 to 3 above, that the Sheriff of the Court or his/her lawful appointed Deputy for the district in which the property is situated, is hereby authorised and directed to evict the First Respondent and all others occupying through him from the property, together with their possessions and livestock, and to hand vacant possession to the Applicants;
5. The First Respondent is directed to pay the costs of the application, being the procedures under Part A and B hereof.”

The eviction order was served on the applicant personally on 14 August 2013. The Sheriff simultaneously served a writ of execution with regard to the taxed costs of the eviction application on the applicant. In pursuance of this writ of execution the Sheriff at the same time attached six cattle and six calves, being the property of the applicant.

[6] The applicant did not comply with the eviction order. The Sheriff subsequently executed the order on 21 October 2013, in the absence of the applicant, and evicted the applicant from the property by removing all his possessions from the property and by handing vacant possession of the property to the respondents. An inventory of the said possessions of the applicant so removed by the Sheriff on 21 October 2013, is attached to the answering affidavit filed in the spoliation application. The respondents thereafter demolished the mud house on the property.

[7] The applicant then launched the spoliation application. The spoliation application was issued simultaneously, but was enrolled for a date after the hearing of the spoliation application.

THE FACTUAL BACKGROUND:

[8] It is evident from the papers filed in all three the relevant applications that the applicant has been living on the farm Rooikraal (“the property”) since 1990 when he was employed as a farm labourer by the previous owner of the said property. In 1992 the first respondent, in his personal capacity, started renting the property from the previous owner and he then employed the applicant as farm worker in 1992. The Tandjiesberg Trust subsequently bought the property during 2002 and the applicant remained as an employee on the property and he was also residing on the property. In this regard it appears from the papers that the applicant previously erected an informal structure on the property for housing purposes and he also occupied a mud house which was in existence on the property. I will refer to these respective structures as such and when I intent to refer to the two structures as a unit, I will refer to it as “the dwelling”. According to the respondents’ version the applicant resigned at the end of August 2011, he moved to Van Reenen and he did not permanently return to the property. Although the applicant visited the property a

number of times since August 2011, it is the respondents' contention that that was only to inspect his cattle, but he never stayed on the property again. It is therefore also the respondents' case that because the applicant voluntarily resigned and voluntarily vacated the property, he has since August 2011 not been an occupier as contemplated in the Extension of Tenure Act, 62 of 1997 ("ESTA").

- [9] The applicant denies that he resigned from his employer and/or that he vacated the property. It is his case that he had a quarrel with his employer during 2011 over non-payment of overtime. He then refused to do further work until he was paid, which continued to be the situation for about two months. Considering that he was not receiving any income, he was forced to seek employment in order to upkeep his family. He was eventually employed by a local grocer about thirty kilometres away from the property. Even during that time his children were still resident on the property and he returned to the property at the end of every month to provide his children with money. It is therefore his case that he never left the property for a period more than a month at any given time and that all his possessions, except

his clothes, remained at the property. As property labourers they were also allowed to keep livestock on the property and his livestock, consisting of cattle, throughout remained on the property which he contends is indicative of the fact that he never vacated the property.

THE SPOLIATION APPLICATION:

[10] For the sake of clarity I record that although this is a combined judgment, I obviously adjudicate the respective applications based on the facts as they prevailed at the respective dates of the hearing of the applications.

[11] It appears to be common cause between the parties that on 21 October 2013, before the Sheriff executed the eviction order, he phoned the applicant to again advise him about the said order and that he should move his possessions from the property. At that stage the applicant was not at the property. Whilst the applicant and the Sheriff were still in conversation, the connection broke up due to poor network reception. According to the first respondent he also tried to contact the applicant on his cell phone, but although the

applicant answered the call, he alleged that he could not hear the first respondent. The Sheriff thereafter proceeded with the eviction and the removal of the applicant's possessions from the property.

[12] Mr Motloun, on behalf of the applicant, contented that before paragraph 4 of the eviction order could have been executed by the Sheriff, the court order should again have been personally served upon the applicant. He submitted that the telephone call from the Sheriff did not constitute proper service of the order on the applicant.

[13] I cannot agree with this contention. It appears to be common cause that the court order was originally served personally upon the applicant on 14 August 2013. It is also common cause that the applicant did not comply with paragraphs 1, 2 and 3 of the court order. Paragraph 4 of the court order specifically authorises the Sheriff to execute the order should the applicant fail to comply with the order. This authorisation forms part of the court order which had already been served upon the applicant on 14 August 2013. There was thus no legal obligation upon the Sheriff to again

serve the court order on the applicant before he executed the order in terms of paragraph 4 of the said order. The telephone call the Sheriff (and the first respondent) made to the applicant, was probably more of a courtesy call than anything else.

[14] Mr Motloung furthermore submitted that because the Sheriff was, according to his submission, assisted by the respondents in the person of the first respondent in carrying out the Sheriff's duties, the execution of the eviction should be considered to have been performed by the first respondent, which is illegal. Therefore, according to Mr Motloung's contention, the applicant, who was in peaceful, though contested possession of the dwelling, was then dispossessed of the dwelling without his consent when the first respondent demolished the dwelling.

[15] I cannot agree with this contention on behalf of the applicant either. It is evident from paragraphs 11.4 and 12 of the answering affidavit filed in the spoliation application, that the eviction and the removal of the applicant's possessions, including the removal of the informal structure, were

effected by the Sheriff himself. This is confirmed by the list of items removed by the Sheriff, Annexure “F” to the said answering affidavit, which document reflects, *inter alia*, “plus minus 200 sinkplate, 30 houtbalke, 18 vensterrame, 15 deure”, all items that probably constituted the building material of the informal structure. It was only thereafter, as is evident from paragraph 13.1 of the answering affidavit, that the first respondent demolished the mud house, which he did not do in terms of the court order, but on behalf of the registered owner of the property (the trust), who in turn was entitled to do so in its capacity as owner of the property. His conduct was therefore not illegal nor unlawful.

[16] It is trite law that in order to obtain a spoliation order two allegations must be made and proved by an applicant, being:

16.1 That the applicant was in possession of the property;
and

16.2 That the respondent deprived him of the possession forcibly or wrongfully against his consent.

See ERASMUS, SUPERIOR COURT PRACTICE, Van Loggerenberg *et al*, at E9-5 – E9-6

- [17] Mr Pienaar, on behalf of the respondents, submitted that to comply with the second requirement the deprivation must be wrongful, being deprivation against the will of the applicant and without resort to legal process. In this regard he referred to the judgment in NTAI AND OTHERS v VEREENIGING TOWN COUNCIL AND ANOTHER 1953 (4) SA 579 (AD) at 589 H – 590 A:

“Before considering the nature of proceedings for ejectment I must point out that in this case the Council did not resort to self-help. The ejectment of Plaintiff’s property was effected by the messenger under a warrant which covered the action he took, for he was authorised and required by process of Court

‘to put the said Plaintiff into possession of the same (i.e. the premises) by removing therefrom the said defendant or any person claiming through or under him’.

I cannot understand how an action can be brought

against the messenger for executing that warrant while the writ stands”.

Mr Pienaar consequently submitted that the applicant had not been deprived unlawfully of his possession, as the Sheriff was authorised by the court order to evict the applicant from the property. The respondents did not resort to self-help.

- [18] I have to agree with this contention. Even if it is assumed just for argument`s sake that the applicant was in fact in peaceful and undisturbed possession of the dwelling, the applicant was evicted as a result of the court order, in terms of which the applicant was no longer allowed to have any further possession of the property or of any structures on the property. It was therefore not the demolishing of the mud house that deprived the applicant of his possession of the property and the dwelling; it was as a result of the eviction order which was obtained after resorting to legal process. In this regard it should also be borne in mind that at the time when the eviction was executed and at the time when the spoliation application was issued, the eviction

order was effective and *in esse*. Until a court order has not been set aside by a competent Court, it stands and must be obeyed even if it may be wrong. See ERASMUS, SUPERIOR COURT PRACTICE, *supra*, at B1-306F.

- [19] The applicant therefore did not proof the essential requirement of having been wrongfully deprived of possession. Having made this finding, it is not necessary to make a finding on the dispute as to whether the applicant was in fact in possession of the dwelling, or not. For the same reason it is not necessary to deal with the further defence raised by the respondents that because the mud house had been demolished, they are not in a position to restore possession, which is a valid defence in a spoliation application. The issue pertaining to the restoration or substitution of possession which may be ordered in certain circumstances in terms of constitutional relief under Section 38 of the Constitution, does not come into play either considering that the applicant did not make out a proper case for a spoliation order.

THE RESCISSION APPLICATION:

[20] As previously indicated, the applicant maintains in his founding affidavit in support of the rescission application, that he did not resign and that he had not left the dwelling on the property. The respondents attached a notice of intention to defend and an answering affidavit of the applicant to their answering affidavit in opposition of the rescission application. I will return to the significance, in my opinion, of this notice and affidavit. For current purposes it should be mentioned that the detailed averments in that affidavit pertaining to the circumstances which led to the applicant seeking other employment which resulted in him not sleeping on the property every night, differ in certain respects with the allegations in the applicant's founding affidavit. The essence of the applicant's version however remained to be to the effect that he did not resign and that he did not leave the property and the dwelling as alleged by the respondents. The respondents, on the other hand, persisted with their version that the applicant voluntarily resigned and although he visited the property from time to time, he moved from the property and the dwelling at the

end of August 2011.

[21] It is alleged by the applicant in the founding affidavit that the application for rescission is made in terms of Rule 42 of the Uniform Rules of Court. In this regard it is the applicant's case that the eviction order was erroneously sought and granted in the absence of any party affected thereby (in this case the applicant) in terms of rule 42(1)(a). It is the applicant's main contention that the order was erroneously granted in that the application was based on the provisions of PIE in circumstances where ESTA is applicable to the exclusion of the provisions of PIE. It is therefore the contention of the applicant that it was not legally competent for the Court to have issued the eviction order.

[22] It is the respondents' case that because the applicant resigned during August 2011 and thereafter left the property and did not reside on the property anymore, the applicant was no longer an occupier as contemplated in ESTA. The applicant was therefore, according to the respondents, an unlawful occupier as defined in PIE.

[23] Mr Motloun, again appearing on behalf of the applicant, in his argument referred to the definition of an unlawful occupier as defined in PIE and the definition of an occupier as defined in ESTA. He submitted that it is evident from the totality of the papers that the applicant in fact still resided on the property. In this regard he referred to the list of personal and household items of the applicant, as well as the livestock, which were removed by the Sheriff when the eviction order was executed and submitted that it is indicative of the fact that the applicant was still resident on the property and hence an occupier in terms of ESTA. He also pointed out that the personal service of proceedings in the three respective applications was effected upon the applicant at the property as such.

[24] Mr Motloun furthermore submitted that once it has been established that ESTA is in fact applicable, the provisions of Section 8 of ESTA is peremptory, which provides for the circumstances in which an occupier's right of residence can be terminated. Section 8(2) and (3), *inter alia*, are applicable in the circumstances of this matter:

- “(2) The right of residence of an occupier who is an employee and whose right of residence arises solely from an employment agreement, may be terminated if the occupier resigns from employment or is dismissed in accordance with the provisions of the Labour Relations Act.
- (3) Any dispute over whether an occupier's employment has terminated as contemplated in subsection (2), shall be dealt with in accordance with the provisions of the Labour Relations Act, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

In this regard he also referred to the judgment in LANDBOUNAVORSINGSRAAD v KLAASEN, 2005 (3) SA 410 (LCC) at para 14 where the following was stated:

“It would seem that the specific cancellation of an occupier's ‘right of residence’ is required under S 9(2)(a), even where the agreement from which the right is derived was cancelled, or has expired by the effluxion of its time. Consent to an occupier to reside on land may only be terminated in accordance with the provisions of S 8(1) or (2) of the Tenure Act. If the underlying contract containing the consent expired

or was cancelled but its termination does not comply with any of the norms of S 8(1) or (2) (for example, where the clause allowing the cancellation is unfair), the consent to reside will continue by operation of law, even though the contract containing the consent came to an end.”

[25] Mr Motloung also submitted that an eviction of the applicant could only have been done under ESTA. He referred to section 9(1) of ESTA which determines as follows:

“9(1) Notwithstanding the provisions of any other law, an occupier may be evicted in terms of an order of court and issued under this Act.” (own emphasis)

Mr Motloung also referred to the pre-requisite of two calendar months’ written notice of an applicant’s intention to obtain an order for eviction as provided for in Section 9(2)(d) of ESTA. He submitted that this is a further compelling condition which had to be complied with before an application in terms of ESTA can in any event be entertained. In the absence of such a notice, the applicant was entitled to remain in possession of the dwelling.

[26] Mr Motloung consequently submitted that it was incompetent for the Court to have granted an eviction order in terms of PIE and that it was consequently erroneously sought and granted.

[27] Mr Els, appearing in this application on behalf of the respondents, submitted that the facts in the matter of LANDBOUNAVORSINGSRAAD v KLAASEN, *supra*, are distinguishable from the facts in the current application. He submitted that in that matter the occupants failed to move out and consequently throughout remained occupiers for purposes of ESTA. He contended that in the current application the situation is different in that the applicant moved out of the dwelling and left the property and when he returned after that, he became an unlawful occupier in terms of PIE. He based his argument on the judgment in AGRICO MASJINERIE (EDMS) BPK v SWIERS 2007 (5) SA 305 (SCA) at para 30.

[28] Mr Els furthermore submitted that all the relevant facts were put before Court in the application for eviction, so even if it was to be accepted that the applicant in fact resided on the

property, that would only have the result that the order was then wrongly granted, which does not mean that it was erroneously granted as required by Rule 42. He therefore submitted and requested that the application be dismissed.

[29] The following is stated in ERASMUS, SUPERIOR COURT PRACTICE, *supra* at B1-308 A pertaining to Rule 42(1)(a):

“In general terms a judgment is erroneously granted if there existed at the time of its issue a fact of which a Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment. It follows that if material facts are not disclosed in an ex parte application or if a fraud is committed the order will be erroneously granted. It has been held that an order granted in an application brought ex parte without notice to a party who has a direct and substantial interest in the matter is an order erroneously granted. An order or judgment is also erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the court to have made such an order. The rule does not cover orders wrongly granted. Though in most cases such an error would be apparent on the record of the proceedings, it has been held that in deciding whether a

judgment was erroneously granted a Court is not confined to the record of the proceedings.Judgments have been rescinded under this sub-rule...where counsel for the Applicant in an ex parte application had led the Court mistakenly to believe that the Respondent had deliberately decided not to consult his or her attorney or to appear at the hearing. ...”

[30] The fact that the application for rescission was brought under Rule 42 does not mean that it cannot be entertained under any other relevant rule such as Rule 31(2)(b) or the common law, provided the requirements thereof are met. This principle was restated in MUTEBWA v MUTEBWA AND ANOTHER 2001 (2) SA 193 (Tk HC) at 198 C – G:

“[11] ...The applicant's notice of motion does not state a specific Rule or procedure in terms of which the application was instituted. In *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E), Erasmus J found that there are two more ways in which a judgment can be rescinded. At 468H the learned Judge expressed himself as follows:

'There are three ways in which a judgment taken in the absence of one of the parties may

be set aside, viz in terms of (i) Rule 31(2)(b) or (ii) Rule 42(1) of the Uniform Rules of Court, or (iii) at common law. . . .

In the notice of motion, applicant approached the Court for relief in terms of Rule 31(2)(b). But as the judgment which is the subject of the application was granted on trial, in terms of Rule 39(1), Rule 31 is of no application. In my view, however, the application was sufficiently widely presented and argued so as to encompass also Rule 42(1) and rescission at common law.'

See also *Nyingwa v Moolman* NO 1993 (2) SA 508 (Tk) at 509I - 510D.

[12] On the basis of these two authorities the fact that an application is specifically brought in terms of one Rule does not mean it cannot be entertained in terms of another Rule or under common law provided the requirements thereof are met."

[31] Although I am of the view that the current rescission application can in fact be dealt with in terms of Rule 42(1)(a), I do however consider it more efficacious to deal with it in terms of the common law.

[32] In order to succeed with such an application for rescission of a judgment granted against him by default, the applicant must show good cause and the Court's discretion must be exercised after a proper consideration of all the relevant circumstances. Good cause entails three elements:

1. The applicant must give a reasonable explanation for his default;
2. The applicant must show that the application is made *bona fide*;
3. The applicant must show that on the merits he has a *bona fide* defence which *prima facie* carries some prospect of success.

See COLYN v TIGER FOOD INDUSTRIES LIMITED t/a MEADOW FEED MILLS (CAPE) 2003 (6) SA 1 (SCA) at 9 C – F.

Applicant's defence:

[34] It appears that there may be a *bona fide* factual dispute between the parties pertaining to the underlying facts on the question of whether the applicant is an illegal occupier in terms of PIE or an occupier in terms of ESTA. This issue has throughout been raised by the applicant, even in his answering affidavit drafted with the intention that it should serve as opposition to the eviction application (Annexure "B" to the respondents' answering affidavit), but which was not timeously filed. Should the application for rescission be granted and the eviction application eventually serves on an opposed basis before Court, it might very well happen that the matter be referred for the hearing of oral evidence or to trial. In the absence of such a request and subsequent order, the Court will have to consider the matter on the basis of the uncontested facts in the respondents' founding affidavit and the applicant's version regarding those facts which are the subject of the factual dispute, in the applicant's answering affidavit. See ROOM HIRE COMPANY (PTY) LTD v JEPPE STREET MANSIONS (PTY) LTD 1949 (3) SA 1155 (T). That may lead to a

finding by the Court that the applicant is indeed an occupier in terms of ESTA. If this is to be found, the application for eviction can obviously not be successful and the matter will have to be dealt with in terms of ESTA.

[35] Even if the Court is to find that the applicant was indeed an illegal occupier in terms of PIE at the time when the application for eviction was issued, it does not necessarily mean that the application will be successful. In the very same judgment of AGRICO MASJINERIE (EDMS) BPK v SWIERS, *supra*, on which the respondents rely for their argument that it should be found that the applicant is in fact an unlawful occupier in terms of PIE, the application for eviction in terms of PIE in that judgment was in fact not granted despite such a finding. I find the facts in that matter to be very similar to those in the current instance. I deem it apposite to quote at length from the said judgment as from paragraph 27 at 317 E and further:

“[27] Failing our outright rejection of the respondent's denial, appellant's counsel relied on an alternative submission that was first raised with clarity in the course of

argument before us and which he developed on the following lines:

- [27.1] When the respondent left the farm in 1998 she did so of her own volition, whether in response to the appellant's offer to pay R25 000 to each resident who departed voluntarily or for other reasons of her own.
- [27.2] The respondent decided to return after she was satisfied that the appellant had no intention of keeping its side of the contractual bargain or simply because it suited her to do so. In either event she did not rely on any delictual wrongdoing by the appellant.
- [27.3] In leaving the farm, the respondent ceased to occupy the premises as contemplated in ESTA. By the time that she changed her mind she knew that she had no consent from the owner to take up residence again on the farm.
- [27.4] If the respondent's initial departure from the farm arose simply from a decision by her to change her place of residence, no question of waiver of her rights under ESTA arose. Such a move was simply a termination of her occupation of her own accord and brought her ESTA rights to an end. If her acceptance of the

offer amounted to a waiver then such a waiver was by reason of the terms of s 25(1) of ESTA void unless permitted by the Act.

[27.5] The conditions for a permitted waiver are to be found in s 25(3), ie a free and willing vacation of the land by an occupier who is aware of his or her rights in terms of ESTA at the time that he or she leaves.

[27.6] A former occupier who claims not to have vacated the land freely, willingly and with knowledge of his or her rights (and, therefore, to have preserved such rights) is entitled to institute proceedings for restoration under s14. Although the express terms of that section only apply to cases of eviction, ie deprivation against the will of the evictee, in order to make sense of s 25(3), s 14 has to be given an extended application which recognises that the remedy of restoration is also open to the occupier who vacates voluntarily while unaware of his or her rights.

[27.7] The respondent was not shown to have been aware of her rights when she left the property. ESTA therefore conferred upon her a right to claim restoration in terms of s 14.

[27.8] Until that right has been adjudicated upon as provided for in ESTA and an order made for restoration, any occupation of the property by her without the consent of the owner would be a resort to self-help and hence unlawful. That, submitted counsel, was the legal consequence of an acceptance of the facts set up by the respondent. On any other interpretation, an ESTA occupier who voluntarily leaves would have more than the s 14 right of restoration that an occupier who is unlawfully evicted has. In the result the respondent ceased being an ESTA occupier and was indeed an unlawful occupier as defined in PIE.

[28] ...

[29] I think that the logic of the reasoning of counsel for the appellant is, save for one reservation the correctness of which it is unnecessary to decide, inescapable. The Legislature, in enacting ESTA, recognised the existence of a large population bound by history and circumstance to the land on which they live. It intended to provide ample protection to such occupiers who would in all probability be disadvantaged by lack of means and inadequacy of education and thus constitute an easy prey to a landowner seeking to take

advantage of them. In these circumstances, and having regard to the broad content of the rights of such occupiers arising from ss 25(1), 25(6) and 26 of the Constitution, it may well be that 'waiver' should be given a broad interpretation which includes unilateral abandonment even though the intention of the ESTA occupier is to take up permanent occupation elsewhere, provided that the occupier is aware of his or her rights under ESTA at the time of his or her departure from the land. However, even allowing the respondent the benefit of that interpretation she faces the problem that the Legislature so constructed ESTA as to institutionalise and canalise all disputes between owners and occupiers (or former occupiers) and thereby to limit the scope for conflict between them. This it sought to achieve through inter alia the restoration proceedings provided for in s 14. In particular s 14(3) affords a wide discretion to a court to make orders which are equitable and appropriate in the particular circumstances of the proceedings before it. That discretion is not one which considers only the interest of the claimant. It recognises that restoration may be impracticable or unfair to the owner. As counsel for the applicant submitted, the assertion by an evictee of an apparently unassailable right to occupy does not

mean that restoration of occupation will automatically follow. That determination lies solely in the discretion of the competent court after a consideration of all the relevant circumstances.

[30] But I think appellant's counsel was also correct in submitting that it is not only evictees whom the Legislature intended to bring within the remedies of s 14. The only way to give meaningful content to s 25(3) is to place the occupier who vacates property, otherwise than freely and willingly and with awareness of his or her rights, on a par with an evictee. It would seem that the Legislature intended that such a person should be regarded as one who was deprived 'against his or her will of residence or use of land or access to water which is linked to a right of residence in terms of ESTA. That equation is by no means unduly strained and it is consistent with the overall purpose of the legislation to which I have earlier referred because it has the effect of bringing the parties together in a controlled judicial environment in order to resolve the dispute. It also follows that resort to self-help is at odds with the means provided. The argument for the respondent is flawed in so far as it equates her claim to a right to occupy with actual occupation. The reality is that, instead of resorting to her remedies under the

statute, the respondent simply moved on to the property without the owner's consent or the authority of an order granted in terms of s 14. In doing so she was not an ESTA occupier and did not become one, but rather occupied the land without any right in law to do so. She was, therefore, an 'unlawful occupier' within the terms of PIE when the application was launched.

- [31] It follows that the applicant has established what it set out to prove. That however does not mean that eviction is the appropriate relief. The respondent's present occupation, although unlawful, is not a crime. While it is no doubt an inconvenience to the appellant, there is no evidence of greater immediate prejudice to it. The respondent is a single mother of minor children, one of whom has special needs. She appears to be indigent. The availability of suitable alternative accommodation is at least doubtful. Her continuous residence on the property extends, save for one absence of nearly two years, for about thirty-five years. Under s 4 of PIE an application for her eviction would be subject to the exercise of an equitable discretion because she had unlawfully occupied the land for a period of more than six months by the time proceedings were initiated in the Court a quo. On the facts which the application procedure requires us to accept she has a claim to

restoration of occupation under ESTA which may result in her once again obtaining legal residence and use of a portion of the farm. The equities of the situation thus justify a flexible approach which will offer her the opportunity of regularising her occupation. The order I propose recognises that the continuance of the uncertainty is undesirable for both parties and should be brought to an end as soon as possible.

[32]

[33] The following order is made:

1. The appeal succeeds. Each party is to pay its or her own costs.
2. The order of the Court a quo is set aside and replaced with the following order:
 - '1. The appeal succeeds. Each party is to pay its or her own costs of appeal. The order of Allie J is set aside. The following order is made in substitution of that order:
 - (a) The respondent is placed on terms to institute proceedings in terms of s 14(1) of the Extension of Security of Tenure Act 62 of 1997 for restoration of her residence and use of land on the

farm Dassenberg No 15, Malmesbury within four months from the date of this order. The appellant may, if so advised, bring counter-proceedings in terms of ss 9, 10 and 12 of that Act.

(b) Should the respondent fail to institute such proceedings timeously or fail to prosecute such proceedings to their conclusion with due expedition, the appellant is given leave to apply on the same papers duly supplemented for an order of eviction under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

(c) Each party is to pay its or her own costs.' (own emphasis)

[36] In the circumstances I find that the applicant has a *bona fide* defence on the merits which *prima facie* carries prospect of success.

Applicant`s default:

[37] The applicant alleges in his founding affidavit that he received a letter which instructed him that he should vacate the property. The respondents indeed attached the said letter to the eviction application as Annexure “E”. He furthermore alleges that the exchange of letters continued, which is again evident from the letters which the respondents attached to the eviction application as Annexures “G” and “H”. The applicant then further alleges in his founding affidavit in the rescission application as follows:

“10.

10.1 The exchange of letters continued until I received an application for eviction by the first respondent.

10.2 I then took it to a Community Legal Assistant in Harrismith, called Jabulani Nhlanhla to assist with the application. He promised to assist with the challenge of this application.

10.3 I never heard from Nhlanhla again until I received a warrant of execution in August 2013. I was informed that the final order was granted against to vacate the property as the employer had successfully applied for my eviction.....

10.4 I have since heard that Nhlanhla is a para-legal and he failed to represent my interest adequately. He never challenged the eviction as has been agreed.

10.5 The decision was therefore obtained by default. I never renounced my right to challenge this eviction.”

[38] In response to the aforementioned allegations, the respondents referred to a notice of intention to defend and an answering affidavit deposed to by the applicant, both dated 13 April 2013, attached to the answering affidavit of the respondents as Annexures “A” and “B” respectively, and which documents were received by the respondents’ attorney of record on 7 May 2013. With reference to these

documents, the respondents aver that it is evident that someone must have assisted the applicant with the drafting thereof. The respondents then allege that the applicant is therefore untruthful when he avers that after he instructed the Community Legal Assistant in Harrismith to assist him with the application he did not hear from him again. The respondents then furthermore contend that the applicant's failure to disclose the filing of the said documents to the Court and the absence of an explanation why the said documents had not been filed timeously, are indicative of the applicant's *mala fides*.

- [39] In my view, however, contrary to the stance of the respondents, the very existence of the said documents in fact serves as confirmation of the applicant's version that he intended to oppose the application and that he in fact sought assistance from a para-legal to do so. It is clear, also read in conjunction with the allegations in the replying affidavit regarding this aspect, that the applicant had no knowledge that the said documents had in fact been forwarded to the respondents' attorney of record. It is obvious that because the applicant received information that

the order had been granted by default, he made the (reasonable) inference that the said para-legal had failed to assist him in the opposition of the application for eviction.

[40] Further confirmation for the applicant's version that he had the intention to oppose the eviction application, is also found in the notice from the applicant to the respondents' attorney of record, dated 5 April 2013 and attached to the respondents' answering affidavit as Annexure "C", in which he confirmed that he had received the application for eviction and specifically recorded that it was his intention to oppose it. Unfortunately the applicant apparently did not file this letter at Court, but I will return to this issue when I deal with costs.

[41] The applicant further alleges that he went to the "Department of Land Affairs" in Bethlehem for assistance. The truth of his allegation is again confirmed by the response of the respondents where they confirm in paragraph 10.1.2 of their answering affidavit that their attorney of record received a phone call from one Dineo from the Department of Rural Development, Bethlehem on

28 August 2013. She enquired about the order that had been granted against the applicant and also requested that the execution of the order be stayed. On 2 September 2013 the respondents' attorney of record however informed the said Dineo that he had received instructions to proceed with the execution of the order.

[42] It further appears from the applicant's founding affidavit that an attorney and counsel were then briefed to assist him and after consultation with counsel on 23 September 2013, he was informed that this application will be served after he signed the necessary papers. These averments are again confirmed by the allegations in the respondents' answering affidavit where they in fact refer to a letter from Sesele Attorneys, dated 2 September 2013, in which the respondents' attorney of record was advised that Sesele Attorneys are acting on behalf of the Department of Rural Development and Land Reform in the current matter. In this letter the following was stated:

“We are in the process of obtaining copies of the application and founding affidavit in order to advise client whether the

provisions of ESTA were followed.

Kindly advise whether your client will agree to hold over the sale in execution until 14 September 2013 to enable us to obtain proper instructions.”

Further letters were then exchanged between the respective attorneys, one of which was dated 11 September 2013 from Sesele Attorneys, stating, *inter alia*, the following:

“We now have instructions to rescind the order granted in your client’s favour.”

In a subsequent letter Sesele Attorneys indicated that they have arranged a consultation with counsel on 23 September 2013 to apply for rescission of the eviction order. In the same letter they requested the following:

“Kindly confirm that you will at least hold over the sale in execution until you hear from us on 23 September 2013.”

Respondents’ attorneys of first instance agreed to this request and indicated in a further letter that they will hold the “matter over” until 25 September 2013.

The following is then stated in the respondents' answering affidavit:

“By the 25th of September 2013 we did not receive any further correspondence or reply from the applicant's attorney, whereafter the Sheriff proceeded with the sale of the livestock as well as the execution of the eviction order.”

[43] Although there was a further delay before the application for rescission was eventually issued on 31 October 2013, it is in my view clear that the applicant had the intention to oppose the application for eviction right from the onset of the proceedings and he, being a layman, did his ultimate best to make it materialise. The failure to have filed the initial notice of intention to oppose and the answering affidavit timeously at Court, was clearly not the applicant's mistake. After having been served with the eviction order as such and having realised that for some or other reason his intended opposition of the application did not materialise, he again took further steps to obtain assistance in this regard.

[44] In these circumstances I am satisfied that the applicant has a reasonable explanation for his default and that his application is being made *bona fide*.

[45] In view of the aforesaid findings and taking all the circumstances into consideration, I am convinced, in the exercise of my discretion, that the eviction order should be rescinded.

CONSEQUENCES OF THE RESCISSION OF THE EVICTION

ORDER:

[46] Once a judgment or an order has been rescinded, the consequences thereof fall to be set aside. In NAIDOO v SOMAI AND OTHERS 2011 (1) SA 219 (KZP) it was stated as follows in paragraph 15 of the judgment:

“Once it is conceded, as it has been in this case, that the default judgment falls to be set aside, then the consequences of the default judgment also fall to be set aside. Those consequences include the issue of the writ of execution, the writ of ejectment and the attachment of the applicant’s property, and his ejectment from the premises.”

In that matter the Court consequently set aside the default judgment, the writ of execution and the writ of ejectment. The sale in execution which was scheduled for a future date, was also cancelled. Furthermore the relevant respondents were directed to restore immediate occupation of the premises to the applicant. It was also ordered that all goods which were attached pursuant to the grant of a writ of execution were to be returned to the applicant. Also see VOSAL INVESTMENTS (PTY) LTD v CITY OF JOHANNESBURG AND OTHERS 2010 (1) SA 595 (GSJ).

[47] The aforesaid principle was also dealt with in the judgment of JASMAT AND ANOTHER v BHANA 1951 (2) SA 496 (T). The following *dicta* appear at 499 – 500 of the judgment:

“A default judgment was granted in favour of respondent against second petitioner and, as a result of a writ of execution issued to enforce such judgment, respondent obtained occupation of the premises. That judgment has been rescinded. Petitioners’ claim for relief is not based on spoliation but on the contention that they are entitled to a restoration of the *status quo* prior to the grant of the default

judgment. Respondent is presently in occupation of the premises solely by reason of the judgment which has been rescinded. That judgment is a nullity and respondent can clearly derive no advantage therefrom nor can petitioners labour under any disadvantage as a result of that judgment. In my opinion petitioners are entitled to claim that any benefit or advantage respondent has derived from the judgment or any disadvantage caused thereby to themselves should be set aside and that the *status quo* prior to the judgment be restored.

...

If a judgment by default was given against a defendant for a sum of money on which execution was levied and the sum of money was after execution paid by the messenger to the plaintiff and such judgment was thereafter rescinded, Mr Eloff conceded that the plaintiff would have no defence whatsoever to a claim by the defendant for a payment of such money.

...Petitioners are clearly entitled to an order restoring the *status quo* and ejecting respondent from the premises until such time as respondent has established a right to occupy the premises. It is true that petitioners' prayer does not seek an order of ejectment pending the determination of respondent's action, but it was in my opinion implicit in the petition that such was the relief sought."

[48] In the premises, I am of the view that the consequences of

the eviction order should *mutatis mutandis* be set aside in this application.

[49] Concerning the sale in execution of the cattle and calves of the applicant which took place on 31 October 2013, I accept that, on probabilities, those livestock have already been handed over to the buyer(s) thereof. I do not know the identity(ies) of the said buyer(s) and have no information as to whether the livestock are in fact still alive. In the circumstances I consider the appropriate order to be that the gross proceeds of the execution sale be paid over to the applicant.

[50] As far as the dwelling is concerned, I have already remarked earlier in this judgment that it appears to have consisted of an informal structure previously erected by the applicant and the mud house itself. Quite a lot of different building materials appear on the inventory of the Sheriff reflecting the goods of the applicant which he removed from the property, which inventory is attached as Annexure “F” to the answering affidavit in the spoliation application. On probabilities those materials or at least some of those

materials previously formed part of the informal structure. There seems to be no reason why the said material cannot again be re-used in re-erecting an informal structure.

[51] It is common cause that the mud house has been demolished by the respondents on the same day that the eviction order was executed by the Sheriff. I have earlier indicated that as the owner of the property, the respondents were legally entitled to demolish the mud house. From the photo of the demolished mud house, Annexure "G" to the answering affidavit in the spoliation application, the thatched roof of the mud house is clearly visible. Judged by the size of the roof, it appears that the said mud house must probably have been quite a big, spacious structure. The extensive number of the goods reflected on Annexure "F", as well as the nature of those goods, also necessitates the inference that the mud house and the informal dwelling together must have provided quite a spacious area to have accommodated all of those goods.

[52] I am now going to record certain events which are not only applicable to the order I intend making pertaining to the re-

erection of a dwelling for the applicant to stay in, but they are *mutatis mutandis* relevant to the issue of costs. At the time when the eviction application served before Court, the respondents, on their own version, were very well aware of applicant's intention to oppose the application (Annexure "C" to the answering affidavit in the rescission application). Despite this knowledge and apparently without bringing this fact to the attention of the Court, the respondents still moved for the eviction order. Only a few days after the eviction order was granted, they received the applicant's notice of intention to defend and his answering affidavit (Annexures "A" and "B" to the answering affidavit in the rescission application). The respondents then continued with the legal process by obtaining the writ of execution and by serving the said writ, as well as the eviction order, on the applicant on 14 August 2013. The exchange of letters between the parties' attorneys then followed. Applicant's attorneys specifically indicated that the applicant intends bringing an application for the rescission of the eviction order. I do keep in mind that the date of 25 September 2013 as agreed upon between the parties' attorneys passed without the applicant's attorney giving any feedback to the

respondents' attorneys. But then, despite respondents' knowledge of the applicant's intention to bring the rescission application, the eviction order and the writ of execution were executed in the absence of the applicant and in the absence of any form of prior notification to his attorneys.

[53] It took the respondents almost four months from the date of the eviction order to have it served upon the applicant. A further two weeks then lapsed before the respondents' attorneys received the first letter from the applicant's attorneys. From the date agreed upon between the parties' attorneys, 25 September 2013, it again took almost a month before the eviction order and the writ of execution were in fact executed. But then all of a sudden, immediately after the aforesaid execution of the eviction order and the writ, the respondents were in the biggest haste to demolish the mud house, knowing full well that the applicant may still bring the rescission application. The respondents gave the following explanation for this conduct in their answering affidavit deposed to by Mr Hobbs filed in opposition of the spoliation application:

“13.1 The applicant also makes use, and for some time, occupied a mud house on the property, adjacent to the informal structure. After the applicant was evicted and his possessions removed from the property, I demolished the mud house due to the fact that the Trust, as registered owner of the property, did not have any need for the house. There was also no other employees who had to occupy the mud house. In any event, the mud house was dilapidated and was a risk for any further occupation.”

[54] As previously indicated, the respondents were legally entitled to demolish the mud house. The question however arises with what motive this action was performed. Their explanation for their conduct, when seen against the background of the totality of relevant facts and events, does not make sense. Many months have passed since the eviction order had been granted, during which time the respondents apparently did not deem it urgent for the order to be served and executed so that the mud house can urgently be demolished. However, all of a sudden on 21 October 2013 the respondents considered it so urgent that the mud house be demolished that they performed the

demolition immediately after the Sheriff executed the eviction order. The aforesaid reasons advanced by the respondents for their conduct do not explain why the demolishing had to be done on such an urgent basis. Surely the mud house could have remained intact without anybody occupying it should it be accepted that it presented a risk for further occupation. It was not necessary to demolish the mud house; moreover so in circumstances where the respondents knew that an application for rescission of the eviction order was probably still forthcoming.

- [55] In the circumstances I deem it their responsibility to assist the applicant and ensure that the applicant be provided with a dwelling similar to what he had prior to the execution of the eviction order so that the *status quo ante* is restored.

COSTS:

- [56] I will first deal with the spoliation application. As I have previously stated in this judgment, the respondents did in fact resort to legal process by means of the eviction

application on the basis of which they deprived the applicant of his alleged possession of the dwelling. But, on the other hand, the respondents moved for the eviction order at a time when they already knew that the applicant intended to oppose the application. Nowhere in any of the papers is there an allegation that the respondents' revealed this to the Court before they moved for the eviction order. Knowledge of this fact could have had a crucial effect on the Court's decision whether to grant the order or not. Because it was the obtaining of this order which eventually resulted in the deprivation of the applicant's alleged possession, albeit a legal form of deprivation, I am of the view, in the exercise of my discretion, that the respondents should be penalised for their conduct. I am consequently of the view that costs should not follow the success of the application, but rather that each party should be ordered to pay his/her own costs.

[57] I now turn to the costs of the rescission-application. I have already detailed the background events which are in my view very relevant to the issue of costs in this application. Based on those events, I cannot but find that the conduct of the respondents reflects a lack of *bona fides*. In the

circumstances and in the exercise of my discretion I intend penalising the respondents with costs.

[58] I consequently make the following orders:

1. In application number 4398/2013:

1.1 The application is dismissed.

1.2 Each party is to pay his/her own costs.

2. In application number 845/2013:

2.1 The Court order authorising the eviction of the applicant from the property Rooikraal 1090, district Harrismith, Free State Province (*“the property”*) together with further relief, granted on 25 April 2013 under application number 845/2013, is set aside.

2.2 The taxation of costs under application

number 845/2013 dated 24 July 2013, as well as the writ of execution issued under application number 845/2013 on 24 July 2013, are set aside.

2.3 The first to fourth respondents are ordered to forthwith pay the gross proceeds of the sale in execution of applicant's goods, consisting of but not restricted to six cattle and six calves, to the applicant; alternatively, and in the event of such proceeds still being in the possession of the Sheriff, the Sheriff is ordered to pay the said proceeds to the applicant.

2.4 The Sheriff is ordered to forthwith return the goods of the applicant which were removed from the property on 21 October 2013, as reflected in the Sheriff's return of service and invoice dated 30 October 2013, to the applicant.

2.5 The first to fourth respondents are ordered to immediately allow the applicant back onto the property with the same rights and obligations pertaining to residence, grazing of animals and all other rights which existed before the issuing and execution of the court order dated 25 April 2013 to the extent that the *status quo ante* is restored subject to the following:

2.5.1 The first to fourth respondents are ordered to allow and assist the applicant to re-erect an informal structure in the same vicinity as where the previous structure was situated, using his own building material; and

2.5.2 The first to fourth respondents are further ordered to assist the applicant and furthermore, if need be, to provide the applicant with

building material and labour in order to enable him to re-erect a dwelling of similar size, comfort and amenities as the demolished mud house.

2.6 The applicant is ordered to file his notice to oppose the eviction application within ten days calculated from 21 February 2014 and to thereafter file his answering affidavit within fifteen days of the filing of the notice to oppose. Thereafter the rules of Court will govern the further proceedings.

2.7 The first to fourth respondents are ordered to pay the costs of the application for rescission.

C. VAN ZYL, J

On behalf of the Applicant:

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On behalf of the First to Fourth
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