Republic of South Africa

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

Before: The Hon. Mr Justice Binns-Ward
Hearing: 2-3 March 2022
Judgment: 11 July 2022

Case No. 18381/2022

In the matter between:

THAPELO MBASA SMITH	First Applicant
THE LANQUEDOC HOUSING ASSOCIATION	Second Applicant
KAREL JOHANNES PIETERSEN N.O.	Third Applicant
DOROTHEA FRANCISKA FIEGELAND N.O.	Fourth Applicant
EZRA MAPISA	Fifth Applicant
KHAYALETHU NYAKOMBI	Sixth Applicant
TANDOKAZI KONCO	Seventh Applicant

and

STELLENBOSCH MUNICIPALITY	First Respondent
ELDRED CEDRIC KLEINSCHMIDT N.O.	Second Respondent
ARTHUR MALISZO XOLA N.O.	Third Respondent
MICHAEL FRASER N.O.	Fourth Respondent
FREDEICK MARK PETERSEN N.O.	Fifth Respondent
WILLIAM CORNELIUS KEET N.O.	Sixth Respondent
DESMOND ADOLF ADAMS N.O.	Seventh Respondent

THE KYLEMORE COMMUNITY DEVELOPMENT FORUM	Eighth Respondent
THE PNIEL COMMUNITY DEVELOPMENT FORUM	Ninth Respondent
THE LANQUEDOC COMMUNITY DEVELOPMENT FORUM	Tenth Respondent
THE MEERLUST BOSBOU COMMUNITY DEVT. FORUM	Eleventh Respondent
EVA JOHANNA WILLIAMS	Twelfth Respondent
LILBURNE FREDERICK CYSTER	Thirteenth Respondent
NIGEL LOUIE SAMUELS	Fourteenth Respondent
AUBREY JOHN JACOBS	Fifteenth Respondent
CONSTANCE STUURMAN	Sixteenth Respondent
GREGORY BRENDON VILJOEN	Seventeenth Respondent
BRIAN CARLO SMITH	Eighteenth Respondent
MERLIN WINSTON ROSE	Nineteenth Respondent
THE REGISTRAR OF DEEDS, CAPE TOWN	Twentieth Respondent
THE MASTER OF THE HIGH COURT, CAPE TOWN	Twenty-first Respondent

JUDGMENT

BINNS-WARD J:

[1] This matter is not without its ironies. For the most part, it concerns an application by or on behalf of a group of persons who, having taken the law into their own hands, seek various heads of relief premised on the alleged breach by their adversaries in the litigation of their legal obligations.

[2] The applicants represent a part of the community living in the Dwars River Valley in the Groot Drakenstein area north of Stellenbosch that is impoverished and lacks access to adequate housing and related basic amenities. In the current matter they represent a segment of that community that, in the circumstances described later in this judgment, has unlawfully occupied a piece of undeveloped land, Erf 10, Lanquedoc, approximately 10 hectares in extent, near the settlement of Lanquedoc.[1]

[1] 'Lanquedoc' appears to be a locally entrenched misspelling of 'Languedoc', a name probably derived from the time when many French Huguenot refugees settled in the valley in the late 17th century. The Languedoc is an area in the south of France, so named after the Occitan language ('Langue d'Oc') that was spoken by its Provencal inhabitants before French became predominant.

[3] The land is registered in the name of the Dwars River Valley Community Development Trust (formerly called the Boschendal Treasury Trust). Several of the trustees have been joined as some of the total of 21 respondents cited in the application. However, two of the trustees, in their respective capacities as such, number amongst the seven applicants. They both reside at Meerlust Bosbou and are cited as the third and fourth applicants.

[4] The other applicants are –

(i) the first applicant, who is the chairperson of a body of persons formerly called the Lanquedoc Backyarders Committee, now called the Lanquedoc Housing Association;

(ii) the Lanquedoc Housing Association, an unincorporated association, as the second applicant;

(iii) Ezra Mapisa, the fifth applicant, who is a homeowner and businessman in Lanquedoc;

(iv) Khayalethu Nyakombi, the sixth applicant, who is a 40-year old man, currently residing at the fifth applicant's address - allegedly since the demolition (in circumstances to be described) of the structure he had erected on the contested land in which to live; and

(v) Tandokazi Konco, the seventh applicant, who is a 38-year old woman, currently living in accommodation provided for her by the fifth applicant at an unidentified address after the demolition (in circumstances to be described) of the structure in which she allegedly lived with the sixth applicant on the contested land.

All of the persons currently living in informal structures on the contested land are alleged to be members of the Lanquedoc Housing Association.

[5] The founding papers assert that the applicants brought the application in their own interest and also, in terms of s 38(b) and (c) of the Constitution '*on behalf of*

previously disadvantaged people who do not have access to formal housing and who have been ordinarily resident [in] *the Dwars River Valley for five years or more (and who accordingly qualify as Beneficiaries of the Trust*'. The first applicant added that the applicants were also proceeding, in terms of s 38(d) of the Constitution, in the public interest. In that respect he averred, without providing any substantiating particularity, that there was '*considerable public interest in ensuring that the First Respondent ("the Municipality") and the Trust comply with their constitutional and legal obligations in circumstances where their failure to do so will adversely affect the socio-economic, and other, rights of a large number of vulnerable people*'.

[6] The parties cited as respondents also included the community organisations nominated in the trust deed to represent the interests of the Trust beneficiaries in each of the five established settlements named in the deed as well as the local municipality in which the contested land is situate, the Stellenbosch Municipality. The Municipality, which was cited as the first respondent, was the only party to oppose the application. None of the other respondents played an active role in the litigation. The Master of the High Court, Cape Town (the 21st respondent) filed a notice to abide the decision of the court, and the Registrar of Deeds (the 20th respondent) filed a report for the court's information.

[7] The notice of motion was divided into two parts: Part A (interim relief, pending the determination of final relief) and part B (final relief). The hearing before me was concerned with the final relief sought in terms of part B. In part B of the notice of motion (as amended) the applicants sought orders:

> '5. Declaring the First Respondent's decision, taken on 13 November 2020, to acquire, or accept the donation of the Property [Erf 10, Lanquedoc] from the Trust, to be unlawful and invalid;
>
> 6. Reviewing and setting aside the First Respondent's decision taken on 13 November 2020, to acquire, or accept the donation of, the Property from the Trust;
>
> 7. Declaring that the First Respondent's conduct in demolishing the Sixth and Seventh Applicants' dwelling on Erf 10 Lanquedoc and evicting them without a court order, on or about 18 November 2020, to be unlawful;

8. Directing the First Respondent to design and implement clear and objective rules and policies so as to ensure that its officials and agents do not demolish, or evict any residents from, any informal dwellings which are occupied, unless such demolition or eviction is authorised by a court order;

9. Directing the First Respondent to return the building materials belonging to the Sixth and Seventh Applicants and reconstruct their dwelling on Erf 10, Lanquedoc, to the condition in which it was prior to its demolition on or about 18 November 2020;

10. Interdicting the First Respondent from demolishing any occupied structure, or from evicting anyone from a dwelling occupied by them, on Erf 10, Lanquedoc, unless authorised to do so in terms of a court order;

11. Declaring the Trust's 29 October 2020 decision to donate, or dispose of, the Property to the First Respondent, to be unlawful and invalid;

12. Reviewing and setting aside the Trust's 29 October 2020 decision to donate, or dispose of, the Property to the First Respondent;

13. Declaring that the Fourth Respondent [Mr Michael Fraser, the chairperson of the board of trustees] has:

13.1 breached his fiduciary obligations as a trustee of the Trust;

13.2 failed to exercise his powers with the care, diligence and skill reasonably expected of a person who manages the affairs of others; and

13.3 failed to properly perform the duties imposed on him as a trustee;

14. Directing the Fourth Respondent to comply with his duties and obligations as declared by this Court;

15. Directing the Twenty First Respondent to consider the evidence before this court in order to determine whether an investigation into the Fourth Respondent's conduct in terms of section 16 of the Trust Property Control Act 57 of 1988 is warranted, or whether any other steps should be taken against him;

16. Directing that the First Respondent, together with any other party who opposes the relief sought, pay the costs of this application, including the costs of two counsel, jointly and severally, on the attorney and client scale;

17. Granting further and/or alternative relief.'

[8] The heads of relief are illogically ordered in the notice of motion, for if the Trust's decision to donate the property to the Municipality were set aside, as sought in paragraphs 11 and 12, then there would be nothing for the Municipality to have accepted, and the relief sought in paragraphs 5 and 6, setting aside the decision of the local authority to accept the donation would be redundant. However, as both aspects of the case were fully argued, and as it is evident that the process of donating the land might very well be continued even if the trustees' decision in terms of which it was initiated is set aside, I shall deal in this judgment with both issues, and broadly in the order in which they were raised in the notice of motion.

[9] The Dwars River Valley Community Development Trust was established in 2006 as an incident of the disposal by Anglo American Farms Ltd (Amfarms) of its farming interests in the area and, in particular, the attendant plans by Boschendal Ltd (which, judged by its company registration number, would appear to have been registered in 2002) for the subdivision and further development of the land surrounding the historic Boschendal manor house. The information in the trust deed suggests that the disposal was to be achieved by the sale of the land to two 'developers', Kovacs 554 (Pty) Ltd and its trading subsidiary, Two Rivers Development Company (Pty) Ltd, and Boschendal Ltd. The founders of the Trust were Boschendal Ltd, Two Rivers Development Company (Pty) Ltd and Anglo American Farms Ltd (formerly called Rhodes Fruit Farms) in association with Amfarms Realisation Company Ltd.

[10] The land was vested in the Trust for the benefit of the communities of the Dwars River Valley previously disadvantaged by the racially discriminatory laws and practices of the pre-Constitutional era. According to the deeds registry information, it was donated to the Trust in 2009 by a company in the Anglo American Farms Group.

[11] The trust deed records (in cl. 2.1.11) that '(i)*n pursuit of the "development rights"* [to be sought by the acquiring developers]*..., and in accordance with advice received from the Stellenbosch Municipality, the Developers together with Amfarms jointly prepared a framework to provide a guideline for the development of the lands in total*'. The framework document was called the 'Boschendal Sustainable Development Initiative' ('SDI').

[12] According to cl. 2.1.13 of the (amended) trust deed '(t)*he Developers and Amfarms agreed that a key component of the SDI was the creation of a Trust that would ensure that the initiatives proposed in the report were wisely managed, coordinated and implemented with the benefits flowing to the various beneficiaries in a transparent manner and in a spirit of partnership with all concerned*'. Clause 2.1.14 proceeds: '*The Boschendal Treasury Trust ..., the former name of this Trust, was such a Trust. Its inception was the product of a common vision between the Founders and the communities of Lanquedoc, Kylemore, Pniel, Johannesdal and Groot Drakenstein/Meerlust. The Trust was set up to work towards a prosperous future to give to poor, to young and to old, without reservation, favour or prejudice, consistent with the dictates of this Trust Deed, the "birth-certificate" of a united and prosperous Dwars River Valley – a microcosm of South Africa*'.

[13] The object of the Trust, broadly stated, is the social and economic upliftment of the beneficiary communities and the creation and maintenance of a salubrious environment for them to live in. It is unnecessary to quote the objects set out in the trust deed in full, it is sufficient to point out that they include the 'general objects' set forth in clause 2.1.19 of the trust deed, which are –

- the sustainable economic upliftment of the Previously Disadvantaged Communities of the Dwars River Valley;

- supporting the sustainability of agricultural resources; and

- the rehabilitation and conservation of the natural and cultural environment for the catchment of the Dwars River Valley.

None of the more detailed 'objectives' stipulated in cl. 2.1.20 is expressly stated to be housing development. The types of development specifically mentioned are 'land development' (a vague expression that arguably might include the provision of housing), 'agricultural development', social development (another vague expression that might include the provision of improved housing) and 'economic and entrepreneurial development'. Clause 11.2.4 does, however, include township development on the Trust Property, provided that where such development exceeds

R2 million in value it must be undertaken in consultation with the beneficiary organisations that at any given time had appointed the trustees.

[14] It is obvious that the attainment of the Trust's stated objects would require access to significant financial capital and high-level managerial and professional expertise. The donation of land to the Trust would also impose upon it the obligation to fund the related rates and taxes. The only indication of where the Trust was to obtain the required finance is the statement in clause 2.1.18 of the trust deed that it was recorded in the SDI that the Trust would benefit from:

- Funds donated by all first and subsequent property owners from a levy on all sales and resales of properties achieved on both the Boschendal and the Berg River Lands on registration of transfer.

- Donations of land from the Developers and Amfarms on receipt of the requisite approvals for both phases 1 and 2 of the proposed development of the Boschendal Lands, and that proposed by Two Rivers for the Berg River Lands broadly as outlined in the SDI.

Clause 5 of the trust deed records confirmation by Amfarms, Boschendal and Two Rivers of their intention to make certain donations to the Trust '*upon the grant and acceptance of development rights*' and the irrevocable undertaking by Boschendal Ltd to donate '*certain moneys to the Trust in terms of Annexure "B", the contents whereof shall be read as if specifically incorporated in* [the Trust Deed]. (The copy of the amended trust deed attached to the founding affidavit lacked an annexure "B".) The evidence did not afford any insight into the Trust's financial situation, except that it is materially in arrears in respect of the rates on the contested land.

[15] The beneficiary communities were identified in the trust deed with reference to five established settlements, viz. Pniel, Johannesdal, Kylemore, Lanquedoc and Meerlust Bosbou. According to Part 2 of the trust deed, s.v. 'History', Pniel was founded in 1843. It grew up around a mission station operated on donated land on which some of the then recently emancipated slave population, which continued to supply labour to the nearby farms, congregated. Johannesdal and Kylemore were

established in the very early 20th century when Pniel began to outgrow its capacity. Lanquedoc was established in 1902, when housing was built there for workers employed by Rhodes Fruit Farms - a company established by Cecil Rhodes, who had then recently acquired the Boschendal estate as well as a number of other farms in the vicinity. The settlement at Meerlust Bosbou originated from accommodation built for migrant workers from the Eastern Cape after the Union Government acquired the surrounding land in 1944 to establish a forestry station. The forestry station, by that stage owned by SAFCOL, was closed in 2002, and the workers then living there were permitted to remain on the property rent-free on the understanding that they would eventually acquire ownership of their houses.

[16] The trust deed contains the following defined meanings for the words 'beneficiaries' and 'beneficiary organisations' used in its text:

> "Beneficiaries" means the previously disadvantaged residents of the Dwars River Valley including the villages of Kylemore, Johannesdal, Pniël, Lanquedoc and Meerlust Bosbou, and the communities of which they form part; and includes the Benficiary Organisations; and "beneficiary" shall have a corresponding meaning.
>
> "Beneficiary Organisations" means registered legal entities which represent residents of the villages of the Dwars River Valley including the villages of Kylemore, Johannesdal, Pniël, Lanquedoc and Meerlust Bosbou, which entities will be duly accredited in such manner as decided by the Trustees according to the requirements of this Trust Deed and referred to in Clause 9.2.

Pniel and Johannesdal are referred to in places in the trust deed in combination with one another, as in 'Pniël/Johannesdal'. In terms of clause 9.2 of the trust deed, there are to be eight trustees to be appointed for 48-month terms as follows:

> Two by the Kylemore Community Development Forum or similar subsequent structure approved by the community of Kylemore;

Two by the Pniël Community Development Forum or similar subsequent structure approved by the community of Pniël;

Two by the Lanquedoc Community Development Forum or similar subsequent structure approved by the community of Lanquedoc; and

Two by the Meeerlust Bosbou Community Development Forum or similar subsequent structure approved by the community of Meerlust Bosbou.

Clause 9.3 of the trust deed provides: '*Any vacancy shall be filled by the Beneficiary Organisation entitled to nominate such Trustee is it out above as soon as reasonably practicable after the occurrence of such vacancy*'. Clause 10.2 provides that the trustees are to be appointed '*by the relevant Beneficiary Organisations at their AGMs*'.

There are a number of indications in the trust deed that the trustees' powers to make what might be termed 'large decisions', such as decisions having financial implications greater than R2 million, may be exercised only '*in consultation with the Beneficiary Organisations that had appointed the Trustees at any given time*'.[2]

[17] It is clear therefore that the second applicant is not a 'beneficiary organisation' within the meaning of the trust deed, and that the beneficiary-interests of the applicants and the other individual beneficiaries they say they represent fall to be represented through the offices of '*the relevant beneficiary organisations*' charged with the election of the Trust's trustees. Clause 2.2.1.2 of the trust deed, which is quoted in the applicants' founding affidavit, confirms as much in terms: '*The beneficiaries are afforded a fair opportunity to participate in the decision-making processes of the Trust through the organisations established in each of the villages of the Valley*'. Qua beneficiaries, the applicants have no right or legitimate expectation to representation by the Municipality in respect of matters falling for decision by the trustees in respect of the Trust's property.

[2] The applicants allege that the contested land has a market value of R44 million. The allegation is founded on hearsay evidence. There is no expert evidence in support of the allegation. It is unnecessary for the purposes of this judgment to make any finding on the point, but it seems to me prima facie that, were it so minded, the Municipality would be able, having regard to s 25(3) and (4) of the Constitution, to expropriate the property to accommodate persons currently without adequate housing against payment of little or no compensation.

[18] The close proximity of the Dwars River Valley to the burgeoning Cape Town metropole has contributed to a rapid growth of the population there. According to the evidence adduced by the applicants, the predominantly Afrikaans-speaking Coloured population of the communities established in the settlements named in the trust deed has in recent years been augmented by a significant number of isiXhosa-speaking people from outside the Valley. The already established communities were to a great part already accommodated in formal housing. The new arrivals, however, lacked access to such accommodation, and most of them are reported to live in 'backyard' accommodation or in informal structures put up on hitherto unoccupied land. The evidence in this regard painted a scene that would be familiar to any observer of this country's rapid urbanisation over the last 40 to 50 years.

[19] The first applicant estimates that '*about half of all the people working in the Dwars River Valley live in informal dwellings and in backyards – predominantly in Lanquedoc*'.

[20] On a literal construction of the trust deed, any member of the previously disadvantaged community who has resided in the Dwars River Valley for longer than five years qualifies as a beneficiary, irrespective of the date of their arrival and that the place where they might live might not be in one of the five identified established settlements. Whether the parties to the establishment of the Trust foresaw the rapidly changing social circumstances in the Valley is not apparent on the papers. No-one, whether it be the representatives of the founders, or the initial trustees, or anyone from the Stellenbosch Municipality, has given evidence on the point. That some degree of housing development by the Trust was foreseen is suggested by the provisions of clause 11.2.4 of the trust deed mentioned earlier and the fact that the 10 ha piece of land owned by it that is in contention in these proceedings had been zoned as a subdivisional area for the creation of 240 residential erven. However, the provisions in the trust deed for the election and composition of the board of trustees, discussed earlier, imply that it was contemplated that the control of the trust would vest in the five long established communities. They contain no indication of any appreciation that an increasing population in the area might give rise to new or substantially altered communities and a concomitant significantly increased demand on available resources.

[21] According to the first applicant, the influx of significant numbers of new arrivals has given rise to tensions, characterised by racial undertones, between the Backyarders and the established communities. He averred that access to land and housing is 'a burning issue'. The applicants aver that the Trust is controlled by older persons from the established communities and that apart from one trustee, who left the area to live in the Eastern Cape immediately after his appointment as a trustee and has never played a role in its management, they are all from the Coloured community.[3]

[22] The Backyarders' Committee, which, as mentioned, was to change its name to the Lanquedoc Housing Association, is described in the founding affidavit as '*a movement consisting of ordinary workers and community activists, home owners and backyard renters* [comprised of] *approximately 60% to 75% Black people and the rest being Coloured persons*'. The first applicant alleged that the Association had made several fruitless attempts to engage with the Trust, represented by its chairperson, the fourth respondent, to discuss access to housing in the Lanquedoc area. He described Erf 10, as well as the adjoining 3,5 ha piece of land zoned for environmental preservation (Erf 1), as '*the obvious location for such housing*'. Somewhat inconsistently with his claim that the Trust had ignored approaches to discuss the issue, the first applicant also averred that discussions about the use of the land for housing had been ongoing between the Backyarders, the residents of Lanquedoc and the Trust for as long as he has been resident in the area, which is since 2011.

[23] The first applicant also pointed out that the Municipality had '*longstanding plans to develop housing in the area*' but that it had not acted on such plans. He had engaged personally on the matter with the current executive mayor of Stellenbosch after the Covid-related hard lockdown in early 2020. The mayor had appealed to him to discourage his constituency from moving onto the land and erecting shacks there. He said that he had complied with this request because it had always been his aspiration that the Backyarders should gain access to formal housing. This seems to imply that the first applicant appreciated that the unlawful occupation of the land for

[3] According to the first applicant, a resolution to remove the absent trustee from office has been taken by the trustees but 'the process has not been finalised'.

the erection of informal dwellings would prejudice the local authority's ability to use it for the development of formal housing. It also implies an appreciation on his part that the Municipality could provide housing on the land only if it acquired it from the Trust. He said that there were, however, already at that stage people who had been living on the land in informal structures for several years. He alleged, without providing any substantiating particularity, that these persons were '*clearly Beneficiaries as defined in the Trust Deed*'.

[24] The deponent to the founding affidavit explained that the application, which was instituted on 8 December 2020, had been '*prompted largely by an urgent meeting of the Council of the Municipality that took place on 13 November 2013*'. He described the '*primary relief*' being sought as the setting aside of the decision of the council to acquire two properties owned by the Trust and the prior decision of the Trust to donate the properties to the Municipality. The properties concerned were the aforementioned Erf 10 and the adjoining Erf 1, Lanquedoc, which, as mentioned, is a wetland area zoned for environmental preservation.[4] Quite how the setting aside of the decisions would serve the legitimate interests of the Backyarders in obtaining access to housing is not explained in the applicants' founding papers. One is consequently left with the impression that the ultimate object is to try to extricate a more favourable position for those who have chosen to unlawfully occupy the land over those of the trust-beneficiaries who are ahead of them on the local authority's housing list. The application does not identify any legal right upon which obtaining such advantage might be founded.

[25] The first applicant described the 'immediate context' of the institution of the current litigation with reference to the following chronology:

16 August 2020	A request by law enforcement officers of the Stellenbosch Municipality to the persons settled on Erf 10 to dismantle the structures in which they had been living

[4] 'Natural Environmental Zone'.

17 August 2020	Certain property of people living on Erf 10 taken without consent by municipal officials and loaded into Law Enforcement and other municipal vehicles
Probably later in August 2020 on date not specified in founding affidavit	Spoliation application launched in Stellenbosch Magistrate's Court, which was opposed by the local authority
12 October 2020	The first applicant is informed by the Municipality's Manager: New Housing, Lester van Stawel, that Erf 10 and adjoining Erf 1 were valued at R44 million and that the Trust had wanted to sell the land to the Municipality, which was unable to afford it at that price.
19 October 2020	Spoliation application by occupiers of Erf 10 dismissed '*on a technical jurisdictional point raised by the Municipality*'. The dismissal resulted in the Backyarders' patience '*snapping*'.
23 October 2020 and following weeks	Backyarders decided that the need for housing was too pressing to await the outcome of negotiations between the Trust and the Municipality and started occupying Erf 10. '*Approximately*

	between 100 and 110 structures were erected in this time'. Some of the land invaders were arrested upon a complaint by Trust, but released without charge after a court appearance on 26 October 2020.
29 October 2020	Meeting of trustees to donate the land to the Municipality. (The circumstances attending the adoption of the resolution is described later in this judgment.)
13 November 2020	An 'in-committee' meeting[5] of the council of the Stellenbosch Municipality resolved to accept the donation of the land by the Trust. (The applicants did not have knowledge of the council meeting at the time.)
15 November 2020	
(Evidence adduced by the Municipality,	
including the production of a copy of the	
attendance register suggests that the	
correct date is in fact **16 November**	

[5] In terms of the Municipality's standing rules and order for the meeting of the municipal council (published in Provincial Gazette Extraordinary 8135 dated 2 August 2019) '*in committee*' is defined to mean '*the part of a meeting of the Municipal Council during which the meeting is closed to members of the public and press, and to such municipal officials as determined by the speaker – excluding the Municipal Manager – because of the nature of the business being transacted*'.

2020.)	Meeting by the first applicant and other representatives of the Backyarders who had moved onto Erf 10 with the aforementioned Mr van Stawel of the Municipality, at which an assurance was allegedly given that no actions were planned to demolish structures on the site and that the local authority would negotiate '*a resolution to the issue*'. No mention was made at this meeting of the council meeting held on 13 November 2020.
15 November 2020 (later in the day)	
(See note above that suggests that this meeting must also actually have taken place on **16 November 2020**.)	Backyarders' meeting held at which the community were informed of the council meeting of 13 November. The meeting adopted a resolution '*that we should put a stop to this as we could not allow history to repeat itself*'. Attempts to engage with the Mayor and local councillor on the issue were unproductive, as they were unwilling to give out any information.
16 November 2020	
(Or later; see notes above re 15	

November.)	A further meeting of Backyarders was held at which it was noted that: • The Municipality cannot make housing available on private land as the land belongs to the community and should not be transferred to the Municipality. • The arrear rates outstanding on the properties in the amount of approximately R640 000 was a matter of concern. • That there was a need to engage with the Municipality about the provision of water for the people on Erf 10. • That was a '*need to prevent outsiders from coming in and erecting structures on the land*'.
18 November 2020	Municipal law enforcement officers, assisted by the Red Ants and the SAPS public order policing unit, demolished structures on Erf 10 that were believed to be unoccupied. According to the applicants, the demolished structures included the structure of the sixth and seventh applicants that was occupied.

19 November 2020	The applicants' attorneys addressed a letter to the Municipality objecting to the manner in which the council decision of 13 November 2020 had been taken and demanding an undertaking that the Municipality would refrain from proceeding further with the transaction.
20 November 2020	The Municipality's attorneys responded to the applicants' attorneys stating (i) the properties had been earmarked for housing for '*pre-determined beneficiaries living in the Dwars River community*' and (ii) the Trust was in talks with the Municipality in connection with the donation of the land.
20 November 2020	Stellenbosch Municipality obtains an order in *ex parte* proceedings in the High Court interdicting the erection by any unauthorised persons of structures on the properties and authorising the demolition of unoccupied structures on the land. The order operated as an interim interdict pending a return date of 11 December 2020.

[26] According to the minutes of the meeting of trustees of the Trust ostensibly held on the evening of 29 October 2020, the item on the agenda was 'The Transfer of the Dwars River Valley Community Trust's Housing Land to the Stellenbosch Municipality'. The minutes are in Afrikaans. They do not make sense in all respects if

construed literally, but their essential import is clear enough. What follows is my translation of them into English:

'Mr. Fraser [the fourth respondent] explained the purpose of this special meeting and the urgency of it. The matter of the transfer of the land to the municipality for protection against unlawful occupation was then discussed in depth. The following resolutions were adopted unanimously:

1. At the proposal of Mr Nigel Samuels [the 14th respondent], chairperson of the Lanquedoc Community Development Forum [the 10th respondent], and seconded by Mr Lilburne Cyster [the 13th respondent], chairperson of the Pniel Community Development Forum [the 9th respondent], it was determined that Mr Mike Fraser will be the person with authority to negotiate on behalf of the Trust and Community and to sign all documents.
2. At the proposal of Ms Constance Stuurman [the 16th respondent], member of the Lanquedoc Community Development Forum [the 10th respondent], seconded by Mr Brian Smith [the 18th respondent], chairperson of the Dwars River Valley Community Development Forum, it was determined that the Trust may transfer the Dwars River Valley Community Trust's housing land to the Stellenbosch Municipality for immediate protection and for use for housing purposes on behalf of the Community of the Dwars River Valley. It was also decided that each Community Development Forum must attach written confirmation in support of this decision.
3. The transfer of 13.5 ha of Dwars River Valley Community Trust housing land to the Stellenbosch Municipality shall be subject to the following conditions:
    a. That it will be used exclusively to provide houses to the "Beneficiaries of the Dwars River Valley Community Trust as provided for in the "AMENDED TRUST DEED IN RESPECT OF THE DWARS RIVER VALLEY COMMUNITY DEVELOPMENT TRUST (formerly known as the Boschendal Treasury Trust)".
    b. The Dwars River Valley Community also holds 69 ha. of agricultural land, which must be developed to provide employment opportunities, food security and sound human dignity to our

community. Stellenbosch Municipality, in cooperation our Trust, must provide social development services and local economic development including, amongst other things, a skills development programme.

c. Stellenbosch Municipality, in cooperation with our Trust, will recruit partners for [? the promotion of] local economic empowerment in our Valley.

d. The Dwars River Valley Community Trust has a spacious office in respect of which monthly service charges have to be paid to the Stellenbosch Municipality. Our Trust has been served with a summons from the Stellenbosch Municipality for outstanding arrears. There are also the other usual running accounts to be serviced to maintain the Trust's operational activities.

We trust that we can hereby reach a meaningful agreement with the Stellenbosch Municipality for the benefit of the future existence and advancement of our community.'

[27] It follows clearly from the terms of the resolution that the decision to donate the land to the Municipality was subject to confirmation by all of the community development forums accredited to appoint the trustees of the Trust. There seems to be no basis to question that it was within the powers of the trustees, subject to obtaining the agreement of the relevant beneficiary organisations, to donate the land on the proposed conditions. The conditions that limit the use of the donated land for housing purposes for the benefit of the Trust's beneficiaries reflect that the donation is intended to achieve an object consistent with the provisions of the trust deed, and making a donation is something that '*a natural person having full capacity would be entitled to do'*. The donation of the land by the Trust is accordingly something that would fall within the powers of the trustees in terms of clause 11.2.20 of the trust deed.

[28] The applicants' founding affidavit relates that in the affidavit filed by the Municipality in support of its abovementioned application brought on 20 November 2020 for an interdict against the persons invading Erf 10, the acting municipal manager made the following averments:

> '33. The engagements between the Trust and the Municipality culminated in a meeting of the Trust on 29 October 2020 to formulate and pass a resolution to conclude a donation agreement between the Trust and the Municipality in respect of the properties. The Trust's meeting was held, and a resolution was passed approving the donation of the properties to the Trust (*sic*) [? the Municipality].
>
> 34. The Municipality was presented with a resolution and a donation agreement was then drafted and presented to the Municipal Council. A copy of the draft donation agreement is attached and marked "SM 06".
>
> 35. However, subsequent to the Trust's meeting and the draft donation agreement certain members of the Trust has (sic) contested the validity of the resolution and in turn the draft donation agreement. The Municipality will continue to engage with the Trust to resolve this administrative hurdle ... .'

[29] The founding affidavit set forth the following grounds of review (some of them stated repetitively) in support of the relief sought in paragraphs 5, 6, 11 and 12 of the notice of motion:[6]

> 1. That the municipal council's decision to accept the donation of land from the Trust was procedurally unfair in that the council had been obligated by ss 3 and 4 of the Promotion of Administrative Justice Act 3 of 2000 ['PAJA'] and ss 4(2)(e), 5(1)(a)(i) and 16(1)(a) of the Local Government: Municipal Systems Act to precede any such decision by (i) a public enquiry or (ii) a notice and comment procedure or (iii) another 'fair or appropriate procedure', and the council had failed to comply with such obligation. In this connection it was alleged that the council's decision 'materially and adversely affected the rights and legitimate expectations of the Applicants and those represented by them'. (The alleged rights and legitimate expectations in question were not specifically identified.)
>
> 2. That the decision infringed the applicants' rights and those of the persons represented by them to '(i) access to land and housing and security of tenure in terms of ss 25(5), 25(6) and 26 of the Constitution, together with

[6] Quoted in paragraph [7] above.

the [unspecified] legislation enacted to give effect to these rights, (ii) be consulted in a meaningful fashion in relation to housing developments which affect them; (iii) have the needs of the poor prioritised in housing development, and (iv) procedural fairness in administrative decisions which affect their rights and legitimate expectations'.

3. That, having regard to the Municipality's evident intention to develop the land to provide 240 housing units in accordance with a zoning and subdivision plan approved in October 2002 (annexure TMS 17 to the founding affidavit), the decision would result in it not being possible to accommodate the 10 000+ trust beneficiaries on the donated land. (In this regard, it was averred by the first applicant that very few of the beneficiaries who are represented by the applicants are on the Municipality's housing waiting list as '(t)*hose we represent generally have come to live in the area more recently than most of the beneficiaries, and those of us who are on the list are not very high up on it*.' The first applicant submitted that '(i)*t is in the interest of the Applicants, and those they represent, for housing opportunities to be developed on the land in terms of the broad, equitable principles in the trust deed, which was established in order to work towards "a prosperous future to give to poor, to young and to old ... the "birth certificate" of a united and prosperous Dwars River Valley" and to promote the "socio-economic advancement, upliftment and development" of Beneficiaries. If housing opportunities are allocated in terms of the Municipality's housing policies, priority on the Municipality's waiting list will play a large, if not exclusive, role in determining who obtains housing on the land. This would be to the detriment of those Beneficiaries who do not live informal housing who would be prioritised if housing were to be allocated to those in greatest need in terms of the Trust Deed*.')

[30] The applicants contend that the Municipality's 13 November 2020 decision is reviewable in terms of s 6(2) of PAJA on one or more of the following grounds (I quote from para 149 of the founding affidavit):

1. Non-compliance with a mandatory and material procedure prescribed by an empowering provision;
2. The action was procedurally unfair;
3. The action was materially influenced by an error of law;
4. Relevant considerations were not taken into account;
5. The action contravenes a law or is not authorised by an empowering provision;
6. The action is not rationally connected to the purpose for which it was taken or the purpose of an empowering provision; and
7. The action is so unreasonable that no reasonable decision maker would have taken it particularly having regard to the municipalities obligation to act reasonably in implementing socio-economic rights.

The contentions were advanced baldly, without identification of the 'empowering provision(s)' or the prescribed procedure(s) relied upon. Ground 5 is contradictory of the preceding grounds, for it appears to suggest the absence of any provision 'empowering' the decision, and instead alleges that taking it contravened an (unidentified) law.

[31] The affidavit does not explain how the acquisition by the local authority of land for housing purposes might be unreasonable in the sense alleged, or not rationally connected to the obligation on the state, in terms of s 26(2) of the Constitution, to take measures within its available resources to achieve the progressive realisation of the right of everyone to have access to adequate housing. This is one of the paradoxical features of this case remarked on at the outset of this judgment.

[32] The import and significant historical context of s 25 of the Constitution and its interrelationship with s 26 have been described in a number of authoritative decisions. The judgment of the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) is amongst the more prominent. Sachs J there identified three salient features of the way the Constitution approaches the interrelationship between land hunger, homelessness and respect for property rights. The first of them bears on the applicants' attack on the Municipality's decision to accept the donation of the land, the other two bear on the approach to the difficult question of evictions.

[33] As to the first feature, Sachs J expressed the position as follows: '*In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the State or by landless people*.'[7]

[34] As much as one empathises with the frustration experienced by the significant part of the country's population which does not yet enjoy them at the slow pace of delivery of the basic amenities and services that the Constitution promises,[8] the hard realities are that, on the one hand, the unilateral seizure of land by landless people like the applicants and those they represent undermines orderly land reform and thereby thwarts the realisation of the Constitution's social project, whilst on the other hand, the State cannot fulfil its obligations in respect of land reform and providing access to housing without acquiring land, as the Municipality, by its willingness to accept the contemplated donation, was endeavouring to do in the current matter. The applicants' invocation of sections 25 and 26 of the Constitution therefore seems to me to be misconceived in the circumstances.

[35] Inasmuch as the applicants seek the review and setting aside of the council's decision in terms of s 6 of PAJA, the Municipality argued that the decision of the municipal council to accept the Trust's offer to donate the land does not fall to be characterised as 'administrative action' within the meaning of that statute. Implicit in the argument was that the decision fell rather to be characterised as 'executive action'. The executive powers or functions of a municipal council are expressly excluded from the ambit of the defined meaning of 'administrative action' in s 1 of PAJA. Consequently, if the Municipality's contention is well founded, the council's decision is not amenable to what the Constitutional Court, in *Minister of Defence and*

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[7] *Port Elizabeth Municipality* supra, in para 20.

[8] Cf. *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) in para 36 and *Thubakgale and Others v Ekurhuleni Metropolitan Municipality and Others* [2021] ZACC 45 (7 December 2021) in para 6.

Military Veterans v Motau and Others,[9] described as 'a higher level of scrutiny in terms of PAJA',[10] whilst nevertheless, of course, still being '*subject to the less exacting constraints imposed by the principle of legality*'.[11] If the council's decision was not 'administrative action' as defined, the applicant's reliance on sections 3, 4 and 6 of PAJA would be misplaced. As the Constitutional Court noted in *Motau*, '(t)*he concept of "administrative action", as defined in section 1(i) of PAJA, is the threshold for engaging in administrative-law review*'.[12]

[36] It is well recognised that drawing the distinction between executive action and administrative action '*is often not easily made. The determination needs to be made on a case-by-case basis; there is no ready-made panacea or solve-all formula*'.[13] Conduct of an administrative nature that involves the implementation of legislation is generally characterised as 'administrative action', whereas conduct that entails the formulation of policy or is closely related to the formulation of policy is treated as the exercise of executive power.[14]

[37] In the current matter, the applicants have sought to bring the council's decision within the ambit of 'administrative action' by characterising it as a procurement matter of the sort contemplated in the overarching provisions of s 217 of the Constitution. Such matters, which in respect of local authorities, are regulated in detail under the Local Government: Municipal Finance Management Act 56 of 2003,[15] are concerned with the disposal of by a local authority of capital assets and the procurement of goods and services. They are of a typically bureaucratic character that is quite distinguishable, in my view, from the nature of the council decision in issue in the current case, which was whether or not to accept the offer of a donation of land to be used for a particular purpose.

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[9] [2014] ZACC 18 (10 June 2014); 2014 (8) BCLR 930 (CC); 2014 (5) SA 69 (CC).

[10] In para 27.

[11] Id.

[12] In para 33.

[13] Id, para 36.

[14] Id, para 44.

[15] See especially s 14 and Part 1 of Chapter 11.

[38] The decision in issue in the current case involved a number of higher-order policy issues. The most obvious one was whether the Municipality should accept the land for housing purposes subject to the conditions attached to the proposed donation. Those entailed, amongst others, the writing off of a considerable sum in arrear rates. They also entailed assuming the burden of addressing the problem arising from the fast-increasing unlawful occupation of the land. Those incidents of the decision required decision making that was beyond the powers of the local authority's functionaries charged with administering legislation. This much was demonstrated by the fact that it was necessary to convene a council meeting for the purpose of making the decision; it was not within the competence of any functionary of the Municipality to make it. This is not surprising.

[39] The matter of the acquisition of land to provide free or subsidised housing in furtherance of the discharge by the local authority of its obligations in terms of s 26(2) of the Constitution is a question that would ordinarily fall to be addressed within the parameters of a municipality's integrated development plan. Integrated development plans are unmistakeably policy framework documents. Housing is recognised in the preamble to the Housing Act 107 of 1997, with reference to the state's obligations in terms of s 26 of the Constitution, as '*a vital part of integrated developmental planning*'.

[40] In terms of s 9 of the Housing Act, '(e)*very municipality must, as part of the municipality's process of integrated development planning ...*' amongst other matters '*identify and designate land for housing development*'. '*Housing development'* is specially defined in s 1 of the Act to mean '*the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will, on a progressive basis, have access to – (a) permanent residential structures with secure tenure, ensuring internal and external privacy and providing adequate protection against the elements; and (b) potable water, adequate sanitary facilities and domestic energy supply'*.

[41] There is no direct evidence on the point, but the circumstances, including the terms of the trustees' resolution of 29 October 2020, suggest that the offer of the donation of the land in this case was precipitated by circumstances related to the invasion of the land in October 2020, and that its acquisition by the Municipality would not have been provided for in the integrated development plan. The acquisition of the land was accordingly an issue that fell to be considered as, in effect, an ad hoc adjunct to the plan that was in place.[16]

[42] I was not referred by counsel to any legislation that regulates the acceptance by local authorities of donations of land. I am satisfied, however, that such donations do not fall within the aegis of s 217 of the Constitution or the provisions of Municipal Finance Management Act. That a municipality has the power to accept such donations to assist in the furtherance of the achievement of its constitutional objects seems to me to flow from the provisions of s 156 of the Constitution.[17] In my judgment, the municipal council's decision was an instance of the exercise of its executive power in respect of development planning and housing policy. It was not administrative action.

[43] That leaves for consideration whether the impugned decision by the municipal council offended against the principle of legality. I have already found that the decision was one that fell within the ambit of the council's powers. The applicants' attack is directed, however, at its alleged procedural shortcomings.

[44] As mentioned above in the chronology given in paragraph [25], the council meeting at which the decision was taken was held 'in committee'.[18] Section 20 of the Local Government: Municipal Systems Act 32 of 2000 provides that meetings of a municipal council are open to the public and that the council may not exclude the

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[16] There is nothing objectionable, and indeed much that is commendable, in acknowledging and upholding a municipality's ability to adjust its planning provisions to deal with and optimise on changed circumstances or unexpected opportunities; cf. *Modderklip* supra, at para 49.

[17] I refer in particular to s 156(1)(b), which provides that '*a municipality has executive power in respect of, and has the right to administer – (b) any ... matter assigned to it by national or provincial legislation*' and s 156 (6), which provides: '*A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions*'.

[18] See note 5 above for the defined meaning of '*in committee*'.

public except when it is reasonable to do so having regard to the business being transacted, or when a by-law or resolution compliant with the general requirements as to openness authorises the council to close the meeting to the public. The Municipality's standing rules and orders for the conduct of council meetings provide, in rule 3.2.3, that the council will meet in committee when discussing 'the Municipality's intention to purchase or acquire land or buildings'. It follows that the closed meeting was held in accordance with the standing rules. There was no attack on the rules in the application and, understandably in the circumstances, the applicants' counsel did not in their oral submissions press the complaint articulated in applicants' papers against the closed meeting. The complaint would appear to have been made ignorant of the relevant provisions of the standing rules.

[45] The applicants' counsel did, however, persist with the argument that the decision was unlawful on the grounds that it had not been preceded by public consultation.

[46] There is no doubting the duty of municipal councils to provide open, democratic and accountable local government. Section 152 of the Constitution provides, in subsection (1), that the objects of local government include providing democratic and accountable local government for local communities and encouraging the involvement of communities and community organisations in matters of local government. Subsection 152(2) provides that a 'municipality must strive within its financial and administrative capacity to achieve the objects set out in subsection (1)'. These provisions are echoed in sections 4, 5 and 16 of the Local Government: Municipal Systems Act 32 of 2000, on which the applicants relied in support of the contention that they and the others they represent should have been consulted before the municipal council took its decision to accept the Trust's proposal concerning the donation of some of the Trust's land.

[47] The effective and efficient government of municipalities would be well-nigh impossible, however, if municipal councils were required to precede every matter requiring decision by a process of public consultation. It is no doubt because the framers of the Constitution were cognisant of that reality that the objects of local government in s 152 are not expressed in terms that would require such a process.

Similarly, the provision in s 4(2) of the Systems Act concerning the duty of municipal councils to encourage the involvement of the local community is made subject to 'practical considerations'. It is only in respect of the delivery of municipal services and the available options therefor that there is express provision (again subject to financial and administrative capacity constraints and practical considerations) for the council to consult the local community.

[48] Encouraging the involvement of the local community is not a concept that requires the Municipality to consult the community in respect of each and every decision that needs to be made by the council. A municipal council is elected to govern. There are many decisions that fall to made by representative government in respect of which its accountability is political. If the community does not approve of them, its remedy is to vote for a change of government at the next election. The role of public participation in the law-making process (discussed in judgments such as *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 204-207) is quite distinguishable from that involved in decisions in the exercise of executive power of the nature involved in the current case. Law-making involves decisions that impose obligations on the community or regulates the exercise by people of their rights.

[49] The applicants' counsel did not refer in their submissions to any statutory provision that imposed a mandatory requirement that the municipal council conduct a process of public consultation in this matter – the concept referred to in s 27(1) of the Municipal Finance Management Act as '*compulsory consultation processes*'. Accordingly, whether the decision can be stigmatised as unlawful depends on whether, in the given circumstances, the council's adoption of the impugned resolution was constitutionally incompatible. In my view, constitutional incompatibility in the posited sense would be shown if it was demonstrably unreasonable for the council not to have conducted a public consultation process before it took the decision.

[50] The applicants have failed to show that the council's decision was unlawful by reason of it not having been preceded by a public consultation process. The decision to accept the proposed donation did not adversely affect anyone's rights in a material

way. It seems to me that the only potentially adverse effect on the local community's rights or legitimate expectations that has been demonstrated is that attendant on the writing off of the Trust's rates liability in respect of the donated land. But the amount involved, although significant, is in all probability immaterial in the context of the Municipality's total budget, especially when considered against the expenses that would probably be involved in expropriating the land in question or other land in the area for the purpose of providing the housing that is obviously needed there. On the contrary, there is no evidence to suggest that the acquisition of the land by the Municipality on the terms suggested could do anything other than to assist in its ability to discharge its constitutional responsibilities under s 26 of the Constitution.

[51] It is relevant in this regard to have regard to the fact that the terms of the proposed donation (which are set out in the Trust's resolution, quoted in paragraph [26] above) provide that the land shall be used for the provision of housing to the persons who are beneficiaries of the Trust and also that its implementation is dependent on the written confirmation by each community development forum in support of the decision. As explained earlier, it is evident from the structural provisions in the trust deed that the beneficiaries' interests vis-à-vis the Trust were to be represented through the community development forums established in respect of the five established settlements that the founders of the Trust had in mind when conceiving of the Dwars River Valley communities to be benefitted by the establishment of the Trust. There is no detail in the papers as to the constitution of the community development forums in question, but it is probable that they are the type of representative organisation referred to in the regulations made under the Systems Act for the provision of guidelines for the establishment and operation of municipal ward committees.[19] It follows that the municipal council could accept that a process of internal consultation within the beneficiary communities would precede the execution of the contemplated deed of donation.

[52] The applicants' counsel sought to buttress their argument that the Municipality's decision should have been preceded by a process of consultation by

[19] See GN965 of 2005 published in GG 27699 of 24 June 2005. Reg 5(3) provides for the delegation by municipalities to ward committees of the powers and duties, amongst other matters, to '(e)*nsure constructive and harmonious interaction between the municipality and community through the use and co-ordination of ward residents' meetings and other community development forums*'.

reliance on s 2(1) of the Housing Act, which provides, amongst other things, that all spheres of government must '*consult meaningfully with individuals and communities affected by housing development*'. I agree with the submission by the Municipality's counsel that this duty to consult goes to consultation concerning matters such as the nature of the housing to be provided, the character of the environment to be created in the provision of the housing and the allocation of the housing, and that it does not apply to a decision whether the Municipality should accept a donation of land that is suitable for use for housing development. The requirement of meaningful consultation in s 2(1)(b) of the Housing Act is comparable to the requirement in s 4(2)(e) of the Systems Act in respect of the provision of services.

[53] The matter of *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28 (8 October 2009); 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) provides analogous support for the conclusion I have reached in respect of s 2(1) of the Housing Act. In *Mazibuko*, the local authority's decision to provide water to residents in Soweto by means of either a metered system of indoor supply, alternatively, if the householder elected not to accept such means, by way of an outdoor standing tap, was characterised as having been made in the exercise of executive power, and not therefore not subject to the duty of consultation provided for in ss 3 and 4 of PAJA. The *implementation* of the decision, however, was held to be subject to the consultation provisions in s 4(2)(e) of the Systems Act. So, in the circumstances of the current case, the duty of consultation provided in s 2(1) of the Housing Act goes to the manner in which housing development is implemented (i.e. the administrative aspect of the undertaking), not to a decision whether to acquire land so that the local authority can discharge its obligation to undertake housing development on a progressive basis (i.e. the policy aspect of the undertaking).

[54] The inappropriateness of the current litigation by the applicants on the applicable facts is in any event highlighted by its intervention in the process before the consultative process embodied in the Trust's resolution could be undertaken. The interim interdict obtained by the applicants, without opposition, in terms of Part A of the notice of motion, has stalled the consultative processes built in by the terms of the Trust's resolution from being undertaken. Therein lies a further paradox in the course the applicants embarked upon and the grounds upon which it was pursued.

[55] The first applicant gave a number of grounds upon which the decision of the Trust to donate the land to the Municipality was invalid. It is unnecessary to set them out, for, on the uncontroverted evidence, it is manifest that the decision to donate the land to the Municipality was taken in an irregular manner. The irregularities might to some extent be explained because the decision was taken in exigent circumstances. The trustees who were party to it appear to have been concerned, under the pressure occasioned by the large-scale October land occupation by the persons represented by the applicants, to take measures for the protection and development of the resource for the purpose for which it was held. All the signs point to the decision having been taken because the trustees felt that it was beyond their capacity to deal with the lawlessness themselves.

[56] The irony of the applicants' complaint that the trustees' conduct was inconsistent with the trustees' obligation to '*ensure ... that the initiatives the Trust embarks on are wisely managed, coordinated and implemented so that the resultant benefits devolve to beneficiaries and stakeholders "in a transparent manner and in a spirit of partnership of partnership with all concerned"*' in the face of a land incursion by a small section of the community, some of whom were confessedly not even beneficiaries of the Trust, appears to have been lost on them. It is another of the paradoxical features of the case that persons who are beneficiaries or potential future beneficiaries of the Trust should complain about the trustees' failure to comply faithfully with the decision-making formalities prescribed in the trust deed when they themselves have unilaterally and unlawfully appropriated the Trust's property, thereby frustrating the trustees' ability to be able to discharge their functions in the manner contemplated by the trust deed.

[57] The applicants' allegation that the trustees' decision of 29 October 2020 was irregularly taken is founded on the evidence of two of the trustees, who are the third and fourth applicants, respectively. They are the trustees elected to the board of trustees by the Meerlust-Bosbou Community Development Forum. Both of them aver that they were given no notice of the meeting of trustees.

[58] The third applicant averred that on 29 October 2020 he received a telephone call from the chairperson of the trustees (the fourth respondent), who asked to meet

with him. They met at the side of the road outside the community hall at Meerlust, where the chairperson informed him that he and the other trustees had reached an agreement with the Municipality 'to build houses for people'. The chairperson held out a piece of paper and, without explaining the content, asked the third applicant to sign it. The third applicant saw that the document reflected the names of the trustees and signed it without knowing that there was to be a trustees' meeting later that evening. The third applicant has not denied that the signature against his name on the attendance register for the trustees' meeting on 29 October was his, so one must infer that the attendance register, included as part of annexure TMS4 to the applicants' principal founding affidavit, was the document he admits to having signed. It is difficult to credit, if, as he claims, he noted that it listed the trustees' names, that he did not also see the document's heading in bold typescript: 'MEETING ATTENDANCE REGISTER'.

[59] The first applicant, whose averments in this regard were confirmed in a confirmatory affidavit by the third applicant, stated that had the third applicant been aware of the fact that it was intended to donate the land to the Municipality he would have attended the trustees' meeting and opposed the proposal as he was of the opinion that it was not in the best interest of the community to give away valuable property. On the applicants' version, the chairperson must have given the third applicant some indication of the purpose for obtaining his signature because the first applicant described that the third applicant's '*understanding was simply that the Trust was contemplating an agreement and negotiations with the Municipality pertaining to the development of housing*'.

[60] The fourth applicant averred that she was advised by the third applicant on 29 October 2020 that the chairperson of the board of trustees was looking for her. She said that she had lost her cellphone and was consequently not readily contactable. She told the third applicant to tell the chairperson that she worked at Leeu Estate in Franschhoek and that she arrived home every day at 17h00 should the chairperson wish to speak to her. The fourth applicant did not explain how the third applicant was able to speak with her during the day if she was not contactable. She did not hear from the chairperson and, it would appear, made no attempt to contact him. She said that it was only 'on or about 23 November 2020' that (in circumstances she did not

describe) she learned that the attendance register in respect of the trustees' meeting held on 29 October 2020 reflected that she had tendered her apologies. She stated that she would never have agreed to the donation of the trust's property to the Municipality.

[61] The trust deed provides (in clause 11.6.2) that '*sufficient notice (depending on how urgently the meeting must be held)*' of any meeting of trustees must be given to every trustee. Notice falls to be given at the '*business address*' of the trustee '*as recorded in the records of the Trust*'. The deed further provides (id.) '(t)*he temporary absence of a Trustee from such address when the notice is given shall not render the notice ineffective'*.

[62] In the context of their allegation that they were not given notice of the meeting it would, in my view, have been expected of the third and fourth applicants to testify in their affidavits as to the particulars of their recorded addresses for the purposes of receiving notice of trustees' meetings and to aver expressly that notice of the meeting had not been given at that address. It is plain that the provisions of the trust deed expressly catered for the situation that a trustee might not be available to receive actual notice. They provided for the sort of situation described by the fourth applicant, in which she was effectively non-contactable and on learning that the chairperson was trying to contact her did nothing to find out why. They provided that that should not be fetter the trustees' ability to discharge their functions in the absence of a trustee who did not have actual notice of a meeting, provided, of course, notice had been given to their recorded address.

[63] I am constrained to record, in the face of the application that the court should direct the Master to investigate the suitability of the chairperson to serve as a trustee, that I have not found the evidence of the third and fourth applicants to be satisfactory in material respects. That the third applicant should sign a document, which on his own evidence concerned the business of the trust, without bothering to apprise himself properly of its content and import does not speak well to his own fitness to discharge his fiduciary responsibilities. The fact that the third applicant's signature appears on an attendance register for the 29 October 2020 trustees' meeting supports the probability that the fourth respondent saw him that day to give him

notice of the urgently convened meeting. It is inherently improbable in the circumstances that the fourth respondent would not have informed the third applicant of the purpose of the meeting.

[64] There are also improbabilities in the fourth applicant's evidence. If she was as difficult to contact as her evidence concerning the consequences of the loss of her cellphone would imply, it follows that the third applicant must have had to go out of his way to get hold of her. It is improbable he would done so if he did not regard it as important to do so. The only matter of importance suggested by the evidence was the convening at short notice that evening of an urgent meeting of trustees. I find it improbable, if the third applicant told the fourth applicant that the chairperson was trying to track her down, that he would not also have told her what it concerned. On the fourth applicant's version, she does not even appear to have enquired what it was about, or thereafter to have shown any interest in finding out. All of this I hold to be inherently improbable.

[65] Had the question of the validity of the trustees' decision turned only on the question of effective notice of the meeting to the third and fourth applicants I would have had earnest reservations about whether a proper and persuasive case had been made out on the founding papers. As it happens, however, it is clear on those papers that the trustees' meeting was not quorate. It appears that the process of replacing redundant trustees with newly elected ones had not been formalised and that the existing letters of authority from the Master, dated 26 January 2018, are outdated. The persons attending the meeting may or may not have been fairly representative of the beneficiary organisations, but even if they were effective representatives of three of the four established communities with the right to elect trustees, they could not validly transact the Trust's business without authorisation in writing from the Master, as provided for in s 6 of the Trust Property Control Act 57 of 1988; cf. e.g. *Lupacchini NO and Another v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at para 3. The provisions of clause 9.4 of the trust deed echo the statutory requirement.

[66] It follows that the application for the setting aside of the resolution must be upheld, and that the relief sought by the applicants in terms of paragraphs 11 and 12

of the notice of motion will be granted substantially in the terms prayed. (That an invalid resolution of the character in issue purportedly adopted by the trustees of a trust is amenable to judicial review under the common law has recently been confirmed by the appeal court in *Trustees for the time being of the Legacy Body Corporate v Bae Estates and Escapes (Pty) Ltd and Another* [2021] ZASCA 157 (5 November 2021); [2022] 1 All SA 138 (SCA); 2022 (1) SA 424 (SCA) from para 33.) I should make it clear, however, that the setting aside of the purported resolution does not imply that a meeting properly constituted for the purpose could not lawfully decide to make the donation to the Municipality contemplated in the vacated 29 October 2020 resolution.

[67] The invalidity of the purported decision of 29 October 2020 means that the matter considered by the municipal council on 13 November 2020 was a chimera. The concept that the council determined in principle to approve did not cognisably exist. There was no need for the applicants to apply for the setting aside of the council's decision if they succeeded, as they have done, in impugning the trustees' resolution that informed it. The Municipality, understandably, has refrained from taking a position as to the validity of the trustees' decision. The first respondent has at no stage suggested that the council's resolution could have substantive effect if, as a consequence of the setting aside of the trustees' decision, there was no donation to accept. In the circumstances, the relief sought in terms of paragraphs 5 and 6 of the notice of motion is redundant. As explained at the outset of this judgment,[20] I have dealt with the issue of the council's decision only because it was addressed at some length in the argument of the case and for the assistance of the parties should the trustees subsequently reaffirm the idea of donating the land to the Municipality in a legally effective manner.

[68] I am not willing to make the orders sought by the applicants in terms of paragraphs 13-15 of the notice of motion. In my view, a clear case of misconduct on the part of the fourth respondent has not been made out on the papers. On the contrary, it is evident that he acted in what he considered to be the best interest of the Trust and its beneficiaries in what he reasonably believed to be an emergency.

[20] In paragraph [8].

There are indications that his actions and those of the other persons who participated in the 29 October 2020 meeting may enjoy majority support amongst the beneficiary organisations. An order by the court directing the Master to investigate the fourth respondent's conduct would carry the implication that the court considered that a prima facie case for his removal had been made out. If the applicants consider that there is a basis for the fourth respondent's removal, they are at liberty to institute the processes necessary to attain that without the assistance of the court. They do not require the imprimatur of a court order to ask the Master to undertake an investigation.

[69] There is also nothing to stop the third and fourth applicants, if they are able to recruit the support of their fellow trustees, themselves achieving the removal of the fourth respondent using the procedure provided in clause 9.7.6 of the trust deed. Any trustee is entitled to have a meeting of trustees convened for any purpose. Furthermore, any of the beneficiary organisations is entitled to require the trustees to call a special meeting of the Trust for any purpose.

[70] The applicants have not explained why they could not have effective resort to any of the forementioned extra-curial or domestic remedies if they have good reason to question the fourth respondent's fitness for office. For similar reasons, there would be no point in making an order as sought in paragraph 14 of the notice of motion directing the fourth respondent 'to comply with his duties and obligations as declared by this Court'. The fourth respondent's duties and obligations are set out in the trust deed and the Trust Property Control Act. In the absence of any dispute about them, there is no need for a court to declare what they are. Any material transgression by the fourth respondent (or any other trustee for that matter) can be addressed by any of mechanisms described in the immediately preceding paragraphs. A court should be approached only if those mechanisms are demonstrably inadequate.

[71] Turning now to address the application by the sixth and seventh applicants for the relief sought in terms of paragraphs 7 and 9 of the notice of motion. The applicants allege that the structure in which they had been living on Erf 10 was demolished in an exercise carried out by the Municipality on 18 November 2020.

[72] The evidence adduced by the Municipality in answer was that an exercise to demolish unoccupied structures erected on the land was carried out on the instructions of the acting municipal manager. The deputy chief law enforcement officer mandated to carry out the exercise was instructed to take video footage 'to protect us against claims that [the demolished structures were] occupied'. The instruction was to 'remove all unoccupied structures and store the material somewhere safe'. A preliminary inspection was conducted at the site on 17 November. According to the law enforcement officer's report to the Municipality's Chief: Law Enforcement and Senior Manager: Protection Service, dated 18 November 2020, a drone flight done during the inspection identified that 'there were approximately 105 completed illegal structures and approximately 30 unoccupied/incomplete illegal structures'.[21] The report stated, apparently in relation to the preliminary inspection, '(t)here were a number of completed structures of which cannot be determined if they are occupied or not'. The report contained no explanation for the reported difficulty in determining whether certain of the structures were occupied or not.

[73] The law enforcement officer's report proceeded as follows in respect of the demolition exercise undertaken on the day following the preliminary site inspection: 'On arrival, the structures were checked to see if it is unoccupied (sic) and then marked with a number to indicate which material belong to the structure. At 09:36 the first unoccupied structure was demolished, see below pictures'. Twelve miniature photographs (being the forementioned pictures below), each approximately 30mm x 25mm in size, depicted various structures made of wood and corrugated iron sheeting that appeared to be unoccupied or in the course of being demolished. If the photographs are studied under a magnifying glass one can make out that some of the depicted structures had numbers boldly painted in red on their outside walls.

[74] The law enforcement officer's report continued 'A drone flight took place before the demolishing commence, during and after the demolishing operation (*sic*). In total, there were 26 illegal unoccupied structures demolished by the Red Ants of

[21] The copy of the report attached to the applicants' founding papers was of poor quality, especially in respect of its reproduction of the pictorial content. An original printout was handed up from the bar during argument for the assistance of the court.

which 13 of them were complete but unoccupied and 13 structures were incomplete. All the material of the demolished structures was loaded onto a truck and stored at Beltana Working Depot for safe keeping.' The report summed up the manner in which the exercise had been carried out as follows: 'The operation was concluded at 11:54 with no injuries to the officers, no damage to vehicles and no shots fired. The community was peaceful and operation was a success and the officers left the area.' The law enforcement officer added, however, that he had received a telephone call at 12:00 from a municipal councillor informing him 'that the owners of the structures that were demolished and a number of the residents of Lanquedoc who assisted during the operation to load the material on the trucks were riotous towards each other. A vehicle collecting scrap metal entered Lanquedoc. A number of residents tried to sell the demolished material left behind to the people collecting scrap metal. This angered the illegal occupants and they turned the vehicle over on its roof and attempted to set the vehicle alight. SAPS and POPS intervened and stopped the people'. The evidence adduced in support of the abovementioned application instituted by the Municipality on 20 November 2020 for interdictory relief against the further invasion of the land supports the applicants' evidence that a few days of unrest ensued after the demolitions, and some municipal employees even had their houses burned down.

[75] The sixth and seventh applicants averred that they had erected their structure on 27 October 2020 and had stayed there since that date. According to their evidence, the only contents in the structure during the subsequent three weeks had been a matrass and two blankets. They had arranged for additional household furniture to be brought from the address at which they had previously been living in Lanquedoc. Those possessions were standing outside the structure waiting to be brought inside at the time the Municipality's officials conducted the demolition exercise. The sixth applicant, who was present at the time, averred that the persons who demolished the structure threw the matrass and blankets that were in it outside before they tore the structure down.

[76] The Municipality's deputy chief law enforcement officer made an affidavit in support of the first respondent's opposition to the sixth and seventh applicants'

application. The affidavit was little more than a confirmation of his report, described above. He described the Municipality's 'approach' in the exercise as follows:

> '11.1 At the start all unoccupied structures were checked and confirmed to be unoccupied.
> 11.2 Each structure was then allocated a number to allocate the material to a structure in case a claim is laid to the material at a later stage.
> 11.3 The materials of each demolished structure was (*sic*) then loaded onto a truck and stored at Beltana Working Depot for safe keeping until claimed by the owner.'

The witness did not give any explanation of the statement in his report concerning a difficulty when the site inspection was carried out on the day before the demolitions in determining whether some structures were occupied or not. He also did not explain the apparent contradiction in his report concerning the removal and storage of <u>all</u> the material that had been used to construct the demolished structures and the fracas that reportedly broke out after the completion of the exercise caused by the attempt by some of the community to sell some of the material that had been left behind to a scrap metal dealer.

[77] There is clear dispute of fact concerning whether the sixth and seventh applicant were in occupation of one of the demolished structures at the time of demolition. The evidence on both sides is unsatisfactory.

[78] On the applicants' side, there was no evidence to identify precisely which of the demolished structures they were occupying. It is evident from the photographic evidence forming part of the law enforcement officer's report that each of the structures identified for demolition depicted in the report was identified by a number painted on the exterior in large red numerals. I would have thought that it would have been evident to anyone present that the structures on which the numbers were being painted had been identified for demolition. It is odd that the sixth applicant said nothing about the identification of her structure for demolition, nor as to what she did to point out to the demolition team that she and her partner were in occupation of it, alternatively, to explain why she did nothing at the time to protest the identification of her structure as one of those to be demolished.

[79] It could be that the circumstances were such that the sixth applicant was too frightened to do or say anything, but if that were the case, I would have expected her to say so. It is evident from the first applicant's evidence that there were Lanquedoc Housing Association representatives on site at the time. It is not explained what they did during the demolitions, but the probability is that they were there to lend moral support to the unlawful occupiers. There is likewise no evidence that any of them attempted to engage with the persons carrying out the demolitions to stop the tearing down of a structure that was occupied.

[80] It is also odd, and unexplained, that the sixth and seventh applicants should have lived in the structure for three weeks with their one-year old infant with nothing but a matrass and two blankets. There is not even mention in their affidavits of any clothing and cooking and eating utensils in the structure. I find it strange that they would have lived there in such extremely austere circumstances when it is admitted that they came from accommodation at an address in Lanquedoc where their furniture remained. Their evidence is tainted with inherent improbability in the circumstances. A different impression might have been given had the evidence concerning their alleged occupation of the structure not been so bald. That greater detail was called for is illustrated by the discussion in *Barnett and Others v Minister of Land Affairs and Others* [2007] ZASCA 95 (6 September 2007); 2007 (6) SA 313 (SCA); 2007 (11) BCLR 1214 (SCA) at para 38 on the import of the term 'home' for the purposes of s 26(3) of the Constitution and PIE, which was referred to in *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88 (4 June 2014); 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) at para 22 as the appeal court's judgment '*on the meaning of occupation for the purposes of PIE*'. It seems to me doubtful, on the test posited in *Barnett* loc. cit., that a person could be said to be in occupation merely through keeping a facility to sleep at the place in issue whilst maintaining and availing of all their other utilities for daily living at another address.

[81] I have already identified one of the unsatisfactory features in the Municipality's evidence; that concerning the enigmatic reference in the law enforcement officer's report to a difficulty at the preliminary site inspection in ascertaining whether some of the structures were occupied or unoccupied. It was also unsatisfactory, in the context of the reported videotaping of the demolition exercise for the purpose of retaining

proof that the structures that were demolished were unoccupied, that the first respondent failed to produce the tape in support of its answer to the sixth and seventh applicants' claim, alternatively, explain its omission to do so. The applicants' reliance on this omission as support for their evidence was somewhat neutralised, however, by the effect of their failure to require the production of the videotape in terms of rule 35(12). The position of the Municipality, as I understood its counsel's argument, was that the Municipality had been under no obligation to produce the filmed evidence as it did not bear the onus. In my view, however, that is a regrettable attitude for an organ of state to adopt in litigation in which it is alleged that it has been guilty of a breach of a person's fundamental human rights. It is an attitude that is inconsistent with the culture of openness and accountability that is an integral aspect of the state's duty to respect, protect, promote and fulfil the rights in the Bill of Rights.[22]

[82] The applicants' counsel argued that the dispute whether the sixth and seventh applicants had been in occupation of one of the structures that was demolished should not be characterised as a real one for the purposes of the *Plascon-Evans* rule. They cited the appeal court's judgment in *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6 (10 March 2008); [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) at para 13[23] in support of the submission. The difficulty that I have with the argument is that the application of the principle identified in *Headfour* is very much dependant on a contextualised assessment of all the evidence. It is not easily applied where, as in the current case, the evidence of the applicant seeking to rely on it is equally amenable to criticism as unaccountably sketchy, and, as the first respondent's counsel justifiably emphasised, where the dispute in issue was eminently foreseeable when the application was instituted. The principle in *Headfour* does not operate in a vacuum; it co-exists, as an integral feature of the *Plascon-Evans* rule, with the principle articulated in *National Scrap Metal v Murray & Roberts* [2012] ZASCA 47 (29 March 2012); 2012 (5) SA 300 (SCA) in para 21-22 (after referencing *Headfour* in para 17), viz. that the test for

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[22] Sections 1 and 7 of the Constitution.

[23] Applied by the Constitutional Court in *Malan v City of Cape Town* [2014] ZACC 25 (18 September 2014); 2014 (6) SA 315 (CC); 2014 (11) BCLR 1265 (CC) at para 73, fn. 38.

rejecting a respondent's evidence on the papers, without the benefit of oral evidence, is 'a stringent one not easily satisfied'.[24]

[83] For the reasons set out below, I have concluded that it is not necessary to determine the dispute of fact for the purposes of deciding on the declaration of illegality sought by the applicants in paragraph 7 of the notice of motion. I do need to record, however, albeit not without hesitance, that I could not have determined the issue whether the structure was occupied in the applicants' favour on the papers alone and without oral testimony. As I shall discuss presently, that finding affects the extent of the remedy that the court is able to afford in respect of paragraph 9 of the notice of motion, in which an order is sought directing the Municipality to reconstruct the structure on the land.

[84] Both sides in the current matter proceeded on the assumption that the demolition by the Municipality of the structures erected by the unlawful occupiers on Erf 10 that were not yet inhabited was permissible without a court order. When I questioned whether this was really so, counsel were unable to cite any authority in support of the assumption. I am understandably reluctant to decide any aspect of the case on a basis different from that on which it was advanced, but it cannot be expected of a court to determine a matter accepting a misdirected understanding of the applicable law by the litigants on both sides.

[85] It seems to me that the misunderstanding that a municipality may demolish unoccupied structures put up by land invaders has to do with the concept of counter-spoliation and its application in some comparable cases. It is trite that the right to counter-spoliate is recognised as a legitimate form of self-help and that consequently resort may be had to it without the authority of a court order.

[86] Counter-spoliation was held to justify the demolition of unlawfully erected structures in comparable circumstances in *Mbangi and Others v Dobsonville City*

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[24] Quoting from *Mathewson and another v Van Niekerk and others* [2012] ZASCA 12 (16 March 2012) para 7. See also *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* (886/2015) [2016] ZASCA 119 (16 September 2016); [2016] 4 All SA 311 (SCA); 2017 (2) SA 1 (SCA) at para 36 and *Canton Trading 17 (Pty) Ltd t/a Cube Architects v Fanti Bekker Hattingh N O* [2021] ZASCA 163 (1 December 2021) at para 69.

Council 1991 (2) SA 331 (W). The judgment falls to be read mindful, of course, that it was decided before the advent of the current constitutional dispensation and at time when the Prevention of Illegal Squatting Act, 1952, which permitted the owner of land without an order of court to demolish any structure erected on his land without his consent - irrespective of whether it was occupied or not - was in force. The basis for distinguishing unoccupied structures from occupied ones in the post-Constitutional era is that unoccupied structures do not implicate s 26 of the Constitution, whereas occupied informal structures almost invariably do.

[87] The continued application of the doctrine of counter-spoliation in the context of land invasions was recently acknowledged, but its constitutionality left open for later determination, in *South African Human Rights Commission and Others v City of Cape Town and Others* [2020] ZAWCHC 84 (25 August 2020); 2021 (2) SA 565 (WCC).[25] In *Residents of Setjwetla Informal Settlement v Johannesburg City* 2017 (2) SA 516 (GJ), on the other hand, the finding by the court that the local authority was not entitled to demolish structures put up only hours beforehand without a court order appears inconsistent with an acceptance that a right of counter-spoliation was available.

[88] The judgment in *Setjwetla Informal Settlement* has been the subject of trenchant academic criticism; see Johan Scott, *The precarious position of a land owner vis à vis unlawful occupiers: Common-law remedies to the rescue?* 2018 TSAR 158. It is also irreconcilable in the relevant respect with the dicta in the appeal court's judgment in *Fischer* supra, at para 22-23, that appear to recognise the availability of counter-spoliation in land incursion cases.

[89] Whether counter-spoliation is an available remedy is a fact-specific question. On the undisputed facts in the current case there were fundamental problems in the way of the Municipality's ability to rely on counter-spoliation, even assuming in its favour that it could be regarded as the owners' agent for the purpose of resisting the land intruders' acts of spoliation.

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[25] For a discussion of whether counter-spoliation should be acknowledged as an available remedy in land incursion matters, see G Muller & EJ Marais, *Reconsidering counter-spoliation as a common-law remedy in the eviction context in view of the single-system-of-law principle* 2020 TSAR 103.

[90] The applicants' evidence that they had erected the structure on 27 October 2020 was uncontroverted. Their evidence in that respect was also consistent with the other indications in the evidence assessed as a whole that it was at the end of October that a significant number of additional structures were erected on the land in the course of the incursion that prompted the urgent meeting of trustees on 29 October described earlier in this judgment. There is no suggestion in the evidence that the structure could have been erected by the sixth and seventh applicants with any other intention than to possess it (*animus possidendi*). The undisputed evidence that they had transported their furniture there to be installed three weeks after erecting the structure is consistent with their having exercised a measure of control over the structure since its erection even if they did not inhabit it in the sense discussed in *Barnett* supra, loc.cit. The physical requirement for possession (*detentio*) 'does not require continual physical occupation; a person has detention even if he leaves the property but is capable of assuming occupation at any time. What is required is that the person in question should manifest the power at his will to deal with the property as he likes and to exclude others'.[26]

[91] The inexorable conclusion to be drawn from the forementioned factors is that the sixth and seventh applicants were in peaceful and undisturbed possession of the structure at the time it was demolished, and had been for three weeks. The remedy of counter-spoliation is not available in such circumstances. The requirement that a counter-spoliator must act *instanter* ('there and then' following immediately upon the spoliation and forming part of the *res gestae* of that occasion[27]) was not satisfied. I make that finding conscious that there is some disagreement in the authorities about the stringency of the requirement.

[92] It follows that on the peculiar facts of the current case there was no lawful basis for the Municipality to demolish the structure without a court order, even if its officials were reasonably of the opinion that it was unoccupied at the time. The understanding by the acting municipal manager that the Municipality was invested with the power - without the need to obtain a court order - to demolish the structures

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[26] Per Eloff J, Viljoen and Van Reenen JJ concurring, in *Ex parte Van der Horst: In re Estate Herold* 1978 (1) SA 299 (T) at 301F-G.

[27] Van Loggereburg, *Erasmus, Superior Court Practice* Vol 2, RS 17, 2021, D7-19.

erected by the persons who intruded onto the land, provided only that they were not occupied, was misconceived.

[93] The sixth and seventh applicants are entitled to the return of the materials with which their demolished structure was constructed. The Municipality has tendered that. The same does not apply to their application for an order that the structure be reconstructed. The applicants' counsel relied on *Tswelopele Non-Profit Organisation and Others v City of Tshwane Metropolitan Municipality* [2007] ZASCA 70 (30 May 2007); 2007 (6) SA 511 (SCA) in support of their contention that such relief was justified and appropriate.

[94] *Tswelopele* is distinguishable, however, because in that case it was proven that the persons whose structures were demolished had been living in them at the time. For the reasons given earlier, I have not been able to make a finding on the papers to that effect in favour of the applicants in the current case. Notwithstanding the recognition in *Tswelopele* that the demolition of the dwellings in that case infringed not only the occupiers' constitutional warranty against summary eviction from their homes but also their rights to personal security, to privacy and their property rights in their materials and belongings, it is evident that the fundamental reason for considering that the reconstruction of the structures was necessary if an effective remedy were to be granted was that anything less would not meaningfully redress the painful and humiliating indignity of being hounded unheralded from the privacy and shelter of their homes.

[95] In the current matter, in which, in the absence of oral evidence, the court is obliged to accept that the structure in question was not inhabited, the rights of the sixth and seventh applicants that were primarily impacted were their property rights in the materials of which the structure had been constructed and their right not to have their established possession of the structure usurped without due process. I consider that an adequate and effective remedy is the return of the materials and a declaration that the unauthorised demolition of the structure was unlawful. A direction that the municipality re-erect a structure for the applicants on the Trust's land would not be appropriate in the circumstances.

[96] Such a direction would implicitly afford the sixth and seventh applicants the facility to take up unauthorised residence on the land, which they have no lawful entitlement to do. It would burden the Trust, or the Municipality should it hereafter become the owner of the land, with the task of legally evicting the applicants, who are confessedly not beneficiaries of the Trust at this stage, so that the land can be used or kept available for orderly settlement by beneficiaries who are in need of access to adequate housing. Orderly settlement, in a situation in which the number of beneficiaries in need of housing exceeds the capacity of the resources available to provide it, necessitates some system of regulated preference. Any remedy that could be seen as providing an advantage to unlawful land occupiers over those in line to be provided access to the land in an orderly development of it is contraindicated. The situation is quite distinguishable from that which sometimes presents when the eviction of a relatively settled community of unlawful occupiers falls to be considered in order to free up the land on which they have been living for some time for orderly settlement by others on the waiting lists for housing.

[97] Turning now to the relief sought in terms of paragraph 8 of the notice of motion, viz. an order directing the Municipality to design and implement clear and objective rules and policies so as to ensure that its officials and agents do not demolish, or evict any residents from any informal dwellings which are occupied, unless such demolition or eviction is authorised by a court order. The difficulty in this regard is that it has not been in issue between the parties that the Municipality does not have the power to evict any person from their dwelling, irrespective of whether it is conventional building or an informal structure, without a court order. The applicability of s 26(3) of the Constitution and, where applicable, PIE, was not in issue. I have made it clear earlier in this judgment that the Municipality also does not have the power to demolish even unoccupied structures save under the authority of a court order unless, arguably, it is able to justify its conduct in doing so as an act of counter-spoliation.

[98] The question then is what is it precisely that the rules and policies contemplated by the applicants would regulate and address? It seems to me that the only issue identified on the papers is one that does not concern questions of authority or policy, but rather one of fact. Whether a structure was occupied or not

when the Municipality's law enforcement teams demolished it is the contentious matter in this regard. That is a factual question. I fail to see how whether a particular factual situation obtains could be amenable to regulation or policy. Facts are facts. They speak for themselves. It would, of course, be possible to specially define the term 'unoccupied' to have a meaning different to that given in the dictionaries, but the choice of the Municipality whether to do so is not a matter in which a court could appropriately intervene.

[99] The applicants sought to bolster their case that the Stellenbosch Municipality has been a serial offender in the demolition of informal structures that are occupied dwellings by filing a number of so-called 'supplementary affidavits'. They did so at the stage that they would have been entitled, in terms of rule 53(4), to supplement their founding papers in the review applications after considering the record of impugned decisions provided by the respondents. They acknowledged, however, that the affidavits they sought to introduce did not qualify for admission under the sub-rule. The Municipality raised an objection against the admission of the supplementary affidavits and did not respond to them. It was only at the conclusion of two days of oral argument at the hearing that the applicants' counsel applied from the bar for the admission of the affidavits. The Municipality persisted in its opposition to that and indicated that if they were admitted it would expect to be given the opportunity to answer them.

[100] In view of the conclusion that I have reached on the application for the order sought in terms of paragraph 8 of the notice of motion, no point would be served by the admission of the affidavits. They would not affect the result. However, quite apart from that consideration, the lateness of the application for their admission and the fact that they concern matter likely to give rise to disputes of fact that could not be resolved on the papers also militate against admitting the affidavits. To the extent necessary, the application for their admission will be refused. The costs attendant on the application for the admission of the affidavits must be inconsequential, and there will no order thereanent.

[101] If there is a case to be made out that the Municipality has been acting in repeated disregard of its constitutional and legal obligations (as to which the court

has made no finding), the appropriate remedy would be a prohibitory interdict, perhaps accompanied with appropriate directions. However, on the disputed evidence in the current matter, a case has not been made for the final interdict sought in paragraph 10 of the notice of motion.

[102] The applicants did not seek an adverse costs order against the trustees. The interim order made on 15 December 2020, in respect of which costs were reserved, bore principally on the relief that will be granted concerning the invalid decision by the Trust on 29 October 2020. It is appropriate therefore that there should be no order as to the costs of those proceedings The applicants will be awarded their costs in respect of the postponement on 16 November 2021, which was due to the non-availability of the first respondent's counsel. As to the remainder of the relief sought, the sixth and seventh applicants have achieved substantial success and are entitled to their costs of suit. For the benefit of the taxing master, I would estimate that about one third of the hearing was taken up by argument on the issues on which the sixth and seventh applicants have succeeded. There is no justification on the proven facts for costs to be awarded on a punitive scale.

[103] In the result, an order will issue in the following terms:

1. The application for the admission of the supplementary supporting affidavits is refused, with no order as to costs.
2. It is declared that the first respondent's conduct in demolishing the structure erected by the sixth and seventh applicants on Erf 10 Lanquedoc without a court order was unlawful.
3. The first respondent is directed to return the building materials of the forementioned demolished structure to the sixth and seventh applicants at the address where they currently reside in the Dwars River Valley.
4. It is declared that the purported decision by some of the trustees of the Dwars River Valley Community Development Trust (formerly called the Boschendal Treasury Trust) on 29 October 2020 to donate immovable property owned by the Trust to the first respondent was invalid, and of no force or effect.
5. The said decision is accordingly reviewed and set aside.

6. Save that there shall be no order as to costs in respect of the taking of the interim order before Slingers J on 15 December 2020, the first respondent shall pay the applicants' wasted costs incurred in respect of the postponement on 16 November 2021 and the sixth and seventh applicants' costs of suit.

7. Save as provided in the preceding paragraphs, the application is dismissed.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Applicants' counsel:	**P. Hathorn SC** **G.J. Gagiano**
Applicants' Attorneys:	**Chennels Albertyn** **Stellenbosch**
First respondent's counsel:	**A. Montzinger**
First respondent's attorneys:	**CSM Attorneys** **Stellenbosch**