THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case no**:** 203/2014
Reportable

In the matter between:

IRIS ARILLDA FISCHER **First Appellant**
CITY OF CAPE TOWN **Second Appellant**

and

BOITUMELO RAMAHLELE AND FORTY-SIX OTHERS **First to Forty-Sixth Respondents**

Neutral citation: *Fischer v Ramahlele* (203/2014) [2014] ZASCA 88 (4 June 2014)

Coram: Mpati P, Theron and Wallis JJA, Hancke and Swain AJJA

Heard: 27 May 2014

Delivered 4 June 2014

Summary: Practice – Applications and motions – dispute of fact – referred for the hearing of oral evidence - not open to the court to decide *mero motu* not to hear oral evidence and determine the application on legal points not emerging from the papers and not raised by the parties.

ORDER

On appeal from: Western Cape High Court, Cape Town (Gamble J sitting as court of first instance):

1 The appeal is upheld with no order as to costs.
2 Paragraphs C to F of the order of the court below are set aside.
3 The counter application is referred back to the Western Cape High Court for the hearing of oral evidence on a date to be arranged but otherwise in terms of the order of Zondi J made on 15 January 2014.

JUDGMENT

Theron and Wallis JJA (Mpati P, Hancke and Swain AJJA concurring):

[1] On 27 May 2014, this court granted an order as set out above. These are the reasons for that order.

[2] On 7 and 8 January 2014 the City of Cape Town's Anti Land Invasion Unit (the Unit), with the assistance of both the Metro police and the South African Police Service (SAPS), demolished certain structures erected on Erf 150 (remaining extent) Philippi, the property of Mrs Iris Fischer, an elderly widow. On 10 January 2014, Mrs Fischer and the City, the first and second appellants, respectively, launched an urgent application (the main application) seeking an interdict restraining a group of persons described as 'persons whose identities are to the applicants unknown and have attempted or are threatening to unlawfully

occupy Erf 150 (remaining extent), Philippi' from seeking to occupy that property or erecting structures thereon.

[3] A rule *nisi* was issued in the main application and the return date was anticipated by Mr Ramahlele and 40 other people, who opposed the confirmation of the rule *nisi*. They in turn launched a counter application against the City, in which they alleged that they had been in peaceful and undisturbed possession of the structures which they had erected on the property and that the demolished structures were their homes. They sought the following relief in the counter application:

'4.1 declaring the conduct of the City of Cape Town in demolishing and/or dismantling the informal structures erected by the applicants at erf 150 (remaining extent) Philippi, to be unconstitutional and unlawful;

4.2 interdicting and restraining the respondents from evicting or demolishing any informal structures erected by the applicants at erf 150 (remaining extent) Philippi without a valid Court Order;

4.3 interdicting and restraining the respondent from demolishing, removing or otherwise disposing of any informal structures, or the constituent materials of such structures, erected by the applicants at erf 150 (remaining extent) Philippi;

4.4 . . . .;

4.5 directing the City of Cape Town to construct for those applicants, whose informal structures were demolished on 7 and 8 January 2014 and who still require them, temporary habitable dwellings that afford shelter, privacy, and amenities at least equivalent to those that were destroyed and which are capable of being dismantled, at the site at which their previous informal housing structures were demolished.'

The high court (Gamble J) granted declaratory relief and mandatory interdicts against the City in the counter application, substantially in the form sought. This appeal is against that judgment with the leave of the high court.

[4] Mrs Fischer is the registered owner of the property which is situated on the Cape Flats, south of Cape Town international airport and adjacent to another long-

standing informal settlement. The property is approximately 2.7 hectares in extent, unfenced and according to the City has been covered with dense and overgrown shrubbery. Mrs Fischer has resided on the property for the past forty seven years. There are two brick structures on the property, one consisting of three bedrooms and the other of two bedrooms. Mrs Fischer and her son Reuben, reside in the one structure and the other structure is occupied by Mrs Fischer's other son, William and his family. The respondents are a group of 37 homeless and poor people who lived in the rural areas of the Eastern Cape and moved to Cape Town to find employment. None of the respondents have full time employment and they survive from hawking, part-time domestic work and social grants.

[5] Until May 2013, the Fischers resided on the property without interference. In May 2013 unlawful occupiers began to invade the property for the first time. This invasion took place in relation to the property as well as several neighbouring properties. The City, at that stage took measures, carried out by members of the Unit, to curtail and manage the invasion. Between 30 April 2013 and 01 May 2013 the City dismantled a number of illegal structures both on the property and on neighbouring properties. Between June and August 2013, City officials conducted regular patrols in the area in order to prevent further incursions onto the property by unlawful occupiers. During this period approximately twenty structures were erected on the property and became occupied. According to the City, these structures are currently on the property.

[6] During August 2013, the City advised Mrs Fischer to obtain legal assistance on removing the occupiers from the property. The City also served a notice on Mrs Fischer in terms of which she was directed to take steps to evict the unlawful occupiers. Mrs Fischer subsequently instructed an attorney, who despite accepting partial-payment, did not provide any meaningful assistance to her. Since she did not have the necessary finances to secure alternative legal representation, she

sought assistance from the City and SAPS but was informed by the latter that they would not be able to assist her without a court order.

[7] According to the City, a large group of people whom it contends are the respondents, started erecting structures on the property on 7 January 2014. City officials were called to the property and commenced with an operation to dismantle the structures which were recently erected or in the process of being erected on the property at the time. In an affidavit filed on behalf of the City, Mr Stephen Clyde Hayward, the head of the Unit, described the events that occurred on 7 and 8 January 2014:

'13.9 On 7 January 2014, there were about fifteen vehicles queuing up on the side of Sheffield Road. The vehicles contained building materials of persons who were seeking to erect structures on the property. Some persons were already erecting structures on the property, while others were queuing up to do so. On the same day, the City demolished thirty two structures on the property. The City was cautious in the approach it applied in this regard and was guided by the following:

The City did not demolish or indeed interfere with any structures that appeared to be a home or a dwelling. In any event, they were certainly not structures that were occupied. In this regard, [the] City monitored the property. At about 2 p.m. on 7 January 2014, the City noticed that persons were moving onto the property and erecting structures thereon. The City has staff that undertakes random patrols of hot spot areas for land invasions, as the property was. In addition, the City received an alert of the impending invasion. The City immediately informed SAPS and the Law Enforcement Metro Police. At 5p.m. the City convened a planning session to respond to the invasion at the Metro Police in Philippi. The demolition operation started at 6 p.m. and, as stated, thirty two structures were ultimately demolished. I state without reservation that none of these structures constituted dwellings or a persons' home and nor were they occupied. Given that the Anti Land Invasion Unit had regularly patrolled the area since May 2013, its members were familiar with structures that had already been erected on the property and were cautious not to interfere with those structures. Instead, it was only structures that had been constructed (and uninhabited) or were in the process of being constructed that were demolished. I once again reiterate, no one was residing in the structures that were demolished. When the Law Enforcement Agencies left the property on 7 January 2014 (at about 7 p.m.) there were between

20 and 30 structures on the property. I should mention that even at that stage there were about ten more structures that were left (due to some degree of uncertainty by the enforcement officers as to whether they were occupied or not).

13.10 Notwithstanding the aforegoing, when the law enforcement officials returned to the property on 8 January 2014 (at about 9 a.m.) there were about a further fifteen new structures (that had been re-erected overnight). The City immediately launched an operation to demolish those structures. I should again reiterate that none of the structures which the City demolished were "dwellings", "homes" or indeed inhabited by people. The structures had been erected over a period of 12 to 15 hours (i.e. between the City having left the property the previous day and having returned the next day). This operation concluded at about 10:30 a.m. on 8 January 2014. Since then, the City has undertaken random patrols and the invasion appears to have subsided since as no new structures were seen.'

[8] The affidavits delivered on behalf of the applicants in the counter application alleged that they had moved onto the property at various times between April 2013 and January 2014, erected structures and made those structures their homes. The City and Mrs Fischer denied this and claimed that the structures demolished on 7 and 8 January 2014 were structures erected or being erected on those days as part of a land invasion and that no-one's home had been demolished. The deponents to affidavits on behalf of the City explained that the City recognised that it could not evict people and demolish their homes, even if unlawfully constructed and occupied, without complying with the requirements of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). They denied, however, that this was what had occurred.

[9] There was thus a clear dispute of fact between the parties in respect of the counter application. Wisely, they recognised this and by agreement on 15 January 2014 obtained an order from Zondi J referring the dispute for the hearing of oral evidence. The issue as defined in the order was:

'Whether the structures which were dismantled by the City of Cape Town on 7th and 8th January 2014, at the property known as Erf 150 Philippi-East remaining extent, were those which were unoccupied and vacant.'

[10] Arrangements were made, in view of the urgency of the matter, for that evidence to be heard on 19 February 2014. On that date the case came before Gamble J. This appeal arises because he did not hear the evidence needed to resolve the dispute between the parties but instead decided the case on what he regarded as a legal issue. He directed (required) that the parties address the court on two points of law which related to the City's conduct during the demolition operations on 7 and 8 January 2014; First, the *locus standi* of the City to act as it had done bearing in mind that its actions took place on private land and second, on what basis the City claimed that its conduct was lawful in the context of the provisions of s 26(3) of the Constitution and PIE. After hearing argument on these issues the court below found – in relation to the first question – that the City had acted only after Mrs Fischer had asked its help and, therefore, the question of the circumstances under which the City could act *mero moto* did not arise. It answered the second question against the City, finding that PIE applied. The factual basis upon which it did so is, however, unclear, although it appears to have involved deciding factual disputes without evidence.

[11] The order granted by the high court reads:

'A. The main application, being the return date of the rule *nisi* issued in the application for urgent interdictory relief by Binns-Ward J on 10 January 2014 is postponed for hearing on the semi-urgent roll to Thursday 22 may 2014.

B. The costs associated with the main application are to stand over for later determination.

C. It is declared that the conduct of the City of Cape Town in demolishing and/or dismantling the informal structures erected by the counter applicants at erf 150 (remaining) Philippi, was unconstitutional and unlawful.

D. The Respondents in the counter application are interdicted and restrained from evicting or demolishing any informal structures erected by the applicants at erf 150 (remaining extent) Philippi without a valid court order.

E. The Respondents in the counter application are interdicted and restrained from demolishing, removing or otherwise disposing of any informal structures, or the constituent materials of such structures, erected by the counter applicants at erf 150 (remaining extent) Philippi.

F. The City of Cape Town is directed to construct for those counter applicants whose informal structures were demolished on 7 and 8 January 2014, and who still require them, temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed and which are capable of being dismantled, at the site at which their previous informal housing structures were demolished.

G. Each party will bear its own costs of suit in regard to the counter application.'

[12] It is pertinent to set out at the outset what was in issue between the parties arising from the claim that the counter applicants had been despoiled of their homes. The issue was, whether on 7 and 8 January 2014 the counter applicants had been in possession and occupation of the structures that the City demolished on those days. They did not challenge the City's right to act as it had done in relation to vacant and unoccupied structures unlawfully erected on private property. The only dispute was the purely factual one of whether those structures were unoccupied and vacant on 7 and 8 January 2014. The case advanced by the counter applicants was that they were erected earlier and were occupied by the counter applicants as their homes. If they were unoccupied and vacant then the counter application fell to be dismissed because the counter applicants had not been despoiled. If the City had demolished people's homes then it acknowledged that it had acted unlawfully and appropriate relief had to be granted.

[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence,[1] to set out and define the nature of their dispute and

[1] *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469 C-E.

it is for the court to adjudicate upon those issues.[2] That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for 'it is impermissible for a party to rely on a constitutional complaint that was not pleaded'.[3] There are cases where the parties may expand those issues by the way in which they conduct the proceedings.[4] There may also be instances where the court may *mero motu* raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided.[5] Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them.[6] The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties.[7] However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship

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[2] *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 15 and 19.
[3] *Phillips & others v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para 39.
[4] *Shill v Milner* 1937 AD 101 at 105.
[5] *CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) para 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 39; *Maphango & others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) paras 109-114.
[6] The power of a court under rule 33(4) to separate an issue or issues *mero motu* is a power to be exercised in respect of issues that already emerge from the pleadings. It is not a power to formulate new issues not chosen by the parties and to require them to be debated.
[7] *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 345A-E. For a recent example in another jurisdiction see *Cramaso LLP v Ogilvie-Grant, Earl of Seafield and Others* [2014] 2 All ER 270 (SC) paras 4-7.

between the parties. That is for them to decide and not the court.[8] If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.

[15] This last point is of great importance because it calls for judicial restraint. As already mentioned Gamble J 'required' the parties to argue as a preliminary issue what he described as two issues of legality. Although he added that the parties were amenable to these proposals, counsel who appeared in this Court and in the court below, confirmed that the judge's own description, that he 'required' the points to be argued, was accurate. They were not asked for their submissions on whether this was an appropriate approach to the matter or even, which was more pertinent, whether either question was in issue in the case. Nor were they asked whether their clients agreed to broaden the issues to encompass these points. The authority on which the judge relied in adopting this approach[9] was not in point. That was a case where the court, *on the application of one of the parties,* held that he could dispense with the hearing of oral evidence, notwithstanding the case having been referred for the hearing of such evidence, because the questions raised on the papers could be determined without hearing such evidence and the evidence could not affect the resolution of those issues. It is a far cry from that for a court to raise issues that do not emerge from the papers and have not been canvassed in the affidavits and require that those be argued instead of hearing oral evidence and deciding the issues raised by the parties.

[16] In argument before this Court counsel for the City said that they had been offered no choice. On the first day of the hearing the judge mentioned two cases to counsel in chambers involving the *mandament van spolie* and adjourned for them

[8] See for example *Herald Investments Share block (Pty) Ltd & others v Meer & others; Meer v Body Corporate of Belmont Arcade & another* 2010 (6) SA 599 (D) para 6.
[9] *Wallach v Lew Geffen Estates CC* 1993 (3) SA 258 (A) at 262H-263I.

to prepare argument in the light of those cases. When they returned the following day he ruled that the issues described above should be argued. Counsel for the counter applicants confirmed this course of events. The parties found themselves in a situation where they felt obliged to argue matters that formed no part of the case. That may easily arise because of the relative positions of judge and counsel or litigant. The latter may feel obliged to adopt the course indicated in order to avoid displeasing the judge and possibly without adequate reflection on the implications of what they are being told to do. For that reason judges must always exercise extreme caution before suggesting that parties depart from the course that they have chosen. That is particularly so in urgent matters where there is not always sufficient time to think through the implications of the issues raised by the judge. Gamble J obviously felt that counsel (and their clients) had acquiesced in the course he suggested, but acquiescence is not consent and what was required was a clear and unequivocal change in the entire approach to the case by the counter applicants to which the City and Mrs Fischer needed to respond. That did not occur.

[17] The result is that this appeal arises from a decision by the court below on issues not identified by the parties as relevant to their dispute and without hearing the evidence that they agreed was both relevant and determinative of the dispute. Had it simply heard that evidence it would have been in a position to decide whether the City's allegations were correct or whether the individual counter applicants were truthful when they claimed to have been in occupation of homes erected on the property before 7 and 8 January 2014. The hearing would have taken place on 19 February 2014 and the following days and once those factual issues had been determined the dispute would have been resolved. The probability is that this would have occurred some time ago and there would have been no need for this appeal. Indeed experience teaches one that in the course of the hearing the true situation would probably have emerged fairly rapidly and the

parties might well have been able to resolve the matter without the need for a judgment. One need only read the judgment of Howie J in *Ntshwaqela*,[10] and the subsequent judgment of Nicholas AJA in this Court,[11] to see that this is likely to be the case.

[18] Regrettably the learned judge in the court below ignored these salutary rules. Without determining the factual dispute that lay at the heart of the counter application, he granted the relief claimed by the counter applicants. This led to a most unhappy situation. His order was inconsistent with the rule *nisi* granted by one of his colleagues on the application by the City and Mrs Fischer, which application was being dealt with separately. Confusion as to the respective parties' legal rights and obligations was thereby engendered. The proper resolution of the dispute has thus been significantly delayed and we have been obliged to restore the position as it stood when Zondi J made his order.

[19] The failure to explore the factual circumstances of the counter applicants lead to the court below granting an order ostensibly relating to Mr Ramahlele and 46 others. This overlooked the fact that the list of counter applicants only contained 42 names, leaving Mr Ramahlele on one side. In respect of three of those there was no affidavit and no evidence at all. In respect of another three their complaint related to an eviction in April 2013 the lawfulness of which was not in issue. This led to the order in their favour being abandoned in a footnote in the respondents' heads of argument. Even that abandonment was problematic as the boyfriend of one of those who had not signed an affidavit had deposed to an affidavit that encompassed both their interests. In respect of one counter applicant his complaint was not that his house was demolished but that a shop and shed adjacent to the house had been demolished. Two mentioned on the list did not themselves depose to affidavits and other people deposed to affidavits on their

[10] *Ntshwaqela & others v Chairman, Western Cape Regional Services Council & others* 1988 (3) SA 218 (C).
[11] *Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A)

behalf. Of the remainder, one appeared to accept that he was trying to move onto the property on 7 January 2014 and another said that she had moved in three days before.

[20] If one eliminates the doubtful cases the rest of the counter applicants claimed to have moved onto the property, built their shacks and lived in them from various dates in 2013. They claimed that they were in possession of their homes and had been dispossessed by the City's actions, basing their claims on the *mandament van spolie*.[12] This was deliberate and entirely appropriate, because, if their factual allegations were correct, they had been despoiled. No doubt because they did not need to do so, they placed no reliance on section 26(3) of the Constitution or PIE, notwithstanding that they were represented by one of the largest public interest law firms in this country, the experience of which in this field is unrivalled.

[21] In this Court, the respondents did not rely on the first issue raised by Gamble J, although one of the *amici* sought to address it. The second issue raised the question of the relationship between PIE and the right of the lawful owner and possessor of land under both s 25(1) of the Constitution and by virtue of the *mandament van spolie*. There is a potential tension between the two, the resolution of which is by no means easy. In addition it raised the question of how local authorities may respond to conduct constituting a land invasion and the extent to which they or the police may intervene in such situations. Yet these issues were

[12] The Constitutional Court has authoritatively expounded the nature of the *mandament* and endorsed the judgments of this Court as to its nature. Madlanga J in *Ngukumba v Minister of Safety and Security* (087/13) [2014] ZACC 14 para 10, said:
'The essence of the *mandament van spolie* is the restoration before all else of unlawfully deprived possession to the possessor. It finds expression in the maxim *spoliatus ante omnia restituendus est* (the despoiled person must be restored to possession before all else). The spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the *mandament van spolie* is to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process.' (Footnotes omitted.) See also *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others* 2007 (6) SA 511 (SCA); *George Municipality v Vena & another* 1989 (2) SA 263 (A) at 271H-272B.

resolved without having been addressed in the papers and without any factual input as to the implications of a decision one way or the other from any party or an *amicus curiae*. There are many bodies that would be affected by or interested in its resolution and which would have been in a position to assist the court with information and legal submissions. That is evidenced by the fact that in this Court two bodies with conflicting interests and submissions intervened as *amici*, namely Abahlali Basemjondolo Movement SA, which was assisted by SERI Law Clinic, and the City of Johannesburg Metropolitan Municipality. Courts should not resolve issues of such public importance without affording all interested parties the opportunity to participate in the proceedings so as to ensure that the court is as well-informed as possible about the implications of its decision.

[22] The court below appears to have been oblivious to these difficulties. It came to its decision without referring to any of them. That decision, as is apparent from the heads of argument furnished to us, was potentially far-reaching. The judge upheld the counter application and granted final relief in substantially the terms sought by the counter applicants. He decided that the dismantled structures were occupied because:

'The fact that the structure had reached the stage of its completion indicates an intention on the part of the builder to take up residency therein.'

and

'If the structure is complete, the invasion of the piece of land in question has taken place, occupation has occurred, and the provisions of PIE are applicable.'

In other words the mere existence of the structure and the intention of the builder to occupy it determines whether that person is an unlawful occupier and entitled to the protection of PIE. Actual physical occupation becomes irrelevant. That is inconsistent with the nature of the possession upon which the *mandament van spolie* is based, which, in the case of immovable property, involves factual control

as well as the intention to derive some benefit from the land.[13] The possession must be both peaceful and undisturbed. A judgment of the full court, binding on Gamble J, held that this meant physical possession that was sufficiently stable and durable for the law to take cognizance of it.[14] This was overlooked. The conclusion reached was also inconsistent with the judgment of this Court in *Barnett*,[15] on the meaning of occupation for the purposes of PIE.

[23] A land invasion is itself an act of spoliation. The Constitutional Court has recently reaffirmed that the remedy of the *mandament van spolie* supports the rule of law by preventing self-help. A person whose property is being despoiled is entitled in certain circumstances to resort to counter spoliation.[16] If the issues in this case were to be broadened, the counter application would have to be investigated and that could only be investigated by hearing evidence on the requests to the City by Mrs Fischer for assistance in regard to the squatting on her property. Another issue central to the relief to be granted was whether Mrs Fischer was a joint spoliator with the City in relation to any act of spoliation by the City.[17] None of these issues had been canvassed in the affidavits before Gamble J, because the counter application was based upon entirely different facts. The claim by the counter applicants was that they had been in occupation of the demolished structures on Mrs Fischer's property for a sufficient period prior to 7 and 8 January 2014 to render their possession of their sites peaceful and undisturbed so as to entitle them to invoke the *mandament van spolie*.

[24] For all those reasons the course adopted in the court below was impermissible. It should simply have heard the evidence tendered by the parties and determined the true facts. Had it done so there was no dispute between the

[13] *Ntshwaqela & others v Chairman, Western Cape Regional Services Council & others* 1988 (3) SA 218 (C) at 221E-F
[14] *Ness & another v Greef* 1985 (4) SA 641 (C) at 647D-F.
[15] *Barnett & others v Minister of Land Affairs & others* 2007 (6) SA 313 (SCA) para 38.
[16] *Yeko v Qana* 1973 (4) SA 735 (A) at 739B-D; *Ness & another v Greef, supra,* at 647I-649H.
[17] *Administrator, Cape, & another v Ntshwaqela & others* 1990 (1) SA 705 (A) at 718G-720B.

parties as to the legal position and appropriate relief could have been ordered depending upon the court's factual findings. That would also have meant that the learned judge would not have fallen into the trap, as he did, of making factual findings adverse to the City on the affidavits as he did, in the alternative, by finding, contrary to the City's evidence, that the demolished structures were in fact the homes of the counter applicants. He would also not have had to concern himself with the operation of the *Plascon-Evans* rule, which he appears to have misconstrued in thinking that it operated against the City, which overlooked that in relation to the counter application the City was the respondent and entitled to the benefit of the rule.

[25] It is for these reasons that the order was granted.

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L V THERON

JUDGE OF APPEAL

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M J D WALLIS

JUDGE OF APPEAL

APPEARANCES

For Appellants:	A Katz SC with M Adhikari Instructed by: Fairbridges Inc, Cape Town McIntyre & Van Der Post, Bloemfontein
Second Amicus Curiae:	C D A Loxton SC with A W Pullinger
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