IN THE LAND CLAIMS COURT OF SOUTH AFRICA
HELD AT RANDBURG

CASE NO:LCC 137/2021

Before the Honourable Flatela J
15 January 2024

DELETE WHICHEVER IS NOT APPLICABLE

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

15/03/2024 [redacted]
DATE SIGNATURE

In the matter between:

LOGOS CARRIERS CC	Applicant
and	
RAYCALDO ROWLAND	First Respondent
WILLIE ADONIS	Second Respondent
WAYNE BARRON	Third Respondent
ALL THOSE HOLDING TITLE THROUGH 1ST to 3RD RESPONDENTS OR OCCUPYING PORTION 79 OF THE FARM MORNING STAR NO. 141, CITY OF CAPE TOWN, WESTERN CAPE	Fourth Respondent
THE CITY OF CAPE TOWN	Fifth Respondent
HEAD: WESTERN CAPE PROVINCIAL DEPARTMENT	

OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT Sixth Respondent

---

JUDGMENT ON LEAVE TO APPEAL

FLATELA J

Introduction

1. This is an opposed application for leave to appeal to the Supreme Court of Appeal against the orders granted on 21 September 2023. I granted an order evicting the First to the Fourth Respondents and all those holding title through or under the Fourth Respondent from the Applicant's property described as Portion 79 of the Farm Morningstar No.141, City of Cape Town, Western Cape Province (The property).

2. The Respondents were ordered to vacate the property on or before 30 November 2023, failing which the Sheriff of the Court was authorised to evict the Respondents from the property on 15 December 2023. The Fifth Respondent was ordered to provide emergency housing with access to services (which may be communal) to the Second, Third, and Fourth Respondents and all those holding title through or under them.

3. On 13 November 2023, before the reasons for orders were given, the First Respondent, on behalf of all the Respondents, filed a notice of leave to appeal, which automatically suspended the orders in terms of Rule 65(1)(a) of the Rules of this Court. The reasons for the orders were given on 30 November 2023. On 21 December 2023, the Respondents filed an amended notice of leave to appeal.

4. For convenience, the parties will be referred to as in the main application.

Principles governing applications for leave to appeal.

5. The principles governing whether leave to appeal should be granted are well

established, but I summarise them for convenience.

6. An application for leave to appeal is regulated by section 17(1) of the Superior Courts Act 10 of 2013 (Superior Courts Act), which provides:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

(a) (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) the decision sought on appeal does not fall within the ambit of section 16(2)*(a)* and

(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

7. Section 17(1)(a) of the Superior Courts Act states that leave to appeal may only be granted where a Judge or Judges are of the opinion that the appeal *would have a reasonable prospect of success and* if there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

8. In *The Mont Chevaux Trust v Tina Goosen & 18 Others*[1] Bertelsmann J held as follows:

"It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another Court might come to a different conclusion. See Van Heerden v Cronwright & Others 1985 (2) SA 342 (T) at 342H. The use of the word "would" in the new statutes indicates a measure of certainty that another Court will differ from the Court whose Judgment is sought to be appealed against."

Contextual Background

9. The factual background is comprehensively captured in the reasons for orders

[1] *The Mont Chevaux Trust v Tina Goosen & 18 Others* 2014 JDR 2335 (LCC) at para 6.

dated 30 November 2023. I do not intend to be as comprehensive here, but a brief background context will suffice regarding the attack leveled against my orders, reasons and findings.

10. The Applicant is the registered owner of the property. It was purchased from ABSA BANK for a consideration of R2 000 000.00 (Two Million Rand). The Applicant also took out a bond from ABSA to finance the property's full purchase. The property was registered in the Applicant's name on 16 September 2020 and is held by Title Deed No: T25665/2020. Simultaneously, the bond was registered in favour of ABSA for R2 000 000.00 (Two Million Rand) and is held by Title Deed No: B14507/2020. The Applicant intended to use the property as a depot for its trucking business and as a residential home for Mr Volkwyn's family.

11. It is common cause that the Applicant has not taken occupation of the property since 16 September 2020, as the First, Second and Fourth Respondents currently occupy the property.

12. The First Respondent, Raycaldo Randel Rowland, is a businessman. Mr. Rowland is no stranger to Mr. Volkwyn, as they know each other personally. They grew up together in the same community. The First Respondent admittedly owns portion 78, Morning Star No.141, City of Cape Town, Western Cape, a property adjacent to the Applicant's but occupies the main house in the Applicant's property with his wife and his three minor children.[2]

13. On how the First Respondent came to occupy the Applicant's property while owning the adjacent property and other properties in the Western Cape Province, the First Respondent avers that he was given consent to reside in the property by the previous owners as he had the intention to buy the property from ABSA before the Applicant bought it. He claims that ABSA Bank accepted his offer to purchase the property, but the property was not transferred to him for some reason.[3]. The First Respondent failed to file a confirmatory affidavit or the ABSA deal, which he claims was sealed.

---

[2] See paragraphs 1 and 104 of the Answering affidavits.
[3] See paragraph 104 of the Answering affidavit.

14. The First Respondent also claims that he is a King of the Cape Khoi. The Applicant's property forms part of the Khoi-Khoi Zan Nation, and the respondents are part of the Kingdom of the Khoi-Khoi Zan Nation. According to the respondents, the Kingdom of the Khoi-Khoi Zan Nation filed a land claim against the property in 2018; therefore, the respondents have a right to reside in the property pending the resolution of the land claim.

15. The Second and Fourth Respondents made similar allegations to the Probation Officer. The Probation Report records that the Second and Fourth Respondents claimed they were afforded the housing on the property as part of their heritage as Khoi-Khoi Zan, as they needed a place to accommodate their cultural dynamics. They claimed they derived their right of residence from their intention to purchase the property and by agreement with the previous owner, Cain Brandon and this information was conveyed to the Applicant. The respondents conveyed to the probation officer that they were willing to negotiate with the Applicant for an amount of the land or acquire another with similar conditions.

16. Before and after the registration of the property in its name, the Applicant, through its representatives, attempted to engage the respondents regarding the nature of their claims on the property and the possible termination of their residence. On behalf of all the respondents, the First Respondent refused to engage meaningfully with the applicant and its representatives. The Applicant was even denied access to its property. The Applicant was compelled to bring an application before the Magistrate Court in Atlantis to gain access to its property. The First Respondents, represented by its erstwhile attorneys, Peter Marais Attorneys, opposed the interdict, which was granted on 21 January 2021[4]. Other occupiers were also legally represented by one Thomas Brink.

17. On 12 November 2020, through its attorneys, the Applicant addressed a letter to the First Respondent's attorneys requesting, amongst other things, a list of the occupiers. The First Respondent's attorneys never provided the list. The letter

[4] A/A at paragraph 111, page 117 of the record.

was also served upon the First Respondent and the occupiers. The respondents failed to provide the Applicant with the list of occupiers.

18. On 3 March 2021, Mr. Volkwyn, together with the Applicant's attorney, Mr van Der Merwe, served by hand to the First, Second Respondents and other occupiers present at the property, estimated at 7- 8 in number notices informing them of the Applicant's intention of termination of their right of residence and affording them an opportunity to make presentations.

19. On 8 March 2022, the Applicant's attorneys sent a notice requesting the respondents' representations to the respondents' erstwhile attorneys, Mr Paul Marais and Thomas Brink, an attorney who represented other respondents during the interdict proceedings in the Magistrate Court. The Sheriff further served the requests upon the occupiers on 11 March 2021 and 19 April 2021.

20. On 28 April 2021, the Applicant terminated the respondents' right of residence. The written Notice was served upon the respondents on the property by the Sheriff on 12 May 2021. The termination notice was also sent to the respondents' erstwhile attorneys on 30 April 2021. The respondents were advised to vacate by not later than 31 May 2021, and the Applicant's attorneys also invited them to discuss anything appearing in the Notice that they wished to discuss. The respondents failed to vacate the property on 31 May 2021.

21. The Applicant instituted these proceedings in this Court on 3 August 2021. The Sheriff served the application upon the First Respondent and other respondents.

22. On 26 June 2022, 10 months after being served with a notice of bar, the First, Second, and Fourth Respondents filed an application to strike out, a counter application, and their opposing affidavit to the main application. The same opposing affidavit was also used to support the application for strike out and a counter-application.

23. On 25 November 2022, the Applicant filed one affidavit, which was to be used as an answering affidavit to the main application and a founding affidavit to the application to strike out and counter the application. No further affidavits were

filed. The respondents failed to file their replying affidavit to its application to strike out and counter application.

24. On behalf of the respondents, it was submitted that the Applicant has not made a case demonstrating the feasibility of the property as a business site for the transport business and how the depot would operate. Rather, the Applicant purchased the property for speculative reasons and used the transport business and its bond payment to evict the respondents from their homes.[5] The respondents submitted that the Applicant has not provided a business plan or evidence to show that his business will operate on land zoned for agriculture.

25. It was further submitted that the respondents had not committed an act of criminality or wrongdoing and that there was no breakdown in the relationship between the parties. Rather, the Applicant has created conditions for constructive eviction and alleges a breakdown to justify colonialist apartheid-style eviction proceedings.

26. Having considered the application, I granted the eviction against the First to the Fourth Respondents.

Amended Notice of Appeal

27. The Respondents appealed on 10 (ten) grounds, with subparagraphs over 11 pages, disregarding the requirements of a notice of appeal. The lengthy Notice of appeal was nothing more than a reiteration of the oral submissions, analysis of evidence, and my findings. The heads of arguments were 26 pages with 55 subparagraphs.

28. Regarding the general principle on appeal, Justice Hendricks in *Doorewaard and Another v S*[6] held that:

"The law governing a notice of appeal (and also a Notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must

[5] A/A at paragraph 95, record page 115.
[6] [2019] ZANWHC 25.

be clearly and succinctly set out in unambiguous terms so as to enable the Court and the Respondent to be fully and properly informed of the case which the Applicant seeks to make out and which the Respondent is to meet in opposing the application for leave to appeal. The Notice should not contain arguments. Therefore, heads of argument must also be filed and served in which the points to be argued will be set out in much more detail.[7]"

29. The grounds of appeal can be summarised as follows:

1. The Court erred and misdirected itself by granting an eviction order against all the Respondents, including the Third Respondent, who has since vacated the property. In addition, the Court erred in finding that the Applicant had complied with the provisions of s 9(2) of ESTA.

2. The Court erred in failing to properly rule on the merits of counter application and application to strike out hearsay and inadmissible evidence.

3. The Court erred in focusing almost exclusively on and affording improper weight to the applicant's circumstances, ruling that there was no genuine dispute of facts.

4. The Court erred in placing a positive obligation on the city of Cape Town to provide alternative accommodation.

5. The Court failed to consider that while the ESTA is silent on who bears responsibility for the provisions of suitable accommodation, it is incumbent upon the Applicant to show its existence.

6. The Court erred in failing to consider the Probation Report of the Sixth Respondent properly.

---

[7] Ibid at para 3. Also see *Songono v Minister of Law-and-Order* 1996 (4) SA 384 (E); *S v Mc Kenzie* 2003 (2) SACR 616 (C); *Xayimpi and Others v Chairman Judge White Commission and Others* [2006] 2 ALLSA 442 (E); *S v Van Heerden* 2010 (1) SACR 539 (ECP).

7. The Applicant failed to make out the case on the founding affidavit but attempted to make out a case on its replying affidavit. The Court erred in finding in favour of the Applicant on the basis that it made out a case on its founding affidavit in the circumstances where the Applicant's explanation of the omission not to put annexures RA1 to RA14 by failing to apply just and equitable principles in balancing the Applicant's and the Respondent's rights.

8. The Court erred and misdirected itself in failing to apply a purposive and generous interpretation of the Bill of Rights and ESTA.

9. The Court erred and misdirected itself in failing to find that the termination of the Respondent's rights and their eviction did not satisfy the requirements of justice and equity as set forth in section 26 (3) of the Constitution, read with sections 8,9 and 11(3) of the ESTA.

30. I now deal with the respondents' grounds of appeal.

Ground one and nine – The inclusion of the Third Respondent and non-service the notices upon the occupiers individually.

31. It was submitted on behalf of the Respondents that the Court erred and misdirected itself by granting an eviction order against all the Respondents, including the Third Respondent, who has since vacated the property where there was no lawful termination of the Third Respondent's right of residence. The inclusion of the Third Applicant in the eviction order is a clear error. I could have rectified this by varying the order in terms of Rule 64(1) of the Rules of this Court, but I decided against that as the respondents had noted leave to appeal before the reasons were given.
32. The error occurred when the typists were instructed that the order was granted against the Respondents. There is no prejudice in simply varying the order to

exclude the Third Respondent. Either party that noticed the error could have made an application to vary the order, but that was not the case in this matter, although the Respondent noticed the error.

33. The Respondents also made errors that were fatal to their case. For example, in paragraph 27 of their answering affidavit, the Respondents stated that *"the prejudice that the Applicant might suffer which sounds in money, even though it may be recoverable, should be given priority over the needs and wellbeing of the Respondent's, that include the elderly, disabled, women and children.*[8]. I understood this to be a typo, and I considered the whole representation when dealing with the respondents' submissions.

34. Mr. Mahomed, on behalf of the respondents, argued that there was no effective service of the notices inviting the occupiers to make representations and notices of termination of the respondents' right to residence as the notices were not sent to all the respondents individually as envisaged by ESTA. It was further argued that there is no proof of termination of the respondents' right of residence per ser, and the notices requesting representations were conveniently obfuscated and conflated with the Notice of termination of residence. It was argued further that there was no evidence in the founding affidavit that there was an attempt from the Applicant to seek the details of the respondents, and the Applicant did not seek directives in Court for effective service of the termination of residence.

35. I find no merit in this ground of appeal. On their version, the First Respondent conceded that since 2019, the respondents have been invited by the Applicant's attorneys to discuss the respondents' occupation of the property and the rights they might have over it. The Applicant's attorneys specifically requested a list of occupiers living on the property. The First Respondent admitted that he never responded to the invitation by the Applicant's representatives and had always spoken directly to Mr Volkwyn whenever he saw him in the area.[9].

36. In paragraph 131 of the answering affidavit, the First Respondent conceded that he never provided the Applicant with a list of occupiers. The reasons for refusal

---

[8] See paragraph 27.1.5 of the answering affidavit.

[9] See paragraph 154 of the Respondent's answering affidavit.

were couched as follows:

"*It is true that the Respondent had not provided the Applicant with a list of people currently residing on the property, but this is not for lack of trying to engage with Mr. Volkwyn and experiencing his arrogance and disdainful attitude.*"[10]

37. Furthermore, the respondents argued that there was no effective service of the notices inviting the respondents to make representations and notices of termination of the respondents' right to residence as the notices were not sent to all the respondents individually as envisaged by ESTA. On their version, a letter dated 12 November 2020 from the Applicant's attorneys to the Respondent's erstwhile attorneys informing them of the purchase and registration of the property to the Applicant's name was delivered on "*selected few.*" In this letter, the Applicant sought access to the property and details of the occupiers. The applicant sought to establish the nature and the extent of rights sought to be asserted by the respondents. There was no response to this letter from the respondents' erstwhile attorneys, the First Respondent, or other respondents.

38. The same argument is advanced regarding the services of two notices, dated 8 March 2021 and Notice of termination of the right to residence dated 28 April 2021, and the application issued on 16 August 2021. The First Respondent failed to identify the "*selected few*" who received the letter, nor did he identify those respondents who did not receive the letter.

39. The respondents also complain that the Applicant has not treated them as individuals. This ground has no merit. Prior to the commencement of these proceedings and throughout them, the First Respondent served as the representative/leader/spokesperson of all the Respondents as a group. The reference to the Respondents as a group and or a community can be gleaned from the respondents' affidavit, which is full of the use of " We, us, the community, the claimants, the Kingdom" when referring to themselves.

40. In these proceedings, the First Respondent claims that the respondents are part of the Khoi-Khoi Zan Kingdom, which lodged a land claim in terms of the

[10] See paragraph 131 of the Respondent's answering affidavit.

Restitution of Land Rights Act 22 of 1994. The First Respondent contended that he and Mr. Samuel, a representative of the Kingdom, endeavored to negotiate with the Applicant about ***their tenure rights as residents and as land claimants*** without success due to Mr. Volkwyn's arrogant and recalcitrant attitude.[11]

41. The Applicant endeavored to serve all the occupiers, including the First Respondent, the two notices (the notice of intention to terminate and a request for representations, the notice of the termination of the right to residence, and the main application. The First Respondent deliberately concealed the occupiers' identities and elected to put himself at the forefront as their King /Leader/Spokesperson. He cannot now complain that only the "select few" were served while not disclosing those who were served and not served. The service of the notices to the occupiers by hand, by the sheriff and to their legal representatives was effective service.

42. It was also argued during the hearing that there was no evidence of meaningful engagement, and the Applicant did not avail themselves of meaningful engagement. I found no merits in this ground. There is ample evidence in the founding affidavit that as soon as the property was registered in its name, the Applicant attempted to engage the respondents individually and through their attorneys. However, the Applicant's efforts were frustrated by the Respondents, who denied the Applicant and their representative access to the property, necessitating an urgent application by the Applicant to gain access to the property.

43. On their version, the First Respondent conceded that as far back as 2019, before the registration of the property to the Applicant's name, a representative of the Applicant, Mr. Volkwyn, and the Applicant's attorneys approached him on separate occasions and informed him about the purchase of the property. The First Respondent states that he told Mr. Volkwyn that they (the respondents) had consent from the previous owner of the property to reside in the property and

[11] A/A in paragraph 107.

that they would not move.[12]. Similar allegations were made by the Second and Fourth respondents to the Probation Officer.

44. In the main application, the Applicant still invited the respondents to approach the Applicant in order to discuss a resolution of the issues before the matter is argued in Court. There is no evidence that the Respondents approached the Applicant in this regard.

45. The Respondents further contend that the Applicant has failed to engage the Fifth and Sixth Respondents meaningfully, have them intervene in the process of meaningful engagement, settle the dispute through Mediation, and arrange suitable accommodation for the respondents, who include women, children, older people, and people with disabilities. The respondents sought for this Court to issue directives to the parties mandating meaningful engagement and the appointment of an independent facilitator. I declined the invitation as there was ample evidence that the Applicant attempted to engage with the respondents.

46. Furthermore, section 21 of ESTA deals with Mediation. It provides that:
"A party may request the Director-General to appoint one or more persons with expertise in dispute resolution to facilitate meetings of interested parties and to attempt to mediate and settle any dispute in terms of this Act."

47. It is common cause that no mediation process has taken place. The respondents place the blame squarely on the Applicant for failing to follow up on the mediation proposal. However, Section 21 of ESTA enjoins any party to request Mediation. The Applicant intimated its willingness to engage with the role players and stated that these engagements should take place before the hearing of the matter. The respondents made no effort to utilise the provisions of Section 21 of ESTA.

48. In its counter application, the respondents submitted that the Court should adjourn the proceedings to appoint a suitable qualified mediator, given the complexity of the dispute, give directives on the process for determining the

[12] See paragraph 105 of the Respondent's answering affidavit.

terms thereof, and give directions to all the parties as to the dates, time, and place of the mediation proceedings.

49. The Respondent further complained that there has been non -compliance with sec 9(2)(d)(ii) and(iii) in that the Fifth and Sixth respondents were not given the notice of intention to obtain a court order as prescribed by this section. There are no merits on this ground. The Applicant has served a copy of this application upon the Occupiers, the Fifth and Sixth Respondent, not less than two months before the date for the commencement of the hearing of the application. The section gives a proviso that if the occupier, fifth and Sixth respondent were served at in this manner, then the provisions of 9(2)(d)(ii) and(iii) shall be deemed to have complied with.

Ground 2 – Failure to properly deal with the counter application and application to strike out.

50. The Court erred in failing to properly rule on the merits of counter application and application to strike out hearsay inadmissible evidence.

51. Indeed, I did not grant any order for either application, but I considered both applications. In any event, the allegations in the "privilege" communication and hearsay evidence were repeated and admitted in the answering affidavit and in the Probation Officer's report, which evidence was considered in *toto*.

Ground Three -failure to consider the Respondent's relevant circumstances.

52. The Third ground of appeal is that the Court erred or misdirected itself in focusing almost exclusively on and affording improper weight to the First Respondent's circumstances and finding that the Second and Fourth Respondents and their circumstances were so unworthy of mention or consideration. There is no substance in this ground. Firstly, I made no such finding. Secondly, on their version, the respondents admittedly failed to place all relevant circumstances for consideration by the Court in their answering affidavit. In paragraph 46 of their answering affidavit, the respondents complained of the

stringent time constraint imposed by the Applicant to file the answering affidavit through the Notice of Bar. The respondents contended that it had not been possible for them to place before the Court all the evidence required in terms of ss 26(3) of the Constitution and ss 3,4,5,6,8,9,10, and 11 of the ESTA.[13].

53. Instead of relating their circumstances, the Respondents referred the Court to the Probation officer's report and recommendations that the evictions should not be granted against the respondent as the property is subject to a land claim, that the option of purchasing the Applicant's property by the DALRRD to secure all the occupiers of the property must be considered, and that the Court should provide directives in that regard.

54. As stated earlier in this Judgment, the respondents were served with this application on 16 August 2021. The *dies* in filing any pleading expired in fifteen days after the application's service. The respondents only filed their opposing affidavits on 26 June 2022, 10 months after being served with a notice of bar. No condonation application was made for the late filing of an opposing affidavit. Instead, the respondents filed an application to strike out and a counter-application. The respondents had ample time to put all the relevant circumstances before the Court.

55. The First Respondent contended that 23 (twenty-three) people from four households, including his own family, are residing in the property. The Rowland family of (5) persons, the Adonis family of (6) persons, the Samuels family of (7) persons, Household four—the Stout family of (5) persons,1 disabled woman, and an elderly pensioner aged 71 years of age.

56. In their answering affidavit, the respondents conceded that the identities of the occupiers were concealed but not deliberately and that the Fifth and Sixth Respondents' reports would better assist the Court with facts and relevant circumstances of the respondents. In the alternative and the event of the respondents' defenses failing, then the First Respondent would request a

[13] See paragraph 46 of the Respondent's answering affidavit.

postponement of the proceedings in order to enable the evidence of the circumstances of all the respondents to be pleaded before the Court in order for the Court to determine whether it is and equitable to grant eviction against the respondents.

57. As a further alternative, the First Respondent requested a stay of execution of an eviction order pending a land rights inquiry to determine the impact of the eviction order on the respondents.

58. The court considered the Probation Report regarding the Second and Fourth Respondents.

Grounds four and Five—Order against the Sixth Respondent to provide emergency housing with access to services that may be communal to all the Respondents.

59. It was argued on behalf of the respondents that the Court erred in placing a positive obligation on the City of Cape Town to provide alternative accommodation. It was further argued that the Court failed to consider the fact that while the ESTA is silent on who bears responsibility for the provisions of suitable accommodation, it is incumbent upon the Applicant to show the existence.

60. This is not the case where the Applicant is obliged to show the existence of suitable accommodation and provide suitable accommodation to the respondents. It is trite that the State has a constitutional obligation in terms of section 26 (2) of the Constitution to provide access to housing, and the Municipality has the constitutional duty to provide alternative accommodation in cases where eviction would lead to homelessness.

Ground six- Failure to Consider the Probation Report

61. It was also submitted on behalf of the respondents that the Court erred in failing to consider the Probation Report of the Sixth Respondent properly. There is no

merit in this ground of appeal. It is clear from the Judgment that I considered both reports. A typographical error occurred in the judgment where it is recorded that the probation officer recommended that the respondents be evicted from the property. This was clearly an error. I made a summary of the probation officers' recommendations, and it is clear that a typographical error occurred in this particular recommendation. I did consider all the probation reports. I could have rectified the error, but the respondents had raised this issue as a ground of appeal. The respondents capitalized on that error by insinuating that I made false statements, and as a result, my findings were nonsensical and jaundiced. The attack on my findings by the respondents is a clear indication of the respondents' dilatory technique in this application. I had fully considered the Probation Officer's recommendations.

Ground Seven-Ad finding that the Applicants have made a case on founding Affidavit.

62. It was submitted that the Court erred in finding in favour of the Applicant on the basis that it made out a case on its founding affidavit, yet material allegations were only made in the replying affidavit. As a result, the respondents were not afforded an opportunity to deal with the allegations.

63. The respondents submitted that the Applicant attempted to bolster its case on its replying affidavit by attaching annexures RA1.1 to RA 14 and the confirmatory affidavits of the Applicant's attorneys JE Van der Merwe, FD van den Berg, DB Smit and WCJ Smit has failed to file the confirmatory affidavits from the persons who had made hearsay averments in the founding affidavit. They argue that no reliance can be placed on the hearsay averments and, as a result, paragraphs 70 to 77 and 89-95 must be struck from the Applicant's founding affidavit.

64. The Applicant has attached the following annexures in its replying affidavit:

- RA1.1 to RA1.6 – the Sheriff's return of service of the request for representations

- RA 2- a Request for Mediation of dispute from the Applicant's attorney to the Respondent's attorneys dated 12 October 2022 and the Respondent's attorney's response to it.

- RA3 and RA4 are electronic inquiries showing that the First Respondent is the sole member of Peremore Enterprise Holding CC, which owns Portion 78 Morning Star, an adjacent property to the Applicant, which the First Respondent admitted he owns.

- RA5 - copies of the First Respondent's opposing affidavit in the magistrate's Court in case no 2000/2020. The First Respondent described himself as a businessman in the trucking industry and an owner of the farm Morning Star no 14, Portion 78

- RA6—an electronic inquiry to the Companies and Intellectual Property Registration Office reflecting Mr. Volkwyn's sole membership of the Applicant.

- RA7 – a copy of the deed of transfer to the Applicant's name

- RA8- a letter dated 12 November 2020 from the Applicant's attorneys to the Respondent's erstwhile attorneys confirming the discussion they had on 18 October 2020 and the response from the Respondent's attorneys.

- RA9 – A copy of the court order in the Magistrate court for the district of Atlantis, case no 2020/2000

- RA10 .1 – A copy of the Sheriff's return of service of the service of the order upon the First Respondent on 27 November 2020

- RA11 – a copy of an email from the Respondent's attorneys dated 03 December 2020 enclosing a notice of intention to defend the application in the magistrate court and a demand for the Applicant to leave the premises pending the finalization of the application.

- RA13 – The Fifth Respondent's copy of a generated tax invoice dated 24/10/2022.

- RA14- a copy of the personal property history search reflecting that the First Respondents owns two other properties, one in Mossel Bay and the other in Cape Town

- A confirmatory affidavit from the Applicant's attorneys on allegations relating to him and a confirmatory affidavit from the previous owners of the properties, Mr. and Mrs Smith, who owned the property until 2015, that there were no individuals, groups, entities or cultural group who had been granted rights to the property no graves in the property.

65. It is trite that in motion proceedings, the Applicant is required to make its case in the founding affidavit and not in the replying affidavit. However, this rule is not absolute; the Court still has the discretion to permit new material in reply.[14] In *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,[15] The governing test in deciding whether to allow new matter in reply was set out in the following terms:

> "In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the Applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the Respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the Applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the Respondent and to set up such additional ground for relief as might arise therefrom."

66. The Applicant did not bring new grounds for the relief sought; rather, he enlarged upon what the First Respondent revealed in his answering affidavit. There is no merit in this allegation.

Ground eight - Failure to interpret the Bill of Rights and ESTA generously.

---

[14] In *Kleynhans v Van der Westhuizen N.O.* 1970 (1) SA 565 (O) at 568E-G, De Villiers J stated the following: 'Normally the Court will not allow an applicant to insert facts in a replying affidavit which should have been in the petition or notice of motion ... but may do so in the exercise of its discretion in special circumstances...'

[15] *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger* 1976 (2) SA 701 (D) at 705H-B.

67. It was submitted that the Court erred and misdirected itself in failing to apply a purposive and generous interpretation of the Bill of Rights and ESTA. There is no merit in this ground. In fact, the court was overly generous.

Conclusion

68. Whether the appeal would have reasonable prospects of success, it would not. However, my considered view is that the appeal ground concerning the counter application and application to strike out falls squarely on section 17(1)(a)(ii) of the Superior Courts Act although I am certain that whichever outcome, it will not change the orders granted. Reluctantly, I grant partial leave to appeal in the Supreme Court of Appeal only on this ground. On the remaining grounds, leave to appeal is refused.

69. As a result, I make the following order:

1. Partial leave to appeal is granted to the Supreme Court of Appeal to deal with counter applications and applications to strike out.

2. The costs of this application shall be the costs on appeal.

Flatela L

Judge of the Land Claims Court

This judgment was handed down. electronically by circulation to the parties and their representatives by email. The date and time for the hand down is deemed to be 16:00 on 15 March 2024.

Date of Hearing:	15 January 2024
Date of Judgment:	15 March 2024
Counsel for Applicant:	LF Wilkins SC
Instructed by	Dicks Van Der Merwe Attorneys
Attorneys for Respondents	Ashraf Mahomed
Instructed by:	Ashraf Mahomed Attorneys