

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2023-12077 7

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>29 Jan '24</u>	
DATE	SIGNATURE

In the matter between:

ROBERT SEAN SHRIVES N.O

First Applicant

CARRIE LEIGH COOPER N.O

Second Applicant

WILLIAM GLEN MILFORD MCKENZIE N.O

Third Applicant

in their capacity as Trustees of

Robda Holding Trust (number IT 563/2015 (G))

and

ANNA SAMMARITANO

First Respondent

SILVESTRO SAMMARITANO

Second Respondent

CITY OF EKURHULENI METROPOLITAN

Third Respondent

MUNICIPALITY

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on Case Lines. The date and time for hand-down is deemed to be 30 January 2024.

G S Myburgh AJ:

- [1] The applicants and the respondent are the owners of adjacent residential erven. The applicant's erf is the higher lying of the two. The natural flow of water would accordingly be from the applicants' property onto that of the respondents. Both erven have been developed inter alia by the construction of dwellings and the making of gardens. Although it was difficult to say to what extent the respective erven have been developed, based on the evidence presented, the aerial photograph which formed part of the applicants' founding papers suggests that approximately 50 percent of the applicants' erf is taken up by a dwelling. Other images showed some disturbance of the natural landscape, which included what appeared to be a strip of cement along the base of the common boundary wall.
- [2] Both properties and apparently also other properties in the area are prone to flash flooding during heavy downpours. Photographs which were attached to the papers showed water which was knee deep and possibly even deeper than that. The papers also contained photographs of damage caused to the properties (especially that of the respondents) by such flooding. The damage was in line with what is to be expected from such occurrences.
- [3] As I have indicated, the properties are separated by a boundary wall. It is of the prefabricated kind, made of cement posts and panels. It was common cause on the papers that one of the lowest panels of the wall had been missing for a long time. This resulted in gap, which was at the lowest point of the applicants' property, through which water could flow freely from the applicant's property onto that of the respondents. There was some dispute as to the exact period for which the panel was absent. The applicants contend that it had always been so. The

respondents denied that but did not produce any evidence to support their contentions. In any event, it was common cause that it was so from at least 2020 to 2022, when the respondents took it upon themselves to block the gap with cement or concrete. Precisely what precipitated this is unclear. The main complaint raised by the respondents at the time seems to have related to debris; however other passages in their answering papers were to the effect that the uncontrolled flow of water via the gap caused the ground to become muddy. It also seemed to be suggested that water flowing from the applicants' property contributed to damage to the property of the respondents.

- [4] Once the gap had been blocked, the wall acted as a complete barrier to water flowing from applicants' property towards that of the respondents, causing it to dam up. This presented a risk of flooding of the applicants' property. Indeed, the applicants had experienced serious flooding even with the gap which had until then existed. The filling of the gap accordingly served to exacerbate the situation.
- [5] In order to address this risk, the applicant's tenant, Mr Watson had a meeting with the respondents during which it was agreed that some of the lower panels of the wall would be replaced by what were referred to as "cross hatched" panels – i.e. panels which have the appearance of lattice work, and which would allow the flow of water through them. Having regard to the images which formed part of the papers, it seems that the water would have to rise about ten centimeters before it could escape via the holes so created – i.e. there would still be some damming of water. How severe that might be was not clear. In particular, it was not clear whether the damming would only affect the applicant's garden or whether it would also affect the dwelling.
- [6] The applicants were, for the reasons already mentioned, not completely satisfied with that solution. They accordingly continued to engage the respondents with a view to restoring the flow which had previously occurred at the base of the wall. They also involved the local ward councilor. A meeting was held between Mr Watson, the respondents and the said ward councilor on 9 November 2022 with a view to finding a solution. The parties reached an agreement in terms of which it was agreed that a hole would be made through the concrete which had been placed in the position of the missing panel and a PVC pipe would be installed in

the hole so as to lead the water to a stormwater pipe situated under the respondents' property which runs close to and more or less parallel with the boundary wall. In order to achieve this purpose a connection had to be made to the stormwater pipe. The facts are not completely clear but it appears that a hole was dug for that purpose. The arrangement also involved the use of a bucket. Precisely what role that played is unclear; however, it is also not important. What is clear is that the arrangement was a makeshift one and one which appears, at least prima facie, to have involved making an unauthorised connection to the stormwater system.

- [7] Initial reports were to the effect that the solution (which was described as a temporary one) was effective. However, it appeared from the answering papers that it was not as successful as initial observations suggested. The reason, having regard to the contents of the answering papers, was that stormwater backed up in the system and flooded the respondents' property via the hole which the PVC drainpipe discharged into. The reason given by the respondent (but not supported by any acceptable expert evidence) appeared to have been either that the stormwater system had not been properly designed or that it was defective. Nothing turns on this as it was common cause on the papers that what occurred was that water backed up in the stormwater drain during heavy rains and then welled up via the connection and flooded the respondents' property.
- [8] During September this year Mr Watson discovered that the respondents had blocked the PVC pipe with cement. The respondents had also blocked the connection to the stormwater pipe in order to prevent a recurrence of flooding caused by the backing up of stormwater as referred to above. A flurry of WhatsApp messages ensued. Mr Watson demanded that the pipe be unblocked, which the respondents refused to do. The matter was accordingly escalated to the parties' attorneys who exchanged correspondence. Their respective positions remained unchanged. The applicants accordingly launched this application which is aimed at restoring the status quo ante (i.e. the unblocking of the drainage pipe) pending the outcome of proceedings to finally determine the rights and obligations of the respective parties.

[9] The requirements for interim interdictory relief are well known. They are the existence or a right, although possibly open to some doubt (i.e. what has often been referred to as a “prima facie right”); ongoing harm or a well-grounded apprehension of harm; the absence of a satisfactory alternative remedy and that the balance of convenience favours the granting of the relief sought.¹

[10] The applicants’ case regarding the right contended for was somewhat unclear on the papers. At some points in the founding papers the deponent referred to the “natural flow of water”, which was suggestive of a claim based on common law principles.² Specific reference was also made to clause 14.7 of the City of Ekurhuleni Land Use Scheme, 2021, which sub-section reads as follows:

“Where, in the opinion of the Municipality (Roads and Stormwater Department), it is impracticable for stormwater to be drained from a higher-lying property directly to a public street, the owner(s) of the lower-lying property shall be obliged to accept and permit the passage over the property of such stormwater, provided that the owner(s) of any higher-lying property, the stormwater from which is discharged over any lower-lying property, shall be liable to pay a proportionate share of the cost of any pipeline or drain, which the owner(s) of such lower-lying property may find necessary to lay or construct, for the purpose of conducting the water so discharged over the property.”

[11] As to the common law position, our courts have repeatedly stated that the obligation of a landowner to receive water from a higher lying property relates only to the natural flow of water from the undisturbed land. This is in the nature of praedial servitude which dates back to Roman times. As this matter was heard on an urgent basis I do not intend to embark on a discussion of the law. Suffice to say that absolution was ordered (on appeal) in respect of a claim which was,

¹ *Setlogelo v Setlogelo* 1914 AD 221; *LF Boshoff Investments (PTY) LTD v Cape Town Municipality*; *Cape Town Municipality v LF Boshoff Investments (PTY) LTD* 1969 (2) SA 256 (C).

² To the extent that the papers referred to a restoration of the *status quo ante*, it had the flavour of a *mandament van spolie*; however, some of the essential averments were (at least arguably) absent, and the case was not argued on that basis.

for all intents and purposes indistinguishable from the one in *Pappalardo v Hau*.³ The reason was that the court, following earlier judgments and after considering a wealth of authority, held that the obligation in question only applied to the natural run off from the higher lying erf in its undeveloped state and that the respondent (who had been the plaintiff in the court of first instance) had failed to establish what volume of run off, if any, would have been natural. In the course of its judgment the court also referred with approval to a number of earlier judgments in which it was held that it is an unavoidable consequence of urban development that the natural flow of water is disturbed and also that flows are concentrated, *inter alia* by the construction of dwellings (the rooves of which collect water), landscaping, the installation of paved areas and the like. Inasmuch as the applicants' papers are silent on this issue and given that it is common cause that the applicants' property is a developed one, I am of the view that the applicants have not made out even the glimmer of a common law right to discharge water via the pipe or hole in question. That they may have done so for an extended period prior to the blocking of the gap in the wall is neither here nor there in this context.

- [12] Turning to the statutory right contended for, the starting point is that the local authority must have expressed the opinion that it is impracticable for the stormwater to be drained to a public street – which is the default position. If that be the case, then the issue of what constitutes an appropriate means of draining to a stormwater connection via a lower lying property and the associated issue of liability for the cost of the works arises. *In casu* there is no evidence that the local authority has expressed the required opinion, let alone sanctioned a solution. That the applicant may be of the opinion that discharging to the street is not practicable is neither here nor there in this context. Indeed, the facts are strikingly similar to those of *Pappalardo*⁴ in which the court, *inter alia* stated that considerations of cost are not to be confused with what is and what is not practicable - i.e. a solution may be costly but nevertheless practicable. The fact that the local ward councilor was involved in coming up with the solution of the PVC pipe and improvised connection to the stormwater system also does not

³ 2010 (2) SA 451(SCA).

⁴ Ibid.

assist the applicants. Ward councillors are elected office bearers, not appointed officials. There is no evidence that the person in question was ever authorised to represent the third respondent. It is also unthinkable that a local authority would authorise anyone other than an official employed in its engineering department to attend to matters of the kind in issue.

[13] I am accordingly of the view that the applicants have not made out any case at all in respect of the right/s contended for and that the application falls to be dismissed on this basis alone.

[14] However, even if I am wrong on that score, the application must fail at the second hurdle. As I have already indicated, the applicants' property flooded when an entire panel of the wall was missing. That being so, it is difficult to understand how a relatively small drainpipe could prevent such a calamity. To this I would add that it is common cause that some of the panels have been replaced with panels which permit the free flow of water through the wall, albeit not all the way to ground level. This being so, it seems to me that no calamity will befall the applicants if the PVC drainpipe is not reinstated. They and their tenant may well experience a degree of inconvenience; however, inconvenience is a far cry from serious harm.

[15] I also do not think that the balance of convenience favours the grant of the relief sought. It was not disputed that the respondents experienced severe flooding of their property as a result of stormwater backing up through the hole which had, unwisely, been made to accommodate the flow of water from the PVC pipe into the stormwater pipe. It also was not and cannot seriously be contended that the applicants would be entitled to discharge water via the PVC pipe absent the connection to the stormwater pipe -which, as I have already pointed out, appears to not to have been properly authorised and hence to have been illegal, and which has since been closed.

[16] For all of these reasons the application cannot succeed. I accordingly make the following order.

Order

1. The application is dismissed with costs.



G S MYBURGH AJ
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

For Applicant: Adams Attorneys
Instructed by: Hamann Attorneys

For First and Second Respondents: J Gates
Instructed by: Hamann Attorneys

Date of Hearing: 6 December 2023

Date of Judgment: 29 January 2024