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

Case number: 4009/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

THABO PATRICK ALLINBORNE MAKHEKHE

Applicant

and

MANTSOPA LOCAL MUNICIPALITY

First Respondent

**THE MUNICIPAL MANAGER OF MANTSOPA
LOCAL MUNICIPALITY**

Second Respondent

**DIRECTOR OF TECHNICAL SERVICES OF
MANTSOPA LOCAL MUNICIPALITY**

Third Respondent

THABO MUFUTSANYANA DISTRICT MUNICIPALITY

Fourth Respondent

HEARD ON: 23 MARCH 2023

CORAM: JONASE, AJ

The judgment was handed down electronically by circulation to the parties' legal representatives by email and released to SAFLII on 11 AUGUST 2023. The date and time for hand-down is deemed to be 11 AUGUST 2023 at 11h00.

Introduction

[1] The Applicant seeks an interdict in the following terms;

a) The First Respondent is directed to forthwith take all necessary steps to search for and effectively repair the leaking municipal water pipe(s) and /or water reticulation infrastructure responsible for the ongoing seepage and accumulation of water at the Applicant's property at M[...]6 Muelli Street, Manyatseng, Ladybrand, and to thereafter properly fill and restore any excavations made in the process, including the existing trench on the pavement of the said property, depicted in annexure "FA15" to the founding affidavit.

b) The First, Second, and Third Respondents are directed to take all necessary steps to ensure that the order in paragraph 1 above is carried out, within 30 (thirty) days from date of such order, alternatively within such period as this court may direct;

c) Costs of this application are to be paid by the First Respondent, provided that if any of the other respondents should oppose the matter unsuccessfully, they be directed to pay the said costs jointly and severally with the First Respondent.

[2] The First, Second, and Third Respondents ("the respondents") oppose this application.

The facts

[3] The Applicant is the owner of the property known as M[...]6 Muelli Street, Manyatseng Ladybrand from 1986/1987. Shortly after the Applicant moved in, there

was a leak in the municipal water supply pipeline running parallel to Muelli Street and workers from the erstwhile Municipality of Ladybrand came to attend to the problem. Since then and for more than 30(thirty) years, there were no further issues with leaks, seepages, or the accumulation of water at the property.

[4] During or about 2018/2019 the Applicant noticed that a section of the ground on the pavement next to the driveway was damp. That struck the Applicant as strange since there had been no recent rain or other reason for the area to be wet. The damp section was easily visible because the soil on the pavement was darker and wet. The dampness gradually expanded under the front wall of the property and into the yard. The property is slightly lower lying than the street, which facilitates the movement of water towards the house.

[5] The Applicant reported the issue to the municipality and the workers were sent to dig open the soil in the damp area and search for the source of the water. The workers later filled the holes and left without giving any feedback. The Applicant was also never contacted by anyone from the municipality and accepted that the problem had been fixed.

[6] Unfortunately, it did not take very long before the same area on the pavement again appeared to be damp. The dampness seems to be isolated to one specific area on the pavement. The Applicant had not noticed any similar issues on the neighbouring pavements nor he is aware of any complaints by other resident's in the street/area about problems with seeping and accumulating water.

[7] The Applicant went back to the municipality and spoke to one Mr. Moeti as the Applicant understood that the said Moeti is employed in the Technical Services Department, which is responsible, *inter alia*, for the maintenance and repair of municipal water pipes and infrastructure. Moeti explained that the workers who had recently been to the property had been unable to discover anything that might cause water seepage. According to Moeti, the damping was therefore caused by underground water and the municipality was not to blame.

[8] The Applicant indicates that he finds it difficult to accept the so-called “*underground water*” explanation because he lived at the property since 1986/1987 and had never experienced any similar issues with dampening, even during years with good rainfall. The problem had to be put on hold because of the Covid-19 pandemic. The dampening problem continued over the lockdown and subsequent months, as it was difficult to pursue the municipality due to Covid-19 protocols.

[9] In June 2021, the Applicant decided to hire a local plumber, one Letuka, to investigate the source of the water. Letuka and his assistant started in the yard and dug in the direction of the water until they got to the front wall. At that point, Letuka advised that the water seem to come from the municipality’s side of the property and the Applicant should report the problem because they could not excavate on municipal land or work on any municipal water infrastructure.

[10] On 1 July 2021, the Applicant went back to the offices of the municipality and managed to convince Moeti to visit the property for himself to see what was going on. On 2 July 2021, Moeti came to the property and the Applicant showed him the hole that had been dug by Letuka and his assistant in the yard towards the wall. The hole was filled with water from the seeping. Moeti took a sample of water from the hole and told Applicant that he was going to test it for chlorine. After performing the tests, Moeti claimed that the water was not coming from the municipal water supply pipes and repeated that there is nothing the First Respondent can do.

[11] The Applicant tried to explain to Moeti that if the water is coming from the municipality’s side of the property boundary they should at least try to assist, but Moeti remained adamant that it was not the municipality’s responsibility and left. The Applicant decided to approach one Ms Tshidi Leseotsa, who was the Acting Municipal Manager of the First Respondent at the time. Due to Covid-19 measures, the Applicant was not allowed to meet with Leseotsa but was advised to talk to one Mr Africa Masuku, the Director of Technical Services and Moeti’s supervisor. Masuku was on sick leave, but the Applicant managed to contact him telephonically and Masuku promised to attend to the matter when he is back at work.

[12] In the meantime, the Applicant was able to get the cellphone number of Letsoetsa who agreed to come to the property, witnessed the extent of the water accumulation problem, and promised that the municipality would try to see what the cause was and fix it. The Applicant also sent Letsoetsa photographs of cracks in the walls of his house which the Applicant believes have been caused by water continually seeping underneath his house and damaging the foundations for years.

[13] When Masuku came back from sick leave, the Applicant explained that municipal workers had previously been to the property during 2018/2019 but that the problem had not been resolved. The Applicant also told Masuku about his interaction with Moeti and that the Applicant disagreed with the so-called “underground water” explanation. Masuku promised to investigate the matter. Later on, a team of workers from municipality arrived and dug a trench on the pavement exposing a section of the municipal water supply pipeline as well as the connection branching off from the supply pipeline to the Applicant’s house.

[14] The Applicant indicates that no visible leak on the exposed section of the water pipeline or at the connection, but water could clearly be seen seeping into the trench from the direction of the street. The workers were not seen taking samples of the seeping water for testing. If samples were taken and tested, the Applicant was never informed of the nature of the tests or the results. Masuku also blamed underground water for the ongoing problem. Days later, they came and dug an inspection hole on the other side of the street, which was not cordoned off, which hole also filled up with water, which was not tested.

[15] The Applicant contends that he remains of the view that this is highly improbable when considering that there has never been any similar water accumulation problem since 1986/1987. The Applicant further contends that he is not aware that a single test for groundwater has been done by the First Respondent to support their theory. The Applicant has no objection to the trench remaining open because it allows the water that continually fills the hole to be drained to mitigate the ongoing damage to the property. However, the Applicant asked Masuku to arrange for the municipality to drain the water with a pump at least once a day. One Mr. James Makeka, an employee of the municipality, initially came to drain the water, but

there were many days when he was not available, and the Applicant had to pay somebody else to do it.

[16] The municipality's workers failed to cordon off the trench with netting or barrier tape, even though it constitutes a serious risk of damage and/or injury to vehicles, drivers, pedestrians, and cyclists. The water volume is quite considerable which amounts to 500 liters in the hole when is full. The hole fills up continuously and it is absorbed into the ground. The Applicant has been to the municipality offices from time to time to enquire about progress but has realised that nothing is going to be done because of the view that the water problem stems from underground water and not municipal water infrastructure. As a result, thereof the Applicant has been forced to buy a petrol-powered water pump so that the hole can be drained without having to rely on the municipality or casual labour. The Applicant has arranged for some concrete to be poured in the area around the municipal water meter in the yard to lessen the nuisance and inconvenience of the mud caused by the perpetual seeping of the water. The concrete, however, does nothing to address the problem.

[17] On 31 August 2021, the Applicant laid a complaint to the Public Protector and towards the end of November or beginning of December 2021 a response from the municipality was conveyed to the Applicant by the investigator from the Public Protector. The said report read as follows;

“the alleged leak was investigated by the municipality, the water seepage in that area is not because of pipe leaks.

After doing the investigations, we observed that the whole area is experiencing water seepage into properties.

We suspect that this could be caused by the underground water.

We will continue to monitor the situation through different seasons and respond appropriately as and when required.

The inspection hole is backfilled.

Kind regards
Afrika Masuku
Dir. Technical Services

[18] The Applicant takes issue with the contents of the said letter as follows;

- a) The inspection hole to which Masuku refers is the hole that was dug on the other side of the street, which was indeed backfilled by the municipality;
- b) The trench on the pavement on his side of the street was however not backfilled;
- c) He is not aware of any investigations done by the municipality to prove that the whole area is experiencing water seepage into properties as claimed.
- d) Neither Moeti, nor Masuku, nor anyone else at the municipality has ever made mention of any such investigations or the possibility of generalised water seepage in the area.

[19] The Applicant's immediate reaction to the response sent by the Public Protector was that he did not feel that Masuku showed any urgency in solving the problem. The Applicant requested permission to proceed and resolve the issue and that stemmed from the possibility that upon fixing the leakage the Applicant would have to dig on municipal land. There was no response from either municipality or the Public Protector for the remainder of December 2021 or the first two weeks in January 2022 until the Applicant approached his attorneys of record. A letter of demand was sent to the municipality requesting it to conduct a formal investigation into the serious water problem and issue an expert report on its findings, failing which the Applicant be granted permission to do so. The investigation was to determine who was responsible to resolve the situation. The municipality failed to respond.

[20] On 1 February 2022, the Applicant received an email from the Public Protector with a letter dated 31 January 2022 from Letsoetsa stating;

“The request from the complainant for the approval is hereby granted on condition that the Applicant submits amongst others a method statement of the proposed solution. Such submission shall be subject to approval by the municipality.

All the correspondence/discussions shall be directed to Mr Afrika Masuku....”

[21] On 2 February 2022, the Applicant received a letter from the Public Protector confirming that the investigation is considered finalised and the file will be closed. The Applicant states that that was apparently based on the municipality granting approval to Applicant to resolve the problem on his own, subject to their approval. The municipality has failed to carry out any proper scientific investigations into the matter or provide a written report on its findings as requested in the letter of demand dated 25 January 2022. The municipality is evidently not prepared to get involved in any further attempts to resolve the issue other than allowing the Applicant to conduct their own investigations on municipal soil, subject to their prior approval of any recommendations made by his appointed contractor on how to resolve the issue.

[22] On 17 February 2022, the Applicant attorneys of record sent a follow-up letter to the municipality requesting a reply to the letter of demand and no reply had been received resulting in the advice to appoint an independent expert to evaluate the situation. The Applicant agreed and instructions were given to one Mr Franz Josef Roberg to investigate and report on the circumstances and causes of the water seepage together with any solution as may be recommended to resolve the problem once and for all. Roberg is a qualified, licensed, and registered plumber with a certificate in Construction Management from the University of Cape Town. In addition to his qualifications, Roberg has for the past five years been engaged in a water savings project of the Department of Public Works and Infrastructure through his employer, Re-Solve Consulting (Pty) LTD, where one of his chief daily duties is finding and repairing water leaks in water reticulation infrastructure at various sites around Free State. Roberg worked on bulk water supply networks on numerous

occasions and has also frequently engaged with various municipalities and their employees in the execution of his duties.

[23] On 30 March 2022, Roberg visited the property where he did an inspection of the problem area, made observations, did investigations, and performed certain water tests as detailed in his report dated 30 March 2022. Roberg's report was sent to the municipality on 1 April 2022 which explained the findings and highlighted that the municipality was not performing its duties and obligations. The municipality was requested to comply with its obligations, failing which this court would be approached for assistance. Roberg prepared an amplified report dealing with certain aspects of the problem in further detail. Roberg explained and confirmed the following;

- a) Two sets of samples of water were taken at the property during his visit on 30 March 2022- the first from the water in the hole at the municipal side of the boundary and the second from the side of the hole closer to the street where Roberg suspected the leak was coming from.
- b) While at the scene, Roberg did DPD reagent tests on both sets of samples and both showed a pink hue confirming the presence of chlorine.
- c) Water from the two sets of samples was also taken to Bloemfontein where it was tested by Roberg using a digital chlorine meter to provide a more accurate reading.
- d) The samples were transported to Bloemfontein in sealed and sterilised bottles and were tested by Roberg as soon as he returned to Bloemfontein just after 11h00 on 30 March 2022.
- e) The digital chlorine water meter was not taken to the inspection because it is the property of his employer, Re-Solve Consulting. The digital chlorine meter is of high quality and is accepted for use in the water-saving project of the Department of Public Works and Infrastructure. To the best of Roberg's knowledge, the meter was functioning properly, was free of faults, and is, in his experience, known to produce accurate results.

- f) The digital chlorine meter confirmed the presence of chlorine in the water sample taken from an excavation at 0.63mg/L and at 0.91mg/L in the sample taken close to the suspected direction of the leak nearer to the street.
- g) The fact that the digital chlorine meter reading is high in the second sample is to be expected because it is closer to the direction of the suspected source and also because the chlorine in the open hole would have started to evaporate.
- h) The presence of chlorine in the water samples taken from the excavation confirms that the water is treated.
- i) Based on his experience, and with the supporting evidence of the tests conducted, Roberg believes with a high degree of certainty that the cause of the water seepage is not a natural spring or the surfacing of groundwater but rather the leaking of a freshwater reticulation system or municipal water.
- j) After all the water from the hole was pumped out, Roberg was able to visually confirm the presence of a small leak that fills up the hole. The leak was in the direction of the street.
- k) Roberg was not able to excavate to find the source of the leak but initially suspected that it might be due to a leaking joint.
- l) During a consultation with his legal representative, the Applicant in preparation for this application, he explained to Roberg that he personally saw the saddle connection to the water meter for his property and could confirm that there was no leak as suspected in his initial report.
- m) According to Roberg it is clear from the tests that the water responsible for the accumulation is treated and therefore comes from a municipal source.

n) Roberg's view is that the Applicant cannot be expected to search for and repair the problem at own expense because all available evidence suggests that the municipality's property is responsible for the leak and it should be their duty to find and repair same and the Applicant agrees.

o) According to Roberg the costs involved in trying to resolve the issue by the Applicant could be substantial depending on the amount of work required and would also involve obtaining the necessary approvals which would be time consuming and burdensome.

p) Roberg also explained that the leak could even be coming from one of the connections branching off from the water supply pipeline and running under Muelli Street to the vacant erven across the road. If that is the case, it is even more unreasonable for the Applicant to be expected to excavate a public road in search of the problem at own cost.

q) Roberg on being asked how was it possible that the test done by Moeti could have been negative for chlorine and Roberg explained that if the sample used by Moeti was taken from the hole dug by Letuka and his assistant and the water had been exposed to the elements for a few days, it was entirely possible for the chlorine levels to be quite low and difficult to see with the reagent test. According to Roberg the fact that the water had filtered through soil could also have contributed to a further reduction in the levels of chlorine.

r) In Roberg's opinion, the test done by Moeti cannot be regarded as determinative. Further and more reliable tests could and should have been done by the municipality which would undoubtedly confirm the presence of chlorine.

s) Roberg also confirmed that the Applicant's initial idea to install perforated pipes in the wet area would not be an adequate remedy because it does not cure the underlying problem. At best, perforated pipes might assist in partially dispense a portion of the seeping water but would do little to

effectively stop the risk of further damage to driveways, walls, and constructed works by a longed water leak.

t) Roberg maintained that it cannot fairly or reasonably be expected of the Applicant to search for and/or resolve an issue that plainly seems to be caused by a fault in municipal infrastructure and thus the responsibility of the municipality.

The opposition

[24] The respondents filed their opposing affidavit and stated as follows;

a) The purpose of this application is noted and accepted. Tshepo Selepe is the Manager Project Management Unit of the First Respondent and attached the Notice of Progress On Projects (July 2022) which identified the project in Manyatseng relating to Investigation and mitigation of high underground water in low laying areas as contained in paragraph 4.2. bullet 6 thereof. Applicant is thus put to the proof that the First Respondent refuses to further investigate or repair the water accumulation problem at M[...]6 Muelli Street, Manyatseng.

b) It is denied that there is ongoing refusal by the First Respondent to conduct the required inspections.

c) In as far as the Applicant not having noticed any similar issues on neighbouring pavements and not being aware of any complaints by other residents in the street/area about problems with seeping and accumulating water, are not denied, but that does not mean there are no neighbours experiencing same problem and /or having made complaints about the seeping and accumulating water in the street/area. This court is referred to both supporting affidavits of Selepe and Koalane specifically relating to other residents experiencing similar problems of seeping and accumulating water in the street/or area of the Applicant.

- d) The First Respondent further refers to the supporting affidavit of Moeti, marked "AFM1" in as far as the test conducted, samples already taken and the results thereof.
- e) The fact that the hole was filled with water the next day, is consistent with the belief that ground water is to blame, and further reference is made to the supporting affidavit of Koloane "AFM3" that the whole area has lot of underground water.
- f) The Applicant's view is not based on any finding, though the view is respected. The investigations as envisaged in the supporting affidavit of Selepe, "AFM4", will give a professional conclusion as the relevant experts are sought to conduct those investigations.
- g) Annexure "AFM4" clearly shows that the First Respondent is doing something about the underground water, by way of conducting intensive investigations by relevant experts with relevant degree of expertise and whatever the Applicant is praying for in this application is already being done.
- h) The Applicant does not clarify as to the nature of independent expert to appoint as per advise. Independent expert can be on various fields, especially relevant to the problem to be determined and Applicant is put to proof of nature of expertise of the independent expert to appoint.
- i) The credentials of Roberg are noted and it is denied that he is expert as it is not on record as to what academic qualifications does he possess from which institution that qualifies him as an expert(except only mentioning that he is a qualified, licensed and registered plumber and trained in construction management by the University of Cape Town as contained in annexure "FA14" not to mention anything as to him being independent as he was instructed by Applicant to give the report that is sought by Applicant himself. The Applicant is thus put to proof that Roberg is an expert as well as to whether he was independent in conducting his investigation.

j) The nature of the problem as experienced by in the areas of Manyatseng, wherein Applicant's house is situated and other low laying area, requires the expertise of a person who possesses the necessary qualification and registered as the Geohydrologist, a person who scientifically investigate and evaluate underground water resources, their quality and characteristics, exploring groundwater by means of geophysical techniques. A Plumber is not qualified as an expert in determining the nature of the problem experienced. That is the reason Selepe seeks the approval of the council of the First Respondent so that the finance can be sourced to secure the professional service of the Geohydrologist to conduct the investigations as envisaged as the First Respondent does not have anyone possessing that skill and expertise in its human capital.

k) As such Roberg's report is denied on basis of lack of necessary expertise, the observations, investigations and certain water tests from the water samples that were taken from the property of the Applicant and the findings are equally denied. Applicant is put to proof that any tests made were done from the samples taken from his house, as the samples can be from anywhere. The independence of Roberg as such are challenged over and above, he being considered an expert.

l) Roberg could not find the source of real source of leakage due to uncertainty of the source thereof, if there is leakage at all. The uncertainty of the source of the water seepage can be anything including underground water hence the First Respondent in annexure "AFM4" recommends the thorough investigations by the people with relevant expertise.

m) The First Respondent admits that the Applicant has a clear right but First Respondent has never refused to conduct the required inspections.

n) The First Respondent denies the infringement on the right of the Applicant on its entirety.

The reply

[25] The Applicant requests this court to consider that the following;

- a) According to Roberg, it is clear from the tests that the water responsible for the accumulation is treated and comes from a municipal source.
- b) The Respondents do nothing to answer the case for the relief sought in substance, except to rely on bare denials, speculations, and inadmissible evidence in the form of hearsay evidence and opinion.
- c) The contention that Roberg is not qualified and experienced to give the expert evidence which he does is entirely without basis when considering his trade, qualifications, occupation, experience, and expertise.
- d) Roberg has experience in finding and repairing water leaks in water reticulation infrastructure at various sites around the Free State and also has worked on bulk water supply networks on numerous occasions. He is more than capable of testing water for the presence of chlorine and providing an expert opinion on the source.
- e) It is not necessary for a Geohydrologist to test accumulated water for chlorine.
- f) If it is the First Respondent's case that underground water is responsible for the seepage/accumulation problem, they bear the onus in this regard and should have incurred the services of a relevant expert of their own choosing.
- g) The respondents have no expert evidence to support their underground water defence or theory. Masuku and deponents of the supporting affidavits are not experts in the field of underground water and are, with the greatest respect, not able to give any opinion in connection with the source of the accumulating water.

- h) Based on the opinion of Roberg, it would seem that the easiest way to determine the accumulating water stems from a municipal source is to test it for chlorine.
- i) Respondents contend that Moeti tested the water that had accumulated inside the Applicant's yard during his visit in July 2021 and found no signs of chlorine. Roberg gave full explanation as to why chlorine levels in the tested water might have been low and difficult to detect with a reagent test.
- j) The Respondents fail to address this important aspect at all, apart from making various unfounded denials about Roberg's expertise and the manner in which his tests were carried out.
- k) However, what is even more important is that on 8 September 2022(not long after this application was served) Moeti and Cloete came to Applicant's property to test the water, this time a more accurate and reliable digital chlorine meter was used instead of visual reagent tests.
- l) The Applicant was present during the visit, carefully observed events and took photographs using his cellphone.
- m) The Applicant noticed Moeti and Cloete tested two samples of water, one from the accumulated pool of water in the excavation on the pavement (more specifically, from the section on the hole furthest from the street) and another from an outdoor tap on the Applicant's property which is connected to the municipal water supply. The test result of the water from the tap was 0.53mg/L, clearly showing the presence of chlorine as one would rightly expect in water treated municipal source. The test result of the water sample from the accumulated pool was 0.12 mg/L, which water was responsible for the ongoing accumulation and must come from a municipal source. Even if the respondents can prove that underground water is present (which they do not, there being absolutely no acceptable evidence put forward by the

respondents), it cannot be disputed that the respondents' own tests show that chlorinated/ treated water is at the very least part of the seepage and accumulation problem. The Applicant took photographs of both Moeti and Cloete during their visit as alleged.

n) It is concerning that the supporting affidavits of Moeti and Cloete (dated 28 September 2022) both fail to make any reference to their inspection on 8 September 2022 or the fact that their own tests confirm the presence of chlorine in the seeping water on the Applicant's pavement.

o) The Applicant maintains that since July 2022, the municipality has refused to take any actual steps to further investigate or repair the water accumulation problem. The Applicant further maintains that the dampness is isolated to one specific area on the pavement, has not noticed any similar issues on the neighbouring pavements are not aware of any complaints by other residents in the street/area about problems with seeping and accumulating water. The respondent contends that there are other residents experiencing similar problems, yet they fail to disclose a single name, address or to attach any confirmatory affidavits.

p) The Applicant attached a confirmatory affidavit of one Mohau Jonas Monoane residing at M[...]4 Muelli Street, Mayatseng, Ladybrand whose property is on the same side of the road as Applicant's property and literally two doors away, which contradicts the respondents' unsubstantiated allegations of dampness in the area. Monoane confirms clearly that he is not experiencing any underground water seepage or abnormal dampness at his premises and this is contrary to the allegations made in the opposing affidavit.

Analysis

[26] The objects of local government are contained in section 152 of the Constitution as follows;

"152. (1) The objects of local government are—

(a) to provide a democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).

[27] This application centers around the Applicant's right to the provision of services, as a member of the community, and the promotion of a safe and healthy environment by the First Respondent. The Applicant approaches this court for the enforcement of the said rights in a form of a final interdict as clearly depicted on the notice of motion. This application is mostly fact-based and of more common cause in nature.

[28] The Applicant complains about water seepage and/or accumulation problem which affects his property situated at M[...]6 Muelli Street, Manyatseng, Ladybrand. That was discovered through a dampness on the Applicant's driveway to his house and that dampness appears to be isolated. The only dispute for a determination is, what is the cause of the said problem? According to the Applicant, the cause thereof is from the First Respondent's source of water reticulation. It is so alleged as the results of certain tests conducted and the results thereof evinced that the water is treated due to the presence of chlorine. The Respondents allege that the cause of the problem is underground water and as such the Respondents cannot be expected to take responsibility to assist the Applicant to find the cause.

[29] The Applicant proposed that the whole ordeal he suffered for long time is readily determinable in that if the water is tested and chlorine is found to be present then the Respondents are responsible to find the cause of the said a water seepage or accumulation in his property.

[30] This court must then proceed to consider the evidence presented through the parties' respective affidavits and at the end, evaluate which evidence is more probable in the circumstances.

[31] The Applicant indicates that the seepage or accumulation of water in his property commenced around 2018/2019 and took reasonable steps to report same to the respondents. All the steps taken by the respondents proved fruitless hence this application. Prior to the issuance of this application, the Applicant, as a measure to show that the respondents are responsible for the problem, sought assistance from his legal representatives who advised him to seek professional assistance as to ascertain the actual cause of the problem. Indeed, one Roberg was approached, and he compiled a report which concluded that the seepage or accumulation of water originates from the Respondents' source due to the presence of chlorine in the water samples taken from the Applicant's area of complaint on his property.

[32] On 1 April 2022, the said report was then sent to the Respondents, prior to the institution of these proceedings, and nothing was done by the respondents to consider and act on the said Report. The Applicant, as a result thereof, filed this application on 23 August 2022. The Applicant alleges that on or about 08 September 2022 the respondents sent Moeti and Cloete to do water tests on water from the tap and water from the pool of the excavation on the driveway of the Applicant's property. The tests were both conducted on a more accurate and reliable digital chlorine meter instead of visual reagent tests. The results on each sample showed the presence of chlorine which was on high content in the tap water than that from the pool of the excavation. The respondents filed their opposing affidavit on 28 September 2022. They said nothing about the visit of Moeti and Cloete on the said date and the outcome of the results of the tests conducted, which is rather strange.

[33] This court is also of the view that the issue for a proper determination of this matter is the quest on whether or not the water samples taken from the Applicant's property where the problem emanates contained chlorine. This is informed by the fact that the dispute between the parties in these proceedings is the presence or absence of chlorine as to determine who must take responsibility in order to find the source of the problem. It was argued on behalf of the Applicant that the Roberg report should be

admitted as proper and Roberg himself be considered as properly qualified to be an expert based on his qualification, trade, experience, etc. (as afore-indicated). Whilst the Respondents argued that;

- a) They succeeded in the onus drawn and proved that they are in the process of addressing the water seepage problem complaint of the Applicant.
- b) The report by Roberg is insufficient to conclude that the water seepage originates from the First Respondent's water reticulation infrastructure and not from underground.
- c) The expert investigation by a registered Geohydrologist is necessary to scientifically investigate and evaluate the underground water.
- d) In applying the rule in **Plascon-Evans**¹, a real dispute of fact exists, and Consequently, the application should be dismissed.

[34] Firstly, the respondents refer to a notice of progress on projects and a council resolution both dated July 2022. On closer perusal and consideration of both respectively, nothing points to the fact that the Applicant's problem has been investigated and /or any way forward to address the problem. Instead, the items refer to future actions to be taken to address underground water in lower bedding areas at Manyatseng underground water , and those areas do not include the Applicant's property and/or area. The Applicant furnished this court with the affidavit of his

¹ SEE: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623

neighbour who resides next door at [...]4 Mueslli Street, Manyatseng, one Monoane, who confirmed that he does not have a problem which the Applicant on his property. Such affidavit sought to address and contradict the Respondent's averment that the area has an underground water problem. have no reason to reject that evidence.

[35] Secondly, Roberg states with clear precision, his qualifications, trade, experience, and how he conducted, evaluated, and analysed the water samples taken from the Applicant's property and the conclusion he made in formulating his opinion that there was chlorine in the said water being a treatment from the First Respondent's source and as such the First Respondent is responsible for the seepage or accumulation of that water on Applicant's property. The respondents indicated that Roberg does not qualify as an expert and his report should be rejected without indicating how the Respondents concluded that the source of water seepage or accumulation is underground water. Roberg dealt thoroughly with respondents' averments which he proved to be non-existent. The respondent failed to file a proper report from their own expert(s) refuting Roberg's report and further, the respondents failed to disclose the results of the water samples on tests conducted by Moeti and Cloete on 8 September 2022. Roberg cannot be disqualified as alleged by the respondents, as such the Robert's report is admissible in evidence.

[36] Thirdly, the necessity of a Geohydrologist to investigate and evaluate underground water is irrelevant as it is now clear that the simple way to determine the problem was the test for chlorine. Even if it could be said that I am wrong in my finding, it remains undisputed as per the report of Roberg that the presence of chlorine in the water may be the determining factor as to the actual source, underground or treated, of the water. The conduct of the First Respondent also fortifies this notion, why else would Moeti, Masuku and Cloete tests the water for chlorine and when it is found to be present, conveniently not make any reference to that finding in their affidavits. As aforesaid, the respondents lost an opportunity to refute the presence of chlorine through their own expert(s) and failed to disclose the results of the tests conducted on 8 September 2022.

[37] Fourthly, the respondents allege an existence of a real dispute of fact. In every case the court must examine an alleged dispute of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral evidence. As a general rule, decisions of fact cannot properly be founded on a consideration of the probabilities unless the court is satisfied that there is no real dispute on the facts in question, or that the one's party allegations are so far-fetched or so clearly untenable or so palpably implausible as to warrant their rejection merely on the papers². It was correctly argued on behalf of the Applicant that the respondents do nothing to answer the case for the relief sought in substance, except to rely on bare denials, speculations and inadmissible evidence in the form of hearsay evidence and opinion. These are dealt with in the analysis of Roberg's evidence above as such I find that there exists no real dispute of fact and the Respondents averment is palpably implausible, far-fetched, and so clearly untenable that this court is fully justified to reject it on the papers.

[38] The respondents chose to be technical instead of assuming their constitutional obligations in terms of section 152 to provide the Applicant with services and promote a safe and healthy environment. The Applicant endured untold hardship in requesting the Respondents to alleviate his plight with regard to the unbearable nuisance caused by the Said water seepage or accumulation which also led to the Applicant incurring costs of hiring Letuka and his assistant, paying someone else when the First Respondent failed to come and assist with pumping out the water, buying a water pump after the Respondents stopped assisting him and further costs to source the services of legal Representatives and expert (Robert).

[39] This court finds displeasure in the manner this matter was dealt with, as indicated above, especially the dishonest conduct by the respondents, even when litigation ensued, after they conducted tests on 8 September 2022 and failed to disclose the results thereof on their opposing affidavit, duly filed on 29 September 2022, as they did with Moeti's visit to the Applicant's property on 2 July 2021. The respondents on receipt of the replying affidavit could have exercised their discretion

² SEE: Plascon-Evans above at page 634I

in favour of requesting leave to file a further affidavit to contradict any issue they deem it fit to do so. This court will, therefore, consider this conduct in awarding costs.

[40] The respondents dispute that the Applicant is entitled to the relief sought on flimsy grounds indicated in this judgment. I am satisfied that the Applicant has met the requirements of a final interdict in that it is common cause that the Applicant has a clear right, he suffered irreparable harm and has no alternative remedy but had to approach this court for the relief sought.

[41] In the circumstances, I make the following order: -

1. The First, Second, and Third Respondents are and hereby directed and ordered to forthwith take all necessary steps to search for and effectively repair the leaking municipal water pipe(s) and /or water reticulation infrastructure responsible for the ongoing seepage and accumulation of water at the Applicant's property at M[...]6 Muelli Street, Manyatseng, Ladybrand, and to thereafter properly fill and restore any excavations made in the process, including the existing trench on the pavement of the said property, depicted in annexure "FA15" to the founding affidavit.
2. The First, Second and Third Respondents are and hereby directed and ordered to take all necessary steps to ensure that the order in paragraph 1 above is carried out, within 60 (sixty) days from the date of this order.
3. The First, Second, and Third Respondents are ordered to jointly and severally, the one paying to be absolved, pay the costs of this application on an attorney-client scale.

SS JONASE, AJ

On behalf of the Applicant:

Instructed by:

Adv. JMC JOHNSON

McINTYRE VAN DER POST

BLOEMFONTEIN

On behalf of the Defendant/Respondent: Adv JJ BUYS
Instructed by: MATLHO Attorneys
BLOEMFONTEIN