



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)
REPUBLIC OF SOUTH AFRICA**

Case Number: **30675/2022**

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: 3 August 2022

SIGNATURE: *JANSE VAN NIEUWENHUIZEN J*

In the matter between:

IRENE FARM VILLAGES HOME OWNERS'

ASSOCIATION NPC

First Applicant

RIAAN VAN WYK

Second Applicant

KARL PETER MAURICE BROWN

Third Applicant

DIRK JACOBUS VAN AARDE

Fourth Applicant

and

THE CITY OF TSHWANE METROPOLITAN

MUNICIPALITY

Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

[1] This application appeared on the urgent court roll for the week of 21 June 2022. The application pertains to a subsidence that formed in one of the public roads in the residential complex known as Irene Farm Villages.

[2] In order to countenance further subsidence in the affected area, the applicants prayed for the following relief:

“2. That the Respondent immediately, but no later than 5 (five) days from date of this order, commence with preventative measures to avoid further subsidence and damage of the surrounding area by:

2.1 Placing berm(s) to divert water from the subsidence area; and

2.2 Testing the Municipal services, specifically the main water line and the sewer line for any possible leaks.

3. In the event of leaks being detected after the testing in paragraph 2.2 above has been conducted, that the Respondent immediately tend to the repairing and/or removing of the leaking service.

4. *That the Respondent commence with the repair and reinstatement of the road service at the corner of Duke Avenue and Queens way, Irene Farm village, Centurion, as the road serves as the storm water draining system.*
5. *That the Respondent furnish the First Applicant with a formal plan of rehabilitation of the area of the subsidence within 20 (twenty) days from date of this order.*
6. *That the Respondent take preventative measures to ensure the continuous supply of service relating to water, sewage and electricity in the event of a sinkhole and/or further damage occurring at the site of the subsidence."*

- [3] The respondent opposed the relief claimed by the applicants and filed a counter application.

MAIN APPLICATION

Background

- [4] Due to the obvious danger to the occupiers of the adjacent residences, I held that the matter was urgent insofar as immediate measures to prevent the subsidence from getting worse is concerned.
- [5] At the time of the hearing of the matter, the respondent had complied with the relief claimed in paragraph 2.2 of the notice of motion.

- [6] The only remaining issue pertaining to urgent measures to prevent further damage to the road surface was the feasibility of the placing of berms to divert water from the subsidence area.
- [7] The applicants appointed Geohazard Solutions Consulting Engineering Geologists ("GHS") to monitor the subsistence and to recommend what steps should be taken to avoid further subsidence and damage to the area.
- [8] GHS, in its report dated 17 May 2022, recommended that the following urgent step should be taken:
- "1. Placement of berms to divert water from the subsidence area is essential and must be addressed as a matter of urgency. This work must be supervised by a suitably experienced person so that water is not diverted in such a way that problems arise elsewhere. The berm must be inspected regularly to ensure it diverts water adequately until Point 2 is undertaken."
- [9] The respondent did not agree that the placement of berms would, even as an interim measure, alleviate the problem.
- [10] In order to find a solution to the *impasse*, I requested the parties to arrange an *in loco* inspection between the various experts. I also requested joint minutes from the experts on the question of whether the placement of berms will divert the water from the subsidence.

- [11] The experts met at the subsidence area and compiled a joint minute. Paragraph 5 of the joint minute contains the conclusion and reads as follows:

“The emergency measure of the placement of a berm on the road to divert the surface water away from the subsidence is not feasible and will not preclude further deterioration of the subsidence.”

- [12] The applicants were not satisfied with the agreement reached between the experts and at the eleventh hour obtained yet another expert report. According to the report, berms, if placed correctly will divert water from the subsidence.

- [13] In a final attempt to find a solution for an obvious dangerous situation, I requested the respondent's experts to consider the applicant's latest expert report and to indicate whether they agree or not.

- [14] The respondent's experts did not agree.

Factual dispute

- [15] In the result, there exist a dispute of fact between the parties, which dispute is incapable of being resolved on the papers and the application stands to be dismissed. [See: *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C)]

Costs

- [16] Ms Steyn, the estate manager of Irene Farm Villages, alerted the respondent in an email dated 28 March 2022 of the subsidence problem in the Estate.
- [17] No response was received and Ms Steyn sent a further email on 5 April 2022, in which she, once again, alerted the respondent to the subsidence problem.
- [18] On 13 April 2022 Ms Sudu, the Deputy Director: Geological and Geotechnical Engineering of the respondent, responded by email. The email referred to an inspection that was done at the site on 12 April 2022 and lists several measures that were proposed to address the subsidence problem. For present purposes the following measure is relevant:
- “An assessment of the stormwater flow on the roadway and a possible request to install a berm or speedbump to divert surface water run-off from the subsided area will be done.”*
- [19] Various correspondence were exchanged between the parties in respect of the implementation of the suggested measures. The applicants, however, became frustrated with the slow progress made by the respondent in implementing the proposed measures and in providing a plan on the way forward.
- [20] On 7 June 2022 a berm was still not constructed, and the main water line and sewer line have not been tested for possible leaks. These failures prompted the applicants to launch the present application on an urgent basis.

[21] I pause to mention, that the subsidence problem got progressively worse from March to June 2022.

[22] In the respondent's answering affidavit deposed to by Ms Sudu, she confirmed the contents of her email and stated that a second inspection was conducted three weeks after the first inspection of 12 April 2022. According to Ms Sudu, the situation had changed since the first inspection. The change is explained as follows:

"46.1 Mr Pienaar observed that the subsidence had grown wider and deeper.

...

46.2 He and Mr Lambert, who has expertise with berms, did not believe that a berm would serve any purpose as the alignment on the road had changed totally.

46.3 If a berm was installed, as demanded by the applicants, it would create a ponding issue whereby the surface water would collect in the subsidence thereby causing further saturation and increasing the possibility of a sinkhole forming sooner than later."

[23] It is clear from the correspondence exchanged between the parties, that the applicants became aware for the first time when the answering affidavit was served, that the respondent has changed its stance on the placing of a berm to divert the service water from the subsidence.

- [24] Notwithstanding knowledge of the difference in opinion pertaining to the placement of berms as a preventive measure, the applicants persisted with the relief claimed herein.
- [25] In the result, Ms Dayanand-Jugroop, counsel for the respondent, submitted that the applicants should bear the cost of the main application.
- [26] Mr Els who succeed Mr Wagener, as counsel for the applicants did not agree. Mr Els, firstly urged the court to postpone the application and reserve the costs, in order for the parties to resolve the *impasse* pertaining to the placing of berms. Secondly, Mr Els, submitted that the court should at least grant the remainder of the relief claimed in the notice of motion to ensure that the respondent fulfil its constitutional duties towards the applicants.
- [27] In the last instance, Mr Els, contended that the court should, in line with the *Biowatch* principle not grant any costs against the applicants.
- [28] I am not inclined to grant a postponement of the matter, as a postponement will not resolve the factual dispute between the parties.
- [29] Insofar as the relief in paragraphs 4, 5 and 6 is concerned, I do not deem the relief urgent. Ms Dayanand-Jugroop, furthermore, submitted that the court should be slow to intervene in the manner in which the respondent discharges its duties and responsibilities.
- [30] I agree. This is not an instance in which the respondent has done nothing. Although not with the necessary urgency the applicants believe is called for in

the circumstances, the respondent has since 12 April 2022 been attending to the subsidence issue. In this regard, various officials of the respondent with the necessary expertise have visited the site, have made recommendations, have inspected the municipality services and have engaged the applicants in an endeavour to find a solution to the problem.

- [31] Lastly, I do not deem the *Biowatch* principle to be applicable to facts in *casu*. In *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 CC, the court explained the principle pertaining to a situation where a party that wishes to assert a constitutional right against an Organ of State should not be mulcted with an adverse cost order:

“[23] *The rationale for this general rule is threefold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but also on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the State that bears primary responsibility for ensuring that both the law and State conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of State conduct, it is appropriate that the State should bear the costs*

if the challenge is good, but if it is not, then the losing non-State litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and State conduct are constitutional is placed at the correct door."

[32] Although the applicants relied on their constitutional right to receive services from the respondent, the nature and importance of the right were not the central issue in dispute and the respondent, furthermore, did not deny or challenge the applicants' right in this regard. The facts in *casu* does not justify a deviation from the normal costs that befalls an unsuccessful litigant.

[33] In view of the fact that the respondent only tested the main water line subsequent to the launching of the application and only made its changed stance in respect of the berms known in its answering affidavit, I am not inclined to award costs against the applicants until the filing of the answering affidavit.

COUNTER - APPLICATION

[34] The respondent claims the following relief in the counter – application:

- "2. *The applicants are directed to submit a plan of action to the respondent within five days of date of this order setting out inter alia the remediation of the storm water drainage on the affected properties on the Estate, and the repairs to the cracks in the boundary walls of various properties.*
3. *The remedial work in the paragraph above shall be completed by the applicants by 31 August 2022.*

4. *The first applicant shall lodge its Dolomite Risk Management Strategy with the respondents within 7 days of this order.”*

[35] The relief emanates from the respondent’s view that the stormwater drainage from the higher lying stands is a possible cause of the forming of the subsidence.

[36] Although Ms Sudu stated in the answering affidavit that “*at this point in time, there is no imminent risk of the subsidence in the affected area turning into a sinkhole and there is no imminent threat to the applicants’ lives or property*”, the respondent maintains that the relief claimed in the counter-application is urgent.

[37] It is somewhat difficult to follow the logic in the respondent’s contention that on the one hand, there is no imminent danger at the site, but on the other hand, to submit that the situation is so urgent that the court should grant the relief in the counter-application on an urgent basis.

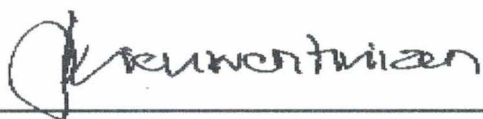
[38] The respondent has furthermore not placed the applicants on terms prior to the launching of the counter-application. The counter-application is in the result premature and manifestly not urgent.

ORDER

The following order is issued:

1. The application is dismissed.
2. The applicants are liable for the costs incurred by the respondent after the filing of the respondent’s answering affidavit.

3. The counter-application is struck from the roll due to a lack of urgency with costs.



N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES:

21 June 2022, 23 June 2022, 27 June 2022 and 1 July 2022

DATE DELIVERED PER COVID19 DIRECTIVES:

3 August 2022

APPEARANCES

For the Applicant: Advocate Wagener SC (21 June 2022)
Advocate Els (23 June 2022, 27 June 2022 and 1 July 2022)

Instructed by: Barnard Incorporated

For the Respondent: Advocate Dayanand-Jugroop

Instructed by: MB Mabunda Incorporated