

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION : MTHATHA**

CASE NO. 70/2017

In the matter between:

MAKAZIWE MGOBOZI

Applicant

and

MHLONTLO MUNICIPALITY

1st Respondent

BOXER SUPERSTORES, QUMBU

2nd Respondent

THE MUNICIPAL MANAGER,

O. R. TAMBO DISTRICT MUNICIPALITY

3rd Respondent

O. R. TAMBO DISTRICT MUNICIPALITY

4th Respondent

JUDGMENT

GRIFFITHS, J.

[1] This is an opposed application in which the applicant seeks the following orders:

1. That the 3rd and 4th Respondents (the Respondents) be and are hereby ordered to take immediate steps to stop any seepage of dirty water and sewerage emanating from the 2nd Respondent's premises or septic tanks into Applicant's premises at Erf No. 13, Main Road, Qumbu.
2. That the Respondents are interdicted from allowing any nuisance-causing substance or material of any nature whatsoever emanating from the aforesaid premises or buildings into the Applicant's premises aforesaid.
3. That the 3rd and 4th Respondents are ordered to pay costs of this application jointly and severally, the one paying the other to be absolved.
4. That the 1st Respondent be ordered to pay costs up to the date of filing of the replying affidavit by the Applicant.

[2] The application has traversed a rather rocky route. Initially, the applicant cited the first respondent (Mhlonto Local Municipality) and Boxer Superstores, Qumbu, as first and second respondents. However, on receipt of an answering affidavit from the first respondent in which the first respondent disavowed any legal responsibility for the sewerage problem that has arisen, as this fell within the sphere of influence of the District Municipality, she applied for joinder of the O. R. Tambo District

Municipality and its municipal manager as third and fourth respondents respectively. This order was duly granted.

[3] As regards the current position of the second respondent, the papers, and indeed the file relating to this matter, were silent. The applicant stated in her second replying affidavit “*As to whether the application is withdrawn against of the second respondent I state that it transpired that Boxer is not responsible for the sewerage problems in Ngcobo, but respondents are.*” As will be obvious from this statement, it is entirely unhelpful in this regard. However, when the matter was heard Mr Kunju, who appeared on behalf of the applicant, confirmed that indeed the applicant had at some stage withdrawn the application as against the second respondent. Accordingly, at this stage I have before me the first respondent (Mhlonto Local Municipality), the third respondent (O. R. Tambo District Municipality) and the fourth respondent (The Municipal Manager, O R Tambo District Municipality).

[4] Once all this was said and done, the position is this: the applicant seeks a costs order against the first respondent based on the submission that the first respondent did not respond to certain letters sent to it in which complaints were levelled about the leaking sewerage. This, the applicant submits, lulled it into a false sense of belief that sewage disposal, by law, fell within the first respondent’s area of responsibility. The applicant has also pointed to the fact that, apparently in response to these letters, the first applicant attempted to dig a trench to alleviate the situation which it says was a further signal in this regard. It no longer seeks relief against the second respondent which is no longer before me (but to which, in the balance of this judgment, I shall refer as the “second respondent”). It however seeks the substantive relief set out in the notice of motion¹ as against the third and fourth respondents.

[5] The essential facts of the matter appear to be that the applicant runs a medical surgery in Ngcobo. Diagonally opposite her is the second respondent’s business. Between the two is a gravel or dirt road. A certain septic tank owned by

¹ In accordance with an amended notice of motion filed by agreement after argument had been heard.

the second respondent and which is situated upon its premises appears to be unable to contain or process the sewerage emanating from the business. As a consequence, the surplus sewerage seeps out onto the road situated between the two premises and ultimately ends up at the premises of the applicant which is situated downhill from the second respondent's premises. The obvious consequences of this are, *inter alia*, that it is a health hazard and it is causing damage to the applicant's premises. As a medical doctor, she is also losing patients. The applicant maintains that as far back as 2008 she contacted the first respondent's Environmental Health Officer by way of letter requesting that the problem be corrected. She subsequently, and during 2016, had her attorneys address letters to the municipal manager of the first respondent in an attempt to stop this nuisance.

[6] As I have indicated, the first respondent's response hereto was to indicate in its answering affidavit that it was not vested with the power to deal with such sanitation and sewage and that this area of responsibility lies with the third respondent. As a consequence, the third and fourth respondents were duly joined as parties to these proceedings.

[7] Despite some toing and froing with regard to condonation applications, the third and fourth respondents ultimately filed an answering affidavit. In that affidavit, the third respondent accepted that indeed it, by statute, holds the responsibility of dealing with sanitation and related issues. However, this responsibility relates, as I understand the answer, to the bulk removal of sewerage and the processing thereof. It does not hold a responsibility in law to deal with sanitation and sewage within the premises of a private residence or business. It proceeds to point out that on the applicant's own case, the spillage of sewerage does not emanate from any bulk sewer piping belonging to the third respondent, but comes from the septic tank and/or pit latrines which are situated on the premises of the second respondent. From there, the sewerage seeps out onto the public road and ultimately onto or into the premises of the applicant.

[8] The first and third respondents accept that the responsibility for sewage disposal lies with the third respondent. Indeed, this appears to be so as the Municipal Structures Act² (“The Structures Act”) states that a District municipality has the responsibility to deal with “[d]omestic waste-water and sewage disposal systems.”³

[9] As I understand the contention of the applicant, it is to the effect that the third respondent has a constitutional obligation not to expose the applicant to an unhealthy environment, that the situation that has arisen in this matter is clearly an “unhealthy environment” and that, bearing in mind its powers, functions and duties, the third respondent is obliged to take all necessary measures to ensure that the seepage of dirty water and sewerage is contained and that the unhealthy situation is rectified. In response hereto, it is the third respondent’s contention that it is common cause that the sewerage emanates from a sewerage pit or what is referred to as a “septic tank” situated on the premises of the second respondent. It contends thus that this is a nuisance caused by a neighbour and that the sole responsibility therefor lies with the second respondent who is the owner of the septic tank and thus the cause of the leaking sewerage. Whilst there was some talk of there being public ablutions lying between the applicant’s and the second respondent’s premises, it appears from the applicant’s founding affidavit that the seepage does not emanate therefrom.

[10] It seems to me that the starting point is to accept that what the applicant, in essence, seeks is a structural interdict that is, an interdict by virtue of which the violator is instructed to take steps to comply with the constitutional obligations resting with it and, although not sought in this matter, to report back to the court on the extent to which it has complied with the court’s order⁴. In *Kenton-On-Sea* the court described the nature of such an interdict as follows:

² 117 of 1998

³ Ibid section 84 (1) (d) of the Structures Act. See also section 84 (1) (e).

⁴ *Kenton-On-Sea Ratepayers v Ndlambe Municipality* 2017 (2) SA 86 (ECG) at paragraph 96

“A structural interdict consists of five elements. First, the court declares the respects in which the violator's conduct falls short of its constitutional obligations; second, the court orders the violator to comply with its constitutional obligations; third, the court orders the violator to produce a report within a specified period of time setting out the steps it has taken; fourth, the applicant is afforded an opportunity to respond to the report; and finally, the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court.”⁵

[11] It has been held that appropriate relief is relief that is required to protect and enforce the Constitution, and:

“Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.”⁶

[12] I however have some difficulty in founding relief solely on this basis. I say this because this matter has proceeded on a rather haphazard basis what with relief initially being sought against the first and second respondents, the case being withdrawn against the second respondent and the relief against the first respondent subsequently being restricted solely to costs, and the third respondent being joined against whom the full relief is finally sought. This has resulted in a number of different affidavits being placed before the court as I have said in rather a haphazard manner. Whilst the applicant has referred to the statutory responsibility of the first respondent in her founding affidavit, she changed horses in midstream and joined the third respondent without fully addressing the nature of the case as against the third respondent so joined. The third respondent has accepted in its answering affidavit that it has responsibility for dealing with sewerage as I have already dealt with and it appears that the parties have to some extent accepted that the allegations

⁵ Ibid at paragraph 98

⁶ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at paragraph 19

in the founding affidavit as against the first respondent, are to apply to the third respondent.

[13] In addition, the nature of the relief sought together with the allegations in the founding affidavit appear to indicate that the applicant's cause of action is based more in nuisance than it is on constitutional relief. A consequence of this is that the third respondent has not, in my view, fully addressed the alleged constitutional relief by way of fully explaining its policy with regard to sewerage in and about the village, and its implementation. Absent all of this, together with the other problems I have mentioned, I would be loath to found any relief in favour of the applicant on this basis.

[14] The applicant has furthermore relied in this matter on the case of ***Limpopo Legal Solutions and Others v Vhembe District Municipality and Others 2018(4) BCLR 430 (CC)*** in this regard. It does not seem however that this case is of any real assistance to the applicant. In that matter it seems clear that the first respondent municipality indeed accepted responsibility for a burst sewer within its area of jurisdiction and for which it held a legal duty to maintain. The only argument was with regard to the question of costs which ended up in the Constitutional Court. This matter is entirely distinguishable. In this case the third respondent contends that the source of the sewerage is not a burst sewer or bulk pipe which falls under its authority and that the source of the nuisance is the second respondent. She has also relied on the case of ***Mafube Municipality & Another v Agritrans CC & Another (FB)*** unreported case no **A248/2008 of 05 November 2009**. In my view, this case does not support the contentions of the applicant. It involved the failure on the part of the municipality concerned to maintain sewerage works in good condition resulting in the leakage of sewerage into the Wilge River. It is clear that in that matter the municipality was in charge of the sewerage works which fell within its area of responsibility. The leakage came directly from the sewerage works. That is a far cry from the facts of the present matter.

[15] In my view however applicant's real cause of action is far more personal. She, in effect, has based her case on her right to an abatement of a nuisance in common law. Nuisance denotes a continuing wrong "...*whereby a neighbour's health, well-being or comfort in the occupation of his or her land is interfered with, as well as the causing of actual damage to a neighbour.*"⁷ In each case it is a question of fact and often a matter of degree as to whether or not the state of affairs resulting from the impugned activity is sufficiently serious as to constitute an actionable wrong. The test applied in this regard is one of reasonableness and it has been said that:

"[T]he plaintiff must show that the inconvenience complained of is in fact more than fanciful, more than one of mere delicacy or fastidiousness; that it was inconvenience materially interfering with the *ordinary* comfort, physically, of human existence, not merely according to elegant or dainty modes and habits of living, but according to *plain and sober and simple notions* (Our emphasis)"⁸

[16] It is furthermore so that "[p]ursuant to the legal entitlement of control which is derived from the ownership over a thing, an owner has a duty to prevent damage on a neighbour's property resulting from his or her omission to exercise control."⁹ The courts have also made it clear that an owner of the property is under a legal duty to take reasonable steps to prevent a fire spreading onto his or her neighbour's land even if the fire was not caused by him but emanated from another property.¹⁰

[17] In the present matter, whilst the property from which the nuisance emanates (that of the second respondent) does not border onto the applicant's property, it is common cause that there is what is referred to as a "dirt road" running between them. Whilst neither the applicant nor any of the respondents addressed pertinently the nature of this road it appears that it is a main road which runs through the town.

⁷ *Badenhorst, Pienaar & Mostert Silberberg and Schoeman's The Law of Property* 5 ed (2006) at page 111.

⁸ *Holland v Scott* 1882 EDC 307 at 332

⁹ *Badenhorst et al* (note 7 above) at page 131; *Regal v African Superslate (PTY) Ltd* 1963 (1) SA 102 (A) at 109D – E

¹⁰ *Minister of Forestry v Quathlamba (Pty) Ltd* 1973 (3) SA 69 (A).

Precisely whether or not the first respondent or the third respondent is responsible for the upkeep and maintenance of this road is not clear but the third respondent has clearly accepted the fact that it is under a statutory duty to provide the necessary infrastructure for the removal and disposal of domestic waste, particularly in the form of waste water and sewerage. Surely, therefore, it is to be regarded as the entity in control of the area of land in between the second respondent and the applicant, namely the dirt road or whatever such open property might be, for this purpose.

[18] As regards the question of the actual nuisance itself, as indicated the test is one of reasonableness. As the facts relating to the extent, duration and nature of the seepage of sewerage onto the property of the applicant remain uncontested by the third respondent, it must be accepted that it is both of long duration and ongoing. That it amounts to a foul and extreme nuisance to the applicant cannot be disputed on any reasonable ground. In my view therefore, it constitutes an actionable wrong and the applicant is fully entitled to, at the very least, the interdicts sought.

[19] Regarding the question of costs vis-à-vis the first respondent, I have pondered this aspect extensively. Once the applicant came to realize that the responsibility for this problem lay with the third respondent she immediately sought to join the third respondent. Whilst it is so that her legal representatives ought, from the outset, to have researched the matter and have realized that this responsibility lay with the third respondent, it is so that at the time when the third and fourth respondents were joined, the first respondent was given the option of withdrawing on the basis that each party pay their own costs. This invitation was not accepted. In view of the shoddy manner in which the applicant was treated in this regard by the first respondent who made vague attempts to alleviate the problem by digging some ineffective trenches, I believe that the first respondent should not escape liability for costs completely.

[20] In the circumstances, **the following order will issue:**

- 1. The third and fourth respondents are hereby ordered to take immediate steps to stop any seepage of dirty water and sewerage emanating from the premises of Boxer Superstore, Qumbu, or its septic tanks into the applicant's premises at Erf No. 13, Main road, Qumbu;**
- 2. The third and fourth respondents are interdicted from allowing any nuisance causing substance such as dirty water and/or sewerage to emanate from the aforesaid premises and onto the applicant's said premises;**
- 3. The third respondent is ordered to pay the costs of this application, save that the first respondent is ordered to pay such costs up to the date of the filing of the replying affidavit by the applicant.**

R. E. GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT : Mr Kunju

INSTRUCTED BY : Bala Mzileni & Associates

COUNSEL FOR 1ST, 3RD, & 4TH

RESPONDENTS : Mr Madlanga

INSTRUCTED BY : S. S. Nkonyeni Attorneys

HEARD ON : 02 MAY 2019

DELIVERED ON : 04 JUNE 2019