



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

NOT REPORTABLE

Case No: 5069/13

In the matter between:

PIETERMARITZBURG & DISTRICT COUNCIL

FOR THE CARE OF THE AGED (PADCA) PLAINTIFF

and

REDLANDS DEVELOPMENT PROJECTS (PTY) LTD	1ST DEFENDANT
GLENN ARTHUR HESSE	2ND DEFENDANT
REDLANDS ESTATE HOMEOWNERS ASSOCIATION	3RD DEFENDANT
ROWEST PROPERTIES (PTY) LTD	4TH DEFENDANT
REDLANDS ESTATE HOMEOWNERS ASSOCIATION	5TH DEFENDANT
BODY CORPORATE OF THE BERKELEY SQUARE SCHEME	6TH DEFENDANT
BODY CORPORATE OF THE PARKVIEW LODGE SCHEME	7TH DEFENDANT
BODY CORPORATE OF THE REGENTS LODGE SCHEME	8TH DEFENDANT
KIBE PROPERTY (PTY) LTD	9TH DEFENDANT
BODY CORPORATE OF THE PARKLANE LODGE	10TH DEFENDANT
REDLANDS HOTEL (PTY) LTD	11TH DEFENDANT
CAMMIN INVESTMENTS CC	12TH DEFENDANT
JAMES FREDERIC CROOKES PALMER	13TH DEFENDANT
JANIS ANNE HESSE	14TH DEFENDANT
TRUSTEES OF THE LANE REYNOLDS TRUST	15TH DEFENDANT
ERNA MCLAREN	16TH DEFENDANT

TRUSTEES OF THE LINDSAY TRUST	17TH DEFENDANT
EDMUND NORMAN ANDERSON & PAMELA LEONIE ANDERSON	18TH DEFENDANT
BODY CORPORATE OF THE MAHOGANY COURT SCHEME	19TH DEFENDANT
BODY CORPORATE OF THE SAFIRE HOUSE SCHEME	20TH DEFENDANT
IFOUR PROPERTIES THREE (PTY) LTD	21ST DEFENDANT
GERALD AUBREY KATZ & CAROLINE FAY KATZ	22ND DEFENDANT
BODY CORPORATE OF THE MEWS SCHEME	23RD DEFENDANT
WILLMEG INVESTMENTS (PTY) LTD	24TH DEFENDANT
TRUSTEES OF THE MARTIN FLAVELL TRUST	25TH DEFENDANT
BODY CORPORATE OF THE HIGHGATE MEWS SCHEME	26TH DEFENDANT
DAVID ALEXANDER PETER SWAN & SUSAN JANE SWAN	27TH DEFENDANT
BODY CORPOPORATE OF THE 3 HIGHGATE DRIVE SCHEME	28TH DEFENDANT
TRUSTEES OF THE BASIL BUDKE FAMILY TRUST	29TH DEFENDANT
BAMBANI PROPERTIES (PTY) LTD	30TH DEFENDANT
BRIAN MAGOR & BRONWYN MAGOR	31ST DEFENDANT
RODNEY PAUL FINLAYSON	33RD DEFENDANT

Coram: Kruger J

Heard: 15 to 27 October 2016

Delivered: 10 January 2017

ORDER

1. The action is dismissed with costs.
2. The costs shall include:
 - 2.1 The costs of two counsel where so employed.
 - 2.2 The costs of Defendant's expert, Chris Brooker, including:

- 2.2.1 The cost of his expert report
- 2.2.2 All pre-trial consultations and inspections, inclusive of:
 - 2.2.2.1 Consultations with the Defendant(s)
 - 2.2.2.2 Inspections of the relevant properties
 - 2.2.2.3 Consultation with Defendants' counsel and attorneys
 - 2.2.2.4 Consultation with Plaintiff's expert;
- 2.2.3 Qualifying fees
- 2.2.4 Reservation fees
- 2.2.5 Travel and accommodation
- 2.2.6 Days fees for attendance at trial.

JUDGMENT

KRUGER J:

[2] The Plaintiff seeks primarily to interdict the Defendants from allowing unattenuated run-off of stormwater from their properties, in excess of the natural flow, from the said properties when they were in a pristine condition. By agreement between the parties the Plaintiff's claim for past and future damages and the determination thereof are to be adjourned sine die.

[3] The Defendants' collective properties are situate in a private estate made up of freehold properties, the infrastructure of which is owned by the Redlands Homeowners Association. (hereinafter referred to as "The Redlands Estate"). The Redlands estate was formerly one undeveloped property. The property was developed into a residential estate and business park with a boutique hotel.

Access to the estate is controlled and security protected. The roads within the estate are all tarred. All stormwater gathered within the estate is reticulated into a combined stormwater reticulation and disposal system. The stormwater which does not flow into this system runs off the estate onto George MacFarlane Lane from where it finds its way into the Municipal system.

[4] The eastern boundary of the Redlands Estate is bordered by George McFarlane Lane. Further to the east of George MacFarlane Lane is a property owned by Shanbar Investments (Pty) Ltd – viz portion 1 of erf 647 – commonly referred to during the trial as the “Briar Ghylls” property. Adjoining the Briar Ghylls property on its eastern boundary, is the Plaintiff’s property – erf 3344 Pietermaritzburg – commonly referred to during the trial as “Woodgrove”. Running almost parallel to the southern Woodgrove boundary is a canal along and in which stormwater is discharged. (Hereinafter referred to as the “Woodgrove Canal”). Situate to the east of George MacFarlane Lane and to the south of Briar Ghylls and Woodgrove is portion 20 of erf 837. What is immediately noticed from the aforesaid is that the Redlands Estate and Woodgrove do not share a common boundary. The properties are separated from each other by George MacFarlane Lane as well as by the Briar Ghylls and portion 20 of erf 837 properties.

[5] The property – portion 20 of erf 837 – is subject to a stormwater drain servitude 3,05m wide in favour of the local authority. This servitude ends at the south western corner of Woodgrove. It is here that one finds two large municipal pipes, each 1m in diameter, which discharges stormwater into the Woodgrove canal.

[6] Mr Richard Logan, one of the Plaintiff’s expert witnesses, described the layout of George MacFarlane Lane. He described the gradient as being steep at the intersection of Old Howick Road and George MacFarlane Lane. This

gradient however flattens out as one approaches the Redlands Estate entrance. Of particular importance was his testimony that the highest point in George MacFarlane Lane is the area opposite the entrance to the Redlands Estate. The gradient thereafter falls in a westerly direction towards Redlands Estate boundary. The lowest point being in an area described as a catchpit situate immediately past the second entrance to the Redlands Estate.

[7] At the first entrance to the Redlands Estate and along George MacFarlane Lane are two further catchpits. These three catchpits are linked to each other. The stormwater gathered in the Redlands Estate reticulation system also finds its way into the municipal pipes which link the three catchpits. From there the stormwater is led along a 600mm wide pipe to the south western corner of the Plaintiff's property where the stormwater is also discharged into the Woodgrove canal.

[8] The Plaintiff's claim, in a nutshell, is that the stormwater which is discharged into the Woodgrove canal via the 600mm pipe originates from the Redlands Estate. The Plaintiff accepts that as it is the lower lying property, it has a duty to accept the natural flow of stormwater from the Redlands Estate. However, this is limited to the quantity of water discharged from the property in its pristine state. The Plaintiff has further alleged that as a result of the increase flow of water (mainly due to the development of the Redlands Estate) the Woodgrove canal and its property in some areas have been damaged. It is the plaintiff's view that should the stormwater flowing from the Redlands Estate be attenuated prior to a controlled discharge into the Woodgrove canal, it would nullify the risk of further damage to the Plaintiff's property and the Woodgrove canal.

[9] The Plaintiff's claim is based on the *actio aquae pluviae arcendae*. Mr Dickson SC, on behalf of the Plaintiff, has submitted that in modern times it is better to consider the Plaintiff's claim under the principles of neighbour law. Both bases will be considered for it is my view that there is a slight but marked distinction between the two.

[10] The *actio aquae pluviae arcendae* was developed in Roman times and applied mainly in respect of rural land and was restricted to the natural flow of water. (Voet 39.3.2) The owner of the lower land was obliged to accept the water discharged or flowing from his upper neighbour. This obligation extended to the acceptance of an increased flow of water provided that such increased flow was occasioned by the upper neighbour in the cultivation of his own land. – **Ludolph v Wegner (1888) 6 SC 193 (paragraph 4)**. (Quoted in **Barklie v Bridle 1956(2) SA 103 (SR) at 108 G**).

[11] In Roman Dutch law this obligation was developed to include and regulate the relationship between owners of neighbouring properties in an urban environment. "Grotius 2.34.16 states with regard to urban tenements (Lee's translation):

"For by the common law everyone must lead his water on his own land, or over his own land out to the street". (1956 Annual Survey South African Law at 134 – 6.)

[11] In **Bishop v Humphries 1919 WLD 13**, the Court recognised the effect of and the changes brought about by urban development. At page 17, Gregorowski J held:

"The fact that when land is sold in small building plots, a state of things is created and contemplated which puts an end to a large extent to the natural servitude which previously existed as regards the water which falls on the

plots. Each owner puts up a building which covers a substantial part of the plot. He places an impervious surface over the naturally porous surface of the soil. He accumulates the water thereon. He alters the natural surface of the rest of the area of his plot by paving it or by locating temporary structures thereon or digging it up, and thereby annihilates the natural arrangement of the soil. The rain water can no longer flow as it used to flow.”

Further at pages 17 to 18 – he concluded:

“The Applicant has altered all the old conditions existing on this stand while it was virgin soil and in a state of nature and it is quite impossible for him to throw a burden on the adjoining stand which is based on the assumption that his stand has preserved rights which he himself has put an end to by his own constructions on the property.”

[12] The upshot of this is that the upper neighbour may only impose the obligation on the lower neighbour to accept the increased flow of water if there was a servitude in his (upper neighbour’s) favour permitting him to discharge this excess flow over his lower neighbours property.

[13] **Barklie v Bridle** (supra) the Court, although not referring to Grotius 2.34.16, held at 109 (E-G):

“In my view, the owner of an urban tenement, by the lawful development of his stand, increases, concentrates and alters the natural flow of water from his stand he is not entitled to discharge that water onto to his lower neighbour’s stand at the point which may be most convenient to himself but most inconvenient to his lower neighbour. He must take reasonable steps to ensure that by the discharge of that water no injury is done to his lower neighbour; and if, by the use of reasonable measures, he can discharge that water onto the adjoining street so that the water may be harmlessly drained down that street, then I consider that he should do so.”

[14] This decision was reached after the Court had found that:

“The effect of the development which has taken place on the Applicant’s stand has been to disturb completely the natural and normal flow of water from this stand the general direction of the normal flow has further been effected by the terracing which have been erected on the property. It is very difficult indeed to say today what the normal flow would have been like when the property was in its natural state.” (at 106 B-D).

[15] Marais JA in **Williams v Harris 1998(3) SA 970 (SCA)** confirmed that the *actio aquae pluviae arcendae* applies to both rural and urban tenements. In reaching this conclusion however he, in my opinion, incorrectly relied on a passage from Grotius, namely 2.35.17 which provides:

“By common law anyone may let his water flow in its natural course, from which comes the old proverb “if water hurts you, you may turn it away”.”
(at 983 I)

Although acknowledging that the aforesaid passage applied to rural properties, he found that it applied equally to urban properties as he “would have expected Grotius to pointedly draw attention to the contrast”. (at 984 A).

[16] In **Pappalardo v Hau 2010(2) SA 451 (SCA)** Hurt AJA favoured the approach in **Bishop v Humphries** (supra) subject to the qualifications suggested by Professor Scholtens (1956 Annual Survey of South African Law) where “the natural situation makes it impossible to discharge rainwater onto a street or road”. He accordingly did not accept that the *actio aquae pluviae arcendae* applied to neighbouring urban properties given the effect of urbanisation in the determination of the natural flow of water. The effect of this judgment is that everyone has to discharge rain water onto the street unless it is impossible or impracticable to do so.

[17] Mr Dickson has submitted that the judgment of Marais JA in **Williams v Harris** (supra) is to be applied as the relevant passage referred to above in **Pappalardo v Hau** is arbiter. This would mean that the Plaintiff is only entitled to receive the natural flow of water from the Defendant's property in its pristine state. This, on my understanding would mean that the claim is based on the *actio aquae pluviae arcendae*.

[18] It is common cause that both the Redlands Estate and Woodgrove were formerly undeveloped land. The Redlands Estate was developed by demolishing whatever structures were there and replacing same with a residential estate, business park and boutique hotel with the addition of tarred roads with pavements and impervious parking areas.

[19] It is also common cause (or at least not disputed) that all the common property (roads, drains, water disposal system) is owned by the 5th Defendant (the Homeowners Association). Further it is common cause that there is no attenuation of the stormwater within the Redlands Estate. Finally, it is common cause that Woodgrove is situate below George MacFarlane Lane and is accordingly also lower than the Redlands Estate.

[20] The Plaintiff has pleaded that prior to the development of the Redlands Estate, Woodgrove was accustomed to receiving the natural flow of water from the Redlands Estate onto and under George MacFarlane Lane and onto it (Woodgrove) through a stormwater pipe situate at its south-western boundary. The Plaintiff further contends that post-development, the run-off of stormwater from Redlands Estate onto the Plaintiff's property exceeds the natural run off from the land in its pristine condition and had increased three-fold.

[21] Mr Peter Miller, the Plaintiff's chairman, testified that in 2008 the Plaintiff became aware of the stormwater problem. As a result of heavy rains there was serious scouring and erosion in the canal. He thereafter commenced observing the run-off during various rainfall periods. He observed that there was a greater volume of water being delivered into the canal from what he termed the Redlands pipe. This is the 600mm pipe referred to earlier in this judgment. This was in comparison to the water which was being delivered into the canal by the two 1m pipes which collect municipal stormwater off Old Howick Road. He estimated the flow from the so-called Redlands pipe to be approximately double or three or at times four times greater than the volume emanating from the two 1m pipes.

[22] He conceded that at the time of the development of Woodgrove the two 1m pipes as well as the so-called Redlands pipe were already there. He also confirmed that the Plaintiff had acknowledged (in a letter dated 18th September 1998) that it was obliged to accommodate stormwater run-off from higher lying urban areas, which was artificially intercepted and diverted through the Woodgrove property, via the said three pipes. Of importance was his testimony that as the canal was unlined (notwithstanding expert advice to line same) it would require more maintenance and would erode more quickly. He agreed that absent the Redlands Estate development there would still be scouring and erosion in the canal.

[23] Ms Hillary Mumford, the previous manager and CEO of the Plaintiff confirmed the evidence of Mr Miller. She confirmed that in January 2008, after a huge storm, the canal was damaged in that there was massive scouring and the gabion baskets and mattresses had been damaged. During October 2012 she noticed that the water flowed off George MacFarlane Lane onto what is called the emergency road on Woodgrove and also flowed through the bamboo from the

Briar Ghyll property. This flooding caused serious damage to the buildings as well as to the embankment. She concluded her testimony by opining that the development of Redlands was having an adverse effect on the Woodgrove property.

[24] Under cross-examination she was constrained to concede that the water which emanated from the so-called Redlands pipe was not only water which had accumulated from the Redlands Estate. She also accepted that the problems experienced in the Woodgrove canal had its sources in more than one water source.

[25] The increase in the run-off of stormwater in post-development of the Redlands Estate is not surprising given the natural consequence of urbanisation – viz, *inter alia* the increase in impervious areas. The Defendants have in fact not disputed this. The Plaintiffs and Defendants experts, James Morris, Graham Payne and Chris Brooker, all agree that the development of the Redlands Estate had, in some way, increased the run-off into the Woodgrove canal. What is in dispute however is the magnitude of this increase. As stated earlier, the Plaintiff contends that this increase is three-fold whereas the Defendant's expert is of the opinion that it is much less. The quantity of the increase is, in my opinion, immaterial. The question to be answered is whether the Plaintiff is obliged to receive this increased flow of water.

[26] The Defendant's expert, Mr Brooker, also confirmed that as a result of the construction of the drain along the north-east corner of the Redlands Estate, the stormwater flow had been diverted from its natural run-off. According to the topographical maps, the natural run-off is in a north-easterly direction, via the Briar Ghylls property and a ultimately into the stream situate in the northern area of Woodgrove. As alluded to earlier in this judgment, this stormwater is reticulated and discharged, via the municipal system, into the Woodgrove canal.

[27] The Defendants' defence is based on three grounds:

- (a) That its stormwater system is a lawfully constructed system approved by the municipality in which:
 - (i) The discharge is collected and diverted into the municipal system and onto George MacFarlane Lane, from where it finds its way into the municipal system.
 - (ii) The municipal system discharges the water so collected, together with other undifferentiated water, through a single pipe into the Plaintiff's property alongside two other municipal pipes.

[28] Although initially denying same, the Plaintiff has conceded that the stormwater reticulation system on the Redlands Estate was approved by the local authority or municipality. However, relying on the provisions of Section 23 of the National Building Regulations and Building Standards Act 103 of 1977, the Plaintiffs contend that the Defendants are not exempt from liability.¹ It is, in my view not necessary to consider this aspect any further at this stage as it will become necessary when the question of damages, if any, is considered.

[29] The Plaintiff has also averred that the discharge of stormwater by the Defendant into the municipal stormwater system or road is unlawful as no measures have been taken to attenuate the stormwater in excess of the natural

¹ Section 23 **Exemption from liability**

No approval, permission, report, certificate or act granted, issued or performed in terms of this Act by or on behalf of any local authority or the board in connection with a building or the design, erection, demolition or alteration thereof, shall have the effect that –

- (a) such local authority or the Board be liable to any person for any loss, damage, injury or death resulting from or arising out of or in any way connected with the manner in which such building was designed, erected, demolished or altered or the material used in the erection of such building or the quality of workmanship in the erection, demolition or alteration of such building;
- (b) the owner of such building be exempted from the duty to take care and to ensure that such building be designed, erected, completed, occupied and used or demolished or altered in accordance with the provisions of this Act and any other applicable law;
- (c) any person be exempted from the provisions of any other law applicable in the area of jurisdiction of such local authority.”

flow on the Defendant's property. This brings me to the second defence – viz – that at the time of the development of the Redlands Estate there was no obligation for the attenuation of storm water. Absent this obligation, the Defendant's discharge of storm water into the municipal system can hardly be said to be unlawful as contended by the Plaintiff. The Plaintiff's own experts have confirmed that attenuation was not the requirement at the time. The municipal requirements at the time were set out in paragraph 4.10 and provides:

“4.10 All outfalls shall be arranged to discharge either into the city stormwater system or a natural recognised watercourse. The effect of the development on the existing stormwater system shall be determined. Allowance shall be made for upgrading the system outside the limits of the sight where necessary. Alternatively the design shall ensure that the post-development run-off does not exceed the pre-development run-off”. (Annexure F – page 17 – Plaintiff's experts reports). (my underlining)

[30] Finally, the Defendants have averred that the *actio aquae pluviae arcendae* does not apply as the Plaintiff and the Defendant are not contiguous neighbours. They do not share a common boundary and are separated from each other by George MacFarlane Lane, the Briar Ghylls property and portion 20 of erf 837.

[31] A perusal of the reported cases relating to this issue reveal that the *actio aquae pluviae arcendae* only applies if the properties are contiguous. – See **Bishop v Humphries**; **Barklie v Bridle**; **Williams v Harris** and **Pappalardo v Hau** – supra. In all these cases the parties' properties to the dispute shared a common boundary.

[32] Relying on the judgment of New Heriot Gold Mining Company Ltd v Union Government 1916 AD 415, Mr Dickson has submitted that contiguity is not required. An examination of the judgment however reveals that whilst the principles of the *actio aquae puviae arcendae* were referred to, the case was decided on the negligence of the Defendant in failing to take appropriate measures to prevent flooding during a construction process.

[33] A perusal of decisions decided internationally on the same subject also suggest contiguity is an element. See, for example, Gardtner v Kidman (1962) 106 CLR 12 – High Court of Australia. The author D P Derham – “Interference with surface waters by lower land holders” (1958) 74 LQR 361 contends (at 364):

“That in English law the upper riparian owner had a liberty to discharge casual waters on his neighbours lower contiguous land”(my emphasis)

[34] I am of the view that as the Plaintiffs and Defendants properties are not contiguous, the Plaintiff’s action must fail.

[35] It is not surprising that in the light of the aforesaid that the Plaintiff has now contended that the matter be considered and regarded as a nuisance principle under the principles of neighbour law. Indeed, being neighbour law, contiguity is not required. “With reference to contiguity, neighbour law in general and nuisance law in particular rests on the assumption that nuisance usually involves two properties that are situated more or less closely together, although they do not have to be strictly adjacent.” – AJ van der Walt – the Law of Neighbours – pages 240 to 241. The author is however of the view that in some instances “actual contiguity is essential” and cites the example of the natural flow of water.

[36] In my view what is required in nuisance/neighbour law is some form of animus. This appears from the description of nuisance law by Derek van der

Merwe: “where the occupants of fixed property, in the course of using that property, conducts himself in such a way in or on such property, as to cause actual or potential damage (or injury or discomfort) to the occupant of neighbouring or near-by fixed property”. – AJ van der Walt (*supra*) at 238.

[37] It can hardly be said that by reticulating its stormwater into a municipal system that the Defendant is conducting itself in such a way on his property so as to cause actual or potential damage to the Plaintiff. I am accordingly not satisfied that applying the principles of neighbour law and/or nuisance law that the Plaintiff has discharged the onus necessary to succeed.

[38] The Plaintiff cannot succeed in the action based on the *actio aquae pluviae arcendae* as the properties are not contiguous. Two examples which immediately come to mind are instances where a person continuously plays his/her music at loud volumes and at all hours of the night thereby affecting not only his contiguous neighbours but also the people living nearby. Another example would be when a person deliberately burns garden refuse much to the annoyance of his contiguous and nearby neighbours. Clearly in these instances there is an element of animus present. In my view the Plaintiff’s reliance on the judgment of Marais JA in **Williams v Harris**, is ill-founded. If one applied the principles set out in **Bishop v Humphries**, **Barklie v Bridle** and favoured by Hurt AJA in **Pappalardo v Hau** then it is clear that the Defendant has not done anything wrong. The Defendant has merely done what the Roman Dutch authorities have provided – namely it has led its stormwater on its own land, over its own land and out onto the street into the municipal system. There is accordingly no obligation on the Defendants to attenuate the stormwater prior to its discharge into the municipal system. As mentioned earlier in this judgment, the Defendant has averred that “other undifferentiated water” is also discharged, together with the stormwater from the Redlands Estate, via the 600mm pipe. As I understood

the evidence, this is not in contention (save perhaps for the volume) and further consideration, in the light of my conclusion, is not necessary. Given these findings, I am of the view that the proper maintenance of the Woodgrove canal is an obligation of the Plaintiff and that had it followed the advice given to it by its experts, as testified by Mr Miller, Ms Mumford and Mr Payne, the problems experienced by it would have been alleviated.

[39] I accordingly grant the following order:

- a. The action is dismissed with costs.
- b. The costs shall include:
 - 2.1 The costs of two counsel where so employed.
 - 2.2 The costs of Defendant's expert, Chris Brooker, including:
 - 2.2.1 The cost of his expert report
 - 2.2.2 All pre-trial consultations and inspections, inclusive of:
 - 2.2.2.1 Consultations with the Defendant(s)
 - 2.2.2.2 Inspections of the relevant properties
 - 2.2.2.3 Consultation with Defendants' counsel and attorneys
 - 2.2.2.4 Consultation with Plaintiff's expert;
 - 2.2.3 Qualifying fees
 - 2.2.4 Reservation fees
 - 2.2.5 Travel and accommodation
 - 2.2.6 Days fees for attendance at trial.

KRUGER J

DATE OF HEARING:	15 to 27 October 2016.
DATE OF JUDGMENT:	10 January 2017.
FOR THE PLAINTIFF:	A J Dickson SC instructed by J Leslie Smith & Co.
FOR THE DEFENDANTS:	A J Troskie SC and P J Broster instructed by Venns.