



REPUBLIEK VAN SUID-AFRIKA

REPUBLIC OF SOUTH AFRICA

IN HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG DIVISION: PRETORIA)

(1) REPORTABLE ☒ YES / NO  
(2) OF INTEREST TO OTHER JUDGES ☒ YES / NO  
(3) REVISED. ☒ OK

22/06/2015  
DATE

  
SIGNATURE

Case No: 27873/12

22/6/2015

In the matter between:

**SOUTH AFRICAN NATIONAL ROADS AGENCY LTD**

**Applicant**

and

**NUMERIA TRADING PTY LTD**

**First Respondent**

**TYSOCON PROPERTIES PTY LTD**

**Second Respondent**

**THORNHILL VILLAGE HOMEOWNERS  
ASSOCIATION**

**Third Respondent**

**POLOKWANE MUNICIPALITY**

**Fourth Respondent**

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**JUDGMENT**

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Background:

1. During 2006 the first respondent developed a township known as Bendor X87 on the North Eastern side of Polokwane. The township is situated on the western side of the N1-27 national road (going in a north-south direction) and the southern side of the R81 national road (going in west-east direction) and more particularly in the corner where these two roads intersect. In terms of one of the conditions for the approval of the township the first respondent built a brick wall along the boundary of the township opposite both of the aforesaid national roads.
2. The surrounding land slopes slightly from the south-east to the north-west with the result that the natural flow of rainwater is from the side of the present N1-27 road through the township in the direction of the R81 road.
3. In the past, and more particularly at the time when the township was developed, the flow of rainwater did not cause any problem. At that time the present N1-27 national road had not yet been built and the only road in the road reserve was one with single lanes in both directions which was situated more than 100 m from the boundary wall of the township abutting the road reserve. This distance and the vegetation growing on that portion of the road reserve resulted in rainwater being attenuated to such an extent that no unnatural accumulation of water or water flow resulted.
4. This situation changed drastically after the applicant built what is now known as the N1-27 national road and a further service road on this particular road reserve laying to the East of the township. These roads were built during

2009. The roads on the road reserve are thus presently the N1-27 national road situated more or less in the middle of the road reserve and two service roads on each side thereof. Underneath all three roads, in the area opposite the township, the applicant constructed respectively six large culverts connected by canals to cater for the flow of water through the road reserve. The most easterly culverts emit their water approximately 10 m from the Western boundary wall of the township.

5. The construction of these roads and the culverts has lead to a situation where the stormwater which is fed through the newly constructed culverts underneath the three roads accumulates against the western boundary wall of the township, runs in a northerly direction towards the intersection with the R81 national road, and then runs around the corner of the boundary wall in a westerly direction where it ultimately, under severe weather conditions, floods the R81 national road.

The Present Application:

6. The aforesaid dilemma prompted the applicant to launch the present application seeking declaratory and interdictory relief against the respondents. As mentioned, the first respondent was the developer of the township. The second respondent intended to develop a certain area within the township but this has not come to fruition. The third respondent is one of two homeowners associations relating to the township and the fourth respondent is the Polokwane Municipality.

The Point In Limine:

7. At the commencement of the proceedings before this court the parties agreed that the point in limine taken on behalf of the first, second and third respondents should first be adjudicated. This relates to the issue of non-joinder which was mentioned by the respondents in the answering affidavit.
8. There are two grounds on which the issue of non-joinder is based. The first ground results from the fact that the applicant had cited, as third respondent, the Thornhill Village Homeowners Association. The respondents thereupon stated that there is a further home owners Association namely the Thornhill Estate Homeowners Association to which a large number of owners of property inside the township belong and which should have been joined as a party to the present proceedings.
9. In the replying affidavit the deponent thereof stated in response that he was advised that the Thornhill Estate Homeowners Association would be joined in these proceedings. This, however, never happened. Adv Maleka SC, assisted by Adv Nalane, on behalf of the applicant endeavoured to show that there was not sufficient evidence before the court to support the contentions of the respondents.
10. On the premise that it was necessary to have cited a Homeowners Association, it is clear that the Thornhill Estate Homeowners Association does exist as a second Homeowners Association to which a number of property owners belong. Those owners clearly do not belong to the third respondent and, on the aforesaid premise, the Thornhill Estate Homeowners Association should also have been joined as a necessary party to these proceedings. I choose, however, not to make a finding as to the joinder of

the Thornhill Estate Homeowners Association to these proceedings and shall leave that decision to the applicant and/or the Thornhill Estate Homeowners Association itself. I refrain from doing so as a result of my view of the second ground upon which the point in limine was based.

11. The second ground upon which the point in limine was based relates to the non-joinder of the individual owners of the different properties inside the township. The reality of the present situation is that the township had been subdivided into separate erven which had all been duly registered into the names of their respective owners. The fourth respondent, the municipality, is the owner of the roads inside the township. All the individual owners belong to the aforesaid two homeowners associations.
12. In order to decide whether it was sufficient for the applicant to have merely cited a homeowners association (or both), it is necessary to consider the test for joinder of a party. This test was restated in **Bowring NO v Vrededorp Properties CC and Another 2007(5) SA 391 (SCA)** by Brand JA as follows in paragraph [21] on page 398:

"The substantial test is whether the party that is alleged to be a necessary party for purposes of joinder has a legal interest in the subject-matter of the litigation, which may be affected prejudicially by the judgement of the Court in the proceedings concerned."
13. In order to decide whether the individual owners have a legal interest in the outcome of the proceedings before this court which interest may be

prejudicially affected by a judgement of this court, it is necessary to have regard to the relief claimed by the applicant.

14. Prayer 1 is for an order "declaring that the first, second and third respondents should forthwith construct the necessary drainage system to allow acceptance of storm-water from the road reserve into the township, in accordance with the provisions of Sections 46 (3) and 47 (2) of the South African National Roads Agency Ltd and National Roads Act, Act 7 of 1998." Section 46 (3) provides as follows:

"(3) The owners or occupiers of land adjoining any national road must -

(a) take all measures on their land that are reasonably necessary to prevent the occurrence of any damage to the national road concerned, including any measures as prescribed from time to time for that purpose;

(b) refrain from doing or permitting anything on or below the surface of that land which is likely to cause damage to that national road."

15. Subsection (4) provides that the owner or occupier of land adjoining a national road will be liable for any damage to the national road if same resulted from a breach of the provisions of subsection (3). Subsection (5) makes provision for a notice in writing by the applicant to the owner or occupier of land to do certain things or to refrain from doing certain things in order to comply with the provisions of the section. This includes, inter alia, a demand for the removal, filling in, alteration, relocation or establishment of any dam, canal, trench, wall, sluice, pipe, excavation, structure or other works, or the cessation of such an act, on the land. Refusal by the owner or

occupier of land to comply with such a notice entitles the applicant to approach the court in terms of subsection (6) for an order to comply with the notice. The court may order such a home owner or occupier to take any other measure that the court considers fit in the circumstances.

16. Section 47 of the Act provides as follows:

"(1) The Agency may divert storm-water from or under a national road onto any land but must pay compensation for any damage caused by the diversion of this storm-water except in the circumstances mentioned in subsection (2).

(2) Where a township is established on land adjoining a national road, the person establishing the township must receive and dispose of the storm-water discharge or diverted from the national road, and the Agency will not be liable for any damage caused in the township by the storm-water."

17. There is a dispute between the parties as to whether section 47 (2) avails the applicant. It was submitted on behalf of the respondents that this subsection is applicable at the time when a township is being developed and not many years thereafter, as is the case in *casu*. I tend to agree with this submission but it is not necessary to resolve this dispute in these proceedings. However, on the assumption that these provisions are applicable, it is necessary to remember that such statutory immunity shall only be available if it is shown, firstly, that reasonably practicable measures had been decided upon before the carrying out of the necessary works, and, secondly, that the work had been executed without negligence. See **Johannesburg City Council v**

**Electrical Distributors Pty Ltd and Another 1977(1) SA 157 (A) at 165F-**

**G.** There is a dispute between the parties about this very issue.

18. What then, are the potential consequences if the relief in prayer 1 and 2 is granted? Adv Maleka initially submitted that if the relief were to be granted, no rights of the individual homeowners would be effected. In fact, so it was submitted, the home owners association was the correct entity to cite as the representative of the individual homeowners. In this regard he, inter alia, referred to paragraphs 2.1.3 A (ii) and (iii) of the conditions of establishment of the township as promulgated in the Provincial Gazette of 4 August 2006. These paragraphs envisage that the homeowners association shall be responsible for the "upkeep and security of the township" and that the individual owners are, through their membership of the homeowners association, ultimately liable for such upkeep and security.
19. Adv Maleka submitted, firstly, that the boundary wall is a security wall and is thus something which falls within the province of the homeowners association. Secondly, it was submitted that holes could merely be drilled through this wall to receive the water into the township in order to resolve the present problem with the storm-water.
20. These submissions do not seem to be correct. Firstly, a homeowners association acts in a governing capacity and generally takes care of issues such as, for example, upkeep or maintenance and security. On the evidence before this court the matter is much more involved and does not relate to maintenance and security at all. The fact that the wall might assist with the security of the inhabitants of the township or might from time to time require

some maintenance, does not bring the issues currently in dispute within the range of activities or responsibilities of the home owners associations either in their own capacity or on behalf of the individual owners. According to the expert evidence presented on behalf of the respondents by Mr Kriel, holes in the wall may have been relevant in the era prior to the construction of the N1-27 national road and the service roads but would not assist one iota to resolve the storm-water problem which had arisen since the construction of these roads. According to him and the other evidence presented by the respondents, major structural work would be necessary to convey the water through the township in different areas and would in all probability result in the demolition of houses and other structures already built by individual owners on their properties. It would similarly affect the owners of properties which have not yet built their houses or other structures. Even Mr Boonstra, who presented expert evidence on behalf of the applicant, envisaged four "corridors" through which the stormwater must be conveyed through and over the township.

21. From the affidavits before this court it is not known where exactly these corridors would have to be situated nor whether canals or other types of structures would be required. What seems to be common cause is that the water would eventually have to be emitted from the township at what was referred to as point "E" on the relevant maps which is a point more or less in the middle of the boundary wall abutting the R81 national road. At that point there is a culvert underneath the R81 to lead the water away. On this premise, and having regard to the maps of the township and the suggested

slope of the land, it is clear that a large portion, consisting of many individual properties, many of which had already been built-up, would be affected if the storm-water is to be received by the township in bulk and in a concentrated form.

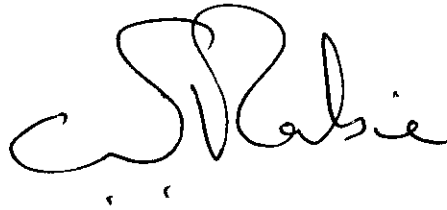
22. Furthermore, having regard to the aforesaid obligation of all the individual owners for the upkeep and maintenance of everything inside the township, the upkeep and maintenance of whatever is constructed inside the township in order to convey the storm-water, would also be for the account of those owners whose properties are not directly affected by the route the water has to follow through the township.
23. Adv Maleka indicated during his argument that a proviso may be added to the relief presently claimed by the applicant to the effect that the order does not affect the houses of the individual property owners other than the first and second respondents as owners. Such a proviso is not feasible for the simple reason, as I have indicated, that on the evidence presently before this court, so-called corridors through the township from the points where the culverts under the N1-27 emit the water to point "E" on the other side of the township, would most certainly have to cross the properties of many of the individual owners. It is necessary to stress that the present application was not directed, as it probably should have, at answering the question as to what should be done with the water, where it should be done and how it should be done. All that this court is asked to do is to declare that the respondents should "constructed the necessary drainage system to allow acceptance of stormwater from the road reserve into the township". Such an order would

clearly detrimentally affect the proprietary rights of many, if not all of the individual owners of the erven inside the township.

24. Although prayer 3 merely asks for an order directing the first and second respondents alternatively the first, second and third respondents to comply with the conditions imposed by the applicant in the various approvals relating to the establishment of the township and certain areas inside the township, the substance of such an order would be exactly the same as an order in terms of prayer 1. The condition referred to is probably a reference to the document containing the final detailed drawings relating to storm-water which the first applicant had to submit to the applicant at the initial stage of the development. However, it is clear that the applicant would, once such document is submitted to it, require exactly the same, if not more, than is presently prayed for in prayer 1. In substance prayer 3 is a mirror image of prayer 1.
25. An analysis of the relief claimed for in prayer 4 provides another reason why the individual owners of the township should have been joined as necessary parties to these proceedings. In that prayer an order is asked "interdicting the fourth respondent from approving the construction of any dwelling within the township until the design of the drainage system allowing acceptance of storm-water has been approved by the applicant and the drainage system has been constructed." This means that the municipality, the fourth respondent, may not approve the construction of any dwelling on individually owned erven until the water works conveying water through the township had been constructed to the satisfaction of the applicant. Such an order would

clearly prejudicially affect the proprietary rights of individual owners. As such they have an interest in the outcome of these proceedings and should have been joined as parties thereto.

26. The effect of the orders envisaged in prayers 1, 3 and 4 clearly affects much more than anything that may be done to the boundary wall. In fact, the state of the boundary wall fades into insignificance in the presence of the major waterworks that have to be constructed inside the township as envisaged by the evidence before this court. The homeowners associations are not in a position to represent the individual homeowners in respect of issues affecting their proprietary rights.
27. Having found that the relief claimed in the present proceedings would, if granted, detrimentally affect the proprietary and other rights of the individual owners of the township and that they should therefore have been joined as parties to the present proceedings I must decide the issue of costs relating to the present proceedings. In that regard both parties concurred that costs should follow the event and that costs of two counsel should be awarded. I am in agreement with these submissions.
28. In the result the following order is made:
  1. The point in limine is upheld with costs which costs shall include the costs of two counsel.
  2. The application is postponed sine die.

A handwritten signature in black ink, appearing to read 'C.P. Rabie'. The signature is fluid and cursive, with the first part being a stylized 'C' and 'P' followed by 'Rabie'.

**C.P. RABIE**

**JUDGE OF THE HIGH COURT**