

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5001/2008

In the case between:

MARTHINUS CHRISTOFFEL KRUGER
EDNA WILHELMINA KRUGER

1st Applicant
2nd Applicant

and

MANGAUNG PLAASLIKE MUNISIPALITEIT

Respondent

JUDGEMENT: RAMPAL, J

HEARD ON: 22 FEBRUARY 2010

DELIVERED ON: 11 MARCH 2010

[1] The matter came by way of an application for leave to appeal. The judgment in respect of which leave to appeal is sought was delivered on the 19th December 2008. In this application the parties are cited as they were in the main application. These proceedings were initiated on the 4th January 2009.

[2] The applicants sought a two pronged relief. Firstly, they sought a mandatory interdict against the respondent

whereby the respondent was directed to commission a traffic impact study within 60 days of the court order. Secondly, they sought an interim order whereby the respondent was also directed to erect a protective concrete wall on the pavement in the street in front of their residential property within seven days of the court order.

[3] I found against the applicants and dismissed the original application with costs. They were aggrieved – hence the current application for leave to appeal against my judgment.

[4] The notice of appeal is a six-page document. Apart from nine sub-paragraphs, seventeen grounds of appeal are relied upon. Among others, it is contended that I erred in finding: that there were adequate traffic measures in Wildeals Avenue to safely regulate the traffic; that the respondent did not create any hazard in the street concerned; that the frequent occurrence of the incidents was exclusively occasioned by human behaviour; that there was no real connection between the driving incidents and lack of traffic measures; that no legal duty rests on the

respondents to protect the particular residents against the criminal actions of the thirds; that a reasonable person or local governor could not have foreseen the driving harm complained of and that the offensive driving incidents were a relatively new phenomenon in the street associated with the recent opening of the liquor bar down the street.

- [5] As regards the adequacy or otherwise of the existing traffic measures, it must be stressed that the peak traffic hours in the street are around 07:00 and 14:00 during week days when parents drop and pick up their children or learners of the two schools situated in that street; that no single driving incident is reported to have taken place during daytime which is alleged to have adversely affected the applicants. On their own version all those reported offensive acts of driving occurred during night time.

- [6] The foregoing is indicative of one logical deduction, namely that if the existent traffic measures can efficiently regulate high traffic volumes during daytime they should do so even better at night when traffic volumes are comparatively low.

If this is so then a traffic study impact will serve no useful practical purpose.

[7] I am not certain whether an intoxicated or a speeding motorist who, on account of his impaired mental faculties, cannot see the end of the road, the reflective chevron board at the T-intersection ahead and the huge object, in other words, the house, beyond the intersection - is likely to see any reflective speed walls, let alone warning traffic signs on the side of the street to adjust the vehicle's speed accordingly and avoid crashing into the boundary wall of the residential property of the applicants.

[8] It is difficult to see how the commissioning of traffic impact study or the erection of traffic signboards or the construction of traffic speed walls would absolutely prevent damage to the residential property of the plaintiff. The contention that the failure of the respondent to commission a traffic impact study or to put in place such physical traffic measures constituted a breach of legal duty which the respondent owes to the applicant is flawed. I am still of the firm view that there existed no special relationship between

the applicants as the victims of the offensive acts of driving and the passive respondent.

- [9] Moreover the relationship between between the actual wrongdoers and the passive respondent sued for their misdeeds is too distant or remote to be regarded as a special relationship. No connective particular duty existed from which a binding legal duty arose to ground delictual liability - **SAAIMAN AND OTHERS v MINISTER OF SAFETY AND SECURITY** 2003 (3) SA 496 (O) at 506E – F para [14] and 506G – I.

- [10] If the foregoing finding is correct, then the enquiry should end right here and now. The rest of the grounds of misdirection relied upon automatically fall by the wayside. This is so because the very foundation of the entire application is the alleged legal duty of care which, as the applicants contended, the respondent owes to them. I am not convinced that the contention has merits.

- [11] Mr Coetzer contended that the applicants, on account of the geographical situation of their house in the same street as a

liquor bar, were exposed to a particular risk. In developing this argument further, counsel also contended that in terms of section 152(1) of the constitution the respondent was obliged to protect its residents from dangers of this sort.

[12] The Constitutional issue was not previously raised on papers or the applicants' heads of arguments or during the course of legal argument. The applicant did not assert that they had a fundamental right to be protected by the respondent and that the respondent had infringed such a right. Mr Coetzer nonetheless argued the point for the first time during the current proceedings. Mr Els, did not argue that it was too late to do so. I was not altogether sure whether Mr Coetzer was free to do so. Be that as it may, I allowed him to argue the point. I therefore had to deal with it.

[13] The argument of counsel in this connection was an attack upon my finding that the applicant had made out no case for the grant of a final interdict. It seems to me that I am required to examine the constitutional question. I say this because unless it emerges that the applicants are entitled to

be protected, they have established no clear right and accordingly they have no cause of action.

[14] The aforesaid section 152 of the Constitution provides:

“152 Objects of local government

- (1) The objects of local government are-
 - (a) to provide 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).”

[15] The applicants placed heavy reliance on section 152(1)(d) – to promote a safe and healthy environment – for their

contention that there was a legal duty on a municipality to prevent harm to resident members of its community occasioned by unidentified drivers who frequently crash into the concrete security wall of their residential property.

- [16] A municipality promotes a safe and a healthy environment in many ways, for instance by: eradicating or reducing pollution levels in the environment; removing refuse or garbage at regular intervals; preventing random and illegal dumping of domestic industrial or medial waste; repairing broken sewerage pipes speedily; lighting of the streets; disposing of solid waste; supplying water and sanitation services; managing stormwater drainage system; providing fighting services; rendering cleaning services; controlling of public nuisance; controlling of food-selling outlets; controlling of municipal abattoirs; controlling of street trading; constructing municipal roads; regulating traffic and parking; providing maintenance works of such roads; and rendering municipal health services.

- [17] As I see it, all of these matters are concerned with public health. See Schedule 4 and 5 of the Constitution where the functions of the local government are specified.
- [18] Our Constitution says that everyone has the right to a safe and healthy environment. Wherever we live, the quality of the environment affects us all. The environment is our shared habitat. We cannot be perfectly healthy, well and alive unless our environment is also healthy. The aforesaid functions of the respondent as a local government are certainly aimed at improving the quality of the general health of people through a safe and a healthy environment. It is a constitutional imperative of a local government to promote a safe and a healthy environment in order to give effect to the fundamental right.
- [19] The environmental right referred to in section 152(1)(d) is violated and the general community health threatened when people abuse the environment. The following activities demonstrate human abuses that have adverse impact on the environment and make it unsafe and unhealthy: uncontrolled waste dumps; dumping of medical and chemical waste;

industrial pollution of air, rivers, dams and water supplies; use of banned pesticides on agricultural farmlands; unhygienic and squalid human settlement; unhygienic slaughtering of animals for selling to the public; broken and leaking sewerage piping systems; trashing streets and recreation parks by disgruntled strikers during protest marches; and the flow of human waste into drinking water sources such as dams and rivers. In my view these unsafe and unhealthy activities are matters of health.

[20] I was at pains to write about the environmental right. On the one hand I have endeavoured to highlight what residents can do to violate that right. On the other hand I have tried to unpack the functions of a local government in executing its constitutional obligation to promote a safe and a healthy environment in order to give effect to that fundamental right. Simply put, the section, in my view, requires a municipality to ensure that the area of its jurisdiction is free from the health risk of dangers inherent in the environmental abuses I have referred to in the preceding paragraph. It is about the promotion of good public health and not the bodily protection of the general public or rather a few specified members of

the public. See the guide **Governmental programmes and Policies Environmental Health and Safety**.

[21] That section 152(1)(d) is concerned with matters of health and not security becomes even clearer when it is read in conjunction with section 205(3) of the Constitution which provides that the objects of the police service are to prevent, combat and investigate crime, to maintain public order, **to protect and secure the inhabitants of the country and their property** and to uphold and enforce the law. By the words “to protect and secure the inhabitants of the Republic of South Africa and their property”, in this section, is contemplated the protection and security of the public in general and not specific individual(s) thereof. By analogy compare **S v HARTMAN, S v JACOBS** 1968 (1) SA 281 (T).

[22] It can, therefore, be clearly seen that the function of protecting the inhabitants and their property from acts of lawlessness is not the constitutional imperative of the respondent. It follows that the applicants had pursued the incorrect party to obtain the legal relief that they sought. Their reliance on section 152(1)(d) was misplaced. The

decision in **McINTOSH v PREMIER, KWAZULU-NATAL AND ANOTHER** 2008 (6) SA 1 (SCA) does not assist the applicants at all. In that case, unlike in the instant case, the court was concerned with the question as to whether the respondent's undisputed statutory duty to maintain a provincial public road encompassed a legal duty to repair a pothole on such a road. Here there is no pothole in the street. Here the issue is not about the respondent's legal duty to maintain a public road but rather the respondent's alleged legal duty to protect particular residents and their property. The distinction between the two cases is evident.

[23] The foregoing indicates that the applicants have not established a clear right which must be protected by a final interdict of mandamus. Their contention that the respondent is obliged by the Constitution to protect them and their property, is plainly untenable.

[24] The applicants also relied on the case of **VON ABO v THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2009 (2) SA 526 (T). Briefly stated the facts of the case were as follows: The applicant was a citizen of

the RSA and an eminent farmer of Bothaville in the Free State Province. He acquired farming interests in Zimbabwe. Over the years he built a considerable farming empire. From 1997 the government of Zimbabwe persisted to violate his rights by destroying his proprietary interest on a number of his commercial farms in Zimbabwe or contributing to their destruction. This destruction was part of a political scheme or policy of the Zimbabwe government to expropriate land owned by white farmers without payment of compensation. He attempted through litigation but failed to protect his interest with the aid of the civil justice system over there. He exhausted, to no avail, all legal remedies available to him in that foreign country.

- [25] Ultimately he approached the above Provincial High Court. The relief he sought was a declarator. The court made an order declaring that the applicant has a right to diplomatic protection against the Zimbabwe government which violated his rights; that the respondents have a constitutional obligation to provide diplomatic protection to the applicant in respect of such violations by the Zimbabwe government; that the failure of the respondents to deal with the applicants'

application for diplomatic protection was inconsistent with the RSA Constitution.

- [26] The facts in the instant case are distinguishable from those in that case in many material respects. There the court had to grapple with a wrong committed by a known wrongdoer. The active or instrumental injurer was a foreign state. The relationship between the active or actual wrongdoer was, in other words, the Zimbabwe government and the passive or careless wrongdoer, in other words, the RSA government, is not distant. The two countries have close diplomatic ties. On the contrary, *in casu*, I had to grapple with municipal and not international law. The actual perpetrators are unknown. No special relationship exists between the actual wrongdoers, in other words, motorists and the alleged passive or careless wrongdoer, in other words, the respondent. Moreover, there is no specific constitutional provision which obliges the respondent to protect and secure residents of its city and their property from injury or destruction occasioned by reckless or negligent acts of driving which have some strong criminal connotations. I am of the opinion that the **VON ABO**-decision does not assist the applicants in any way.

[27] Elsewhere in my judgment I found that the applicants had failed to discharge the onus of establishing that they were entitled to the relief they sought. In essence what they really want is a court order directing the respondent to help them make out a case which they, on their papers, have failed to make out. They have no expert evidence on which the proposition is based. They merely suppose that the physical traffic measures in place are not adequate to regulate the traffic safely. They hope that the traffic impact study, which they want but are not prepared to pay for, will somehow be in their favour. They should first have investigated the matter, obtained the necessary evidence and sued the party responsible in law to protect and secure them and their property. They have dismally failed to do so.

[28] In the light of the foregoing reasons, I am not persuaded that I misdirected myself, as the applicant contended or in any other way on matters of fact or questions of law. The submission of Mr. Els that no other reasonable court is likely to come to a different conclusion, has substance. I am

satisfied that there is no single reasonable prospect of success on appeal. I would therefore refuse leave to appeal.

[29] Accordingly I make the following order:

29.1 The application for leave to appeal is refused.

29.2 The applicants are ordered to pay the costs.

M. H. RAMPAL, J

On behalf of applicants:

Adv. J.K. Coetzer
Instructed by:
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BLOEMFONTEIN

On behalf of respondent:

Adv. J. Els
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