

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A248/2008

In the appeal of:

MAFUBE MUNICIPALITY
MAHLAKU, BRUTUS

1st Appellant
2nd Appellant

and

AGRITANS CC
ANDRIES SWART

1st Respondent
2nd Respondent

CORAM: WRIGHT, J *et* VAN ZYL, J *et* MOLOI, J

JUDGMENT: WRIGHT, J

HEARD ON: 19 OCTOBER 2009

DELIVERED ON: 5 NOVEMBER 2009

[1] The 1st appellant in this appeal is the Mafube Municipality while 2nd appellant is Mr Brutus Mahlaku, the municipal manager of the 1st appellant. The appellants were the respondents in an application lodged in the Free State High Court by Agritrans CC and Andries Swart who are now the

respondents in the present appeal. The court will refer to the parties as they were referred to in the court below.

- [2] The applicants brought an urgent application against the respondents (the present appellants) for a declaration that the 1st respondent was in contempt of the court order under case number 2365/04 and seeking the imprisonment of the 2nd respondent for 90 days in the event of non-compliance with certain parts of the proposed court order. In the alternative certain mandatory orders were sought against 1st respondent. These prayers demanded that 1st respondent prepare and make operational two sewerage pumps and maintain and operate these pumps situated in the Namahadi Pump House, as well as an order for costs on the attorney and client scale against both respondents, alternatively only the 1st respondent. The orders were clothed in the form of interim relief but it is common cause that when the application was heard the applicants requested final relief.

[3] In the application it was alleged that the 1st respondent neglected to maintain the Namahadi Sewerage Works which were erected on a portion of the property owned by 1st applicant with the consequence that, as stated in the application:

“5.2.1 raw sewerage is currently and continues to flow into the Wilge River, which is one of the principal feeder rivers to the Vaal Dam;

5.2.2no effluent is being made available by the 1st respondent to the 1st applicant which is used for irrigation purposes; and

5.2.3a nuisance is being caused.”

This application was not the first to be lodged in this court as the applicants had already obtained an order on the 20th of June 2004 from Lombard J with more or less the same effect as the alternative prayers in the present notice of motion. The precise orders that were granted are set out in the judgement of the court *a quo* which also gives details of further proceedings when the court was approached under

case number 5349/2005 for relief couched in similar terms when the same problems that existed prior to 2004 had resurfaced. The outcome of the 2005 proceedings is not relevant to the present application or appeal.

- [4] It can be mentioned that when it appeared that the pumps were no longer operational as a result of which the raw sewerage flowed directly into the Wilge River, a letter of demand was send to the respondents requesting them to rectify the situation. According to respondents, one of the pumps was already repaired and re-installed on the 4th of February 2008. This is denied by applicants who allege that this took place only on a later date, namely on the 18th of February 2008. According to the applicants, the repair of the one pump was also insufficient to process the sewerage produced by the Namahadi settlement as even when one pump is operational raw sewerage (or be it a lesser amount) continues to flow into the Wilge River. If none of the pumps are operational all the sewerage produced by the Namahadi settlement flows directly into

the Wilge River. Colour photographs were attached to the founding affidavit to demonstrate the applicants' allegations, and which clearly illustrate the problems complained about.

[5] In the court *a quo* the main relief was dismissed, but alternative orders were granted virtually in the form and context sought, save that costs were granted on the ordinary scale. The respondents now appeal against this order, and there is no cross-appeal.

[6] Mr Kemp's (who appeared for the respondents) main argument was that there was a factual dispute between the parties and that the court should have, in terms of the rules applying to the adjudication of motion proceedings, dismissed the application for this reason, alternatively should have referred the matter for oral evidence in this regard. He also had a few other arguments, and attacked certain parts of the order relating to the payment of an Eskom account, and ordering the 2nd respondent to pay

costs. These latter aspects of his argument will be dealt with at a later stage.

[7] It is trite law that three requisites for a final interdict are a clear right, a reasonable apprehension of harm, or to put it otherwise, an act of interference, and the fact that no other remedy is available.

[8] With regard to the clear right, the following can be mentioned:

(a) In terms of the “gebruiksooreenkoms” attached as annexure “A15” to the supporting affidavit, the 1st respondent had an obligation to conduct and maintain the operation of the sewerage works and the pumping of effluent to the pivot irrigation system on the property at its own cost. According to this agreement if the 1st respondent was in breach of any of the terms of the agreement, the 1st applicant would be entitled to cancel the agreement after which all improvements situated on the property would

become the property of the owner (that is 1st applicant).

- (b) The 1st respondent is enjoined in terms of section 152 of the Constitution of the Republic of South Africa Act, no 108 of 1996 to ensure the provision of basic services to communities in a sustainable manner and to promote a safe and healthy environment.
- (c) It is common cause that the 1st respondent is also enjoined in terms of section 21 of the Health Act, no 63 of 1977 to prevent a nuisance on an unhygienic condition (as defined in the Health Act) from occurring.

These obligations were not denied by respondents, and it is therefore common cause that it was the duty and obligation of 1st respondent to see to it that the Namahadi Sewerage Works were operating at all times, and to such an extent that there was no spillage of sewerage into the Wilge River.

- [9] Mr Kemp, however, referred to the allegation of respondents as set out in paragraph 8 of the opposing affidavit that a stone caused a break in the casing of the pump which resulted in the pump room overflowing, and that this was immediately rectified by respondents to such an extent that the one pump was installed on the 4th of February 2008. According to 1st respondent's affidavit, deposed to by 2nd respondent, one pump was sufficient to operate the system, and if there was further spillage, it was the result of load shedding, or some other reason, which may have caused the lack of electricity. According to Mr Kemp, there is no reason for rejecting the applicants' allegation that load shedding could have caused the spillage which persisted after the pump had been repaired. Even if the defendants' version was less probable than that of the applicants, this was not sufficient as the case could not be decided on the probabilities, but should then be referred to oral evidence.

[10] The respondents' argument is to therefore that no interference with the rights of the applicants has been proven to the extent required by law.

[11] In this respect it is necessary to consider the following passage in the work by Prest, **The Law & Practice of Interdicts**, 1996, page 44 to 45, where the following is said:

“The injury must be a continuing one: the court will not grant an interdict restraining an act already committed for the object of an interdict is the protection of an existing right; it is not a remedy for the past invasion of rights. A past infringement of rights may, however, constitute evidence upon which the court implies an intention to continue in the same course.

Van der Linden, speaks of *een gegronde vrees ... dat 'er eene zoodanige feitelijkheid ... gepleegd zal worden*. This is usually rendered by the phrase ‘reasonable apprehension of injury’ to the applicant’s right. A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the

undisputed facts, injury will follow: he is only to show that it is reasonable to apprehend that injury will result. It is clear that there is a difference between proving on a preponderance of probabilities that 'a reasonable apprehension of injury' exists and proving on that preponderance that 'an injury will be incurred'. A reasonable apprehension of injury is one which a reasonable man might entertain on being faced with the facts which the court finds to exist on a balance of probabilities. The test for apprehension is an objective one. The applicant must therefore show objectively that his apprehensions are well grounded. Mere assertions of his fears are insufficient. The facts grounding his apprehension must be set out in the application to enable the court to judge for itself whether the fears are indeed well grounded."

- [12] When the applicants' deponent discovered that the pumps were not operational from the 28th of January 2008, he immediately instructed the attorneys to address a letter to the 1st respondent calling up on the 1st respondent to repair the pumps. This letter is attached as annexure "A3" to the founding affidavit. In this letter it was already mentioned that if the pumps were not repaired, an application would

be brought. Because the 1st respondent failed to respond to annexure “A3”, a copy of this letter was provided to the 1st respondent’s attorneys as appears from annexure “A4”. After the work had been done by 1st respondent on the 18th of February 2008, it was discovered that only one pump was operational, and that raw sewerage continued to flow into the Wilge River.

[13] A series of photographs were attached to the supporting affidavit taken from the 8th of February 2008 up to the 11th of March 2008. Each photograph is described in the supporting affidavit, and show the spillage occurring on the dates in question.

[14] The respondents’ response to the photographs is unsatisfactory. They failed to deal with the photographs at all, and merely alleged that the copies (which were not colour copies) which were attached to the application served on the 1st respondent, were illegible. It is important to bear in mind that colour copies were provided to the 1st

respondent's attorneys on 3rd April 2008 (four days prior to the filing of the respondents' answering affidavit). Up to the date of the hearing of the application on the 12th of June 2008 the respondents failed to deal with the photographs. Mr South, who appeared for the respondents, argued that the respondents' failure to dispute the evidence (which was properly placed before the court) and constitutes admission thereof. Although there is no further evidence of what happened after the 11th of March 2008, there is also no reason to accept that the spillage did not occur after these dates.

- [15] Although the well-known test as set out in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) from 634 to 635 is of course applicable, the situation may be different if the respondents' version consists of bald or uncreditworthy denials, or if they raise fictitious disputes of fact, or give a version which is palpably impossible or so far fetched or untenable that the court is justified in affecting them merely on the papers.

See **NATIONAL DIRECTOR OF PUBLIC**

PROSECUTIONS v ZUMA 2009 (2) SA 277 SCA at paragraph [26]. The response of the respondents to the photographs is merely one of the factors to be taken into consideration.

[16] Other factors to be considered, are the following:

- (a) The photographs show that the 1st respondent's allegation that at least one pump was working from the 4th of February 2008, is not correct.
- (b) The photographs also show clearly that even when one pump is operational, raw sewerage continues to flow in the Wilge River.
- (c) Another factor to be taken into consideration is the complete failure by 1st respondent to acknowledge receipt of the applicants' letter, and to respond to the

content thereto even when the letter was sent to the attorneys.

- (d) The version that when one pump fails, the other automatically comes operational, contradicts the version that when the stone caused one of the pumps to fail on 27 January 2008, it resulted in the pump station been flooded in circumstances when the back-up pump was allegedly available and operational.
- (e) The averment by the respondents that an order was placed in respect of the pumps on the 28th of January 2009 in circumstances where it appears from the invoice that an order was only placed on 12th February 2009 (as can be seen clearly from annexure “C” to the opposing affidavit, p. 145 of the papers).
- (f) On the 2nd February 2008 a letter was written by applicants’ attorneys to 1st respondent which contains the following paragraph:

“2. We have had an opportunity to consult with Piet Schabort (who leases farmlands from our client [Agritrans CC]). We are advised that:

2.1 the two pumps which the sewerage to the sewerage works servicing Namahadi ceased working on 26 January 2008;

2.2 the pumps never worked at any stage until 18 February 2008 (presumably after receipt of our letter referred to above);

2.3 for a period of approximately three weeks all the sewerage produced by Namahadi flowed directly into the Wilge River, which river flows into the Vaal Dam;

2.4 for the same period as mentioned in clause 2.3 above Mr. Schabort has not had the benefit of the “purified” sewerage water, for irrigation of his crops and has been obliged, as far as possible, and with the view to mitigating his damages, to pump water from the Wilge River to irrigate his crops;

2.5 since the 18th of February 2008 the pumps have been pumping sewerage, to the

sewerage farm, but very erratically on account of repeated blockages, and the absence of a standby pump;

2.6 on the 20th of February 2008 the sewerage operated with only one pump, which is inadequate. The sewerage works are designed to operate using two pumps with a standby pump, if required. As a result of only one pump being functional, raw sewerage continued to flow into the Wilge River;

2.7 sometime in the afternoon or evening of the 20th of February 2008, the solitary working pump became blocked up and inoperational. When Mr. Schabert went to enquire on the morning of the 21st of February 2008 as to why no sewerage was being pumped to the sewerage works he was advised by the supervisor "Koos" that the Municipal staff (including Koos) were in training and unable to attend to the problem."

In the same letter (written before the application was lodged) the respondents were requested to maintain

an operate sewerage system properly, or further steps will be taken, and an order for contempt of court requested. Their only reply to this letter was a letter from respondents attorneys asking the applicants to serve any proceedings directly on the attorneys.

[17] It cannot be denied that many of the answers to all the allegations in the founding affidavit are, to say the least, evasive. They show no clear intention to set the matter right, and merely advance an opinion that there is nothing further to set right after the pump was in operation again, (according to the respondents on the 4th February 2008).

[18] It is trite law that the court can look at the founding affidavit, as well as the replying affidavit, insofar as it merely answers allegations or denials raised in the opposing affidavit. There was no request by respondents to file a further affidavit, or an application to strike-out anything in the replying affidavit.

[19] In the result the only conclusion is that the court *a quo* was correct when it decided that the respondents had failed to properly maintain the two sewerage pumps housed at Namahadi Sewerage Pump House. The following paragraph in the judgement can also not be faulted:

“[25] The respondents unsubstantiated averments around the Eskom load-shedding is far-fetched and cannot be an excuse to have an unhealthy situation persist while the respondent simply shrugs its shoulders and claim to be waiting for the pump parts. The respondent has not even refuted the fact that the unhealthy and hazardous situation depicted in the photographs and deposed to by the applicant exists.”

These conclusions can be arrived at without even taking into consideration the evidence from Mr E J van Zyl, the environmental health practitioner (whose report are attached to the replying affidavit).

[20] As far as the so-called defences of *lis pendens* and *res iudicata* are concerned, the court dealt with this matter in paragraphs [20] and [21] and [23] of the judgment. These issues were raised before the court *a quo*, but Mr Kemp did not rely on them, and merely remarked that it is strange that the same relief can be claimed in later proceedings when there is a court order to that effect. We think Mr Kemp quite correctly did not take this point, and that the court's conclusion in paragraph [20] of the judgment is correct, namely that a new act of interference with applicants' rights had taken place. In any case, it must be remembered that the prime relief sought was one of contempt of court. The court merely came to the conclusion that the respondents were not *mala fide* and dismissed prayer 1, but if one looks at the position from the beginning of February, and especially after the 18th of February 2008, and at the way in which applicants' requests were answered, there was ample justification to ask for this prayer. Because there is no counter appeal it is not necessary to decide whether the prayer should have

been granted, but in view of it's dismissal there is no doubt that the court was entirely correct to grand the alternative relief.

[21] Mr Kemp only raised two further issues should the appeal be dismissed, namely that prayer 5 should have not been granted and that as far as prayer 6 is concerned, costs should only have been ordered against the first respondent.

[22] Argument was addressed to us with regard to the question whether a court is entitled to say how an order should be implemented, in other words, how the respondents must maintain and operate the pumps, and if the court can grant such an order that the account must be paid. As this is academic at this stage, this court is prepared to delete that paragraph in the order, and we agree with Mr South's submission that if this should be done, it should not effect the order as to costs.

[23] With regard to the costs order against 2nd respondent, this aspect is more debateable. The applicants were entirely right to cite Mr Mahlaku, as he is the person who is at the head of the administration of the 1st respondent, and also the accounting officer of the 1st respondent, and as such is the person responsible to ensure that the 1st respondent carries out its constitutional and other statutory duties. He was therefore sited in his capacity as municipal manager, and the court accepts the 1st respondent would in any case be liable for any costs incurred by him. We do think, however, the correct order should have been to merely order the 1st respondent to pay the costs, but this does not entitle 2nd respondent to any costs of the opposition, or any costs which may have been incurred by him. Compare **SWARTBOOI AND OTHERS v BRINK AND OTHERS** 2006 (1) SA 203 at paragraph [25]. On the contrary, it seems probable that the 1st respondents lack of taking the proper steps can to a considerable extent be laid at his door. There is also no suggestion whatsoever that any extra costs were incurred by him personally.

[24] Accordingly the following order is made:

24.1 The court *a quo*'s order is varied in the following respects:

- (a) Paragraph 5 of the order is deleted;
- (b) Paragraph 6 is varied to the extent that only the 1st respondent is ordered to pay the applicants' costs.

24.2 Save for the aforesaid variation of the order, the appeal is dismissed.

24.3 The 1st appellant is ordered to pay respondents' costs of appeal.

I concur.

G. F. WRIGHT, J

C. VAN ZYL, J

I concur.

K. J. MOLOI, J

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