

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 5001/2008

In the case between:

M C KRUGER
E W KRUGER

1st Applicant
2nd Applicant

and

MANGAUNG PLAASLIKE MUNISIPALITEIT

Respondent

JUDGMENT: RAMPAL, J

HEARD ON: 13 NOVEMBER 2008

DELIVERED ON: 19 DECEMBER 2008

[1] The matter came by way of motion proceedings. The applicants seeks a mandatory interdict against the respondent. They apply for an interim order whereby the respondent is directed to erect a protective concrete wall or a rail guard on the street pavement in front of their residential property within seven days pending the outcome of a traffic impact study which the respondent must commission within sixty days of such order. The respondent opposes the application.

- [2] The applicants and their two minor children live at 66 Lilac Avenue, Gardenia Park in Bloemfontein. The family purchased the property on the 28 February 1998. The property is situated at the point where Wildeals Avenue intersects Lilac Avenue. Wildeals Avenue is a tarred and straight street approximately 750m long. At its one end is a liquor bar called “The Bucket” and at the other end the couple’s house. Between these two landmarks, there is no street which intersects Wildeals Avenue. There are two schools in the street, namely:- Hoërskool Jim Fouché and Laerskool Jim Fouché.
- [3] The couple’s property is situated right at the T-intersection as one drives from the bar. There is one “stop marking” painted on the surface of the road at the intersection. Besides this stop road marking, there are no stop signs or traffic lights erected in Wildeals Avenue. There are no speed walls.

[4] Precisely when the liquor bar down the street started doing business in the neighbourhood does not appear. But comments made from the court bar by the two lawyers indicated that the applicants were already residing there at the time the liquor bar opened its doors for the first time for business. Ever since then eight motorists have driven through the concrete wall fencing the property of the applicants. The first of such driving incidents occurred on the 8th April 2004 whereas the last on Sunday the 18 May 2008. On every occasion, the concrete wall was damaged. The couple suffered damages. Although the comprehensive insurer paid the repair costs, every time the couple had to fork out R1000 insurance excess in respect of each claim.

[5] The applicants allege, on account of such driving related incidents, that the respondent has created a dangerous situation through its omission to put in place appropriate and adequate physical traffic measures on the particular road in order to ensure that motorists who use it, can safely do so.

- [6] The applicants further alleged that the respondent has a statutory legal duty:

“... om die nodige veiligheidsmaatreëls op die betrokke pad aan te bring ...”

and a statutory legal duty:

“... om my en die tweede applikante, wat in die betrokke area woonagtig is, se belange te beskerm.”

- [7] In the answering affidavit, the respondent denied the existence of the alleged statutory duties but admitted that:

“12.2 Respondent het wel ‘n plig om te verseker dat paaie welke onder sy jurisdiksie val veilig is, maar is dit my submissie dat daar wel voldoende maatreëls op die betrokke pad is om die veiligheid van padgebruikers te verseker.”

The essence of the respondent resistance is grounded on the contention that there are currently adequate traffic measures on the road concerned to ensure the safety of road-users and that the road *per se* is not dangerous to the general public using it as the applicant alleged.

- [8] The question in the case is whether the current traffic safety measures in place on the street concerned are adequate or not to make it safe for use.

Mr. Coetzer, counsel for the applicant, answered the question in the negative but Mr. Nel, counsel for the respondent, answered it in the affirmative.

- [9] A cursory overview of the law through caselaw is necessary to ascertain the existence or otherwise of a legal duty. In **CAPE TOWN MUNICIPALITY v BAKKERUD** 2000 (3) SA 1046 SCA at paragraph 31 Marais JA said the following about the dual nature of the onus which rests on the claimants:

“It will be for a plaintiff to place before the court in any given case sufficient evidence to enable it to conclude that a legal duty to repair or to warn should be held to have existed. It will also be for a plaintiff to prove that the failure to repair or to warn was blameworthy (attributable to culpa).”

- [10] It is a salient principle of law that where a municipality neglects to take reasonable measures to prevent harm to public road users, such negligent municipality can be held delictually liable. To ascertain whether the traffic measures in place at the time the harm was suffered were reasonable and therefore adequate depends on the peculiar circumstances of each case. There is no hard and fast rule. The judicial enquiry entails value judgment based on the weighing up of a variety of factors. In **NGUBANE v SOUTH AFRICAN TRANSPORT SERVICE** 1991 (1) SA 756 (AD) the following considerations were highlighted:

“As regards the requirement in para (a) (ii) above in this judgment, it is acknowledged that reasonable steps are not necessarily those which would ensure that foreseeable harm of any kind does not in any circumstances eventuate. The

contributor (Prof J C van der Walt) in Joubert (ed) The Law of South Africa vol 8 sv 'Delict' para 43 at 78 comments in this regard that:

'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foreseeable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.'

[11] In **PRETORIA CITY COUNCIL v DE JAGER** 1997 (2) SA 46 (AD) at 56 E – H, Scott JA said the following about the hazard on the road:

"It is a matter of common experience that the municipalities of larger towns and cities are regularly obliged to undertake road works involving the digging of holes and trenches in roadways

and pavements. There are few such works that are not fraught with some danger. This much is known to the public and municipalities are entitled to expect some reasonableness on the part of pedestrians once their attention has been drawn to the work in progress and the existence of danger. No doubt there are situations in which something more than a mere warning fence is required. The circumstances may be such as to require a protective barrier of the kind suggested by counsel which would all but exclude the possibility of a pedestrian falling into an excavation. But I think it would be unrealistic and expecting too much of municipalities with pressing and more worthy demands being made on their generally limited financial resources to have to incur the expenditure of establishing in every case a protective barrier of such a kind as to physically prevent pedestrians from gaining access to or falling into holes or trenches of the kind with which this case is concerned."

- [12] In that case there were excavations in the street. The city council of the municipality warned the public about the danger the excavation posed. Despite the warning, the respondent fell into the excavation and got injured. On appeal the court held that the steps taken to warn the

pedestrians about the hazard were adequate and that the municipality was not required to incur further expense to ensure that pedestrians did not fall into the excavations.

[13] The general principle is that where a reasonable actor in the shoes of a municipality would not have done more than was actually done in a given case, no negligence can be attributed to the defendant municipality. The converse is also true. Where a reasonable person in the same position as the municipality would have acted differently by doing more than was actually done then negligence may be imputed to such a municipality.

[14] It is common cause that previously the road had no traffic signs besides the stop road marking and the two pedestrian crossings in front of the schools. However, there is currently a reflective chevron board right in front of the property of the applicants. It appears that all the eight incidents complained of occurred during night-time. There is hardly any similar incident which occurred during day-time. Therefore, it seems legitimate to deduce that the

measure which the respondent had in place regulate the flow of traffic reasonably well. The street apparently has a heavier traffic volume during day-time than during night-time. Now, if such measures can efficiently and properly regulate traffic flow during day-time there is no logical explanation why they can be said to be wanting during night-time.

- [15] None of the incidents can be purely attributed to any hazard on the road itself. It is certainly not the case of the applicants that any of the vehicles that crashed into the concrete fence were forced to take an evasive action to avoid a hazardous obstacle, condition or situation on the road such as: a deep pothole – Graham’s case *supra*; or a huge falling rock – Bakkerud’s case *supra*, or a deep excavation – De Jager’s case *supra*. In the instant case, none of the road-users involved in any of the crashes blamed the respondent municipality for their vehicular damage or bodily injuries. It would seem that, all of them, without an exception, realised that human behaviour and not physical hazard on the road coupled with inadequate

measures was the exclusive cause of their damage or injury. In my view there is virtually no connective tissue between the misfortune of the applicants and the alleged omission of the respondent to take adequate measures in order to ensure the safety of the users of the particular street. I am of the view that the current measures are reasonably adequate and that the street is reasonably safe for any careful and considerate user.

- [16] The applicants are endeavouring to have the respondent compelled to protect them as individual(s) against criminal transgressions committed by the thirds. The risk of crime is a general risk shared by all – **SAAIMAN AND OTHERS v MINISTER OF SAFETY AND SECURITY AND ANOTHER** 2003 (3) SA 496 (O). The respondent cannot be held liable for the crimes. Here we are not concerned with the sort of a situation that obtains where a municipality has actively created a dangerous situation on the road but subsequently failed to take appropriate measures to guard against possible harm to the members of the general public. The right which the applicants claimed they have is, in these

circumstances, very obscure, if it exists at all. On eight different occasions the applicants were adversely affected by the driving incidents. Their concrete fence was damaged. However, in none of those crashes did any of the offending motor vehicle forage so deep into their property as to cause damages to their house or injury to any family member. The likelihood of the applicants or their children becoming injured during such frolic incidents appears to be relatively slim seeing that the majority, if not all of them, happened during night-time.

- [17] Neither in their founding affidavit or replying affidavit did the applicants quantify their damages. Their exact financial loss has been limited to a total of R8 000,00 in respect of insurance excess, viz R1 000 x 8 incidents. This is so because their long term property insurers paid the undisclosed repair costs. The applicants fear, and they have sound reason to be anxious, that similar crashes will probably take place again in the future. However, it is important to make the observation that the applicant have

suffered no irreparably harm so far, through any of the crashes complained of.

[18] Although they are apprehensive about possible repetition of similar incidents in the future, I am not persuaded that their apprehension is reasonable. There is nothing to suggest that they will suffer irreparable harm unless the respondent takes steps to protect them against such acts of interference. The law does not, by way of an interdict, protect every one merely because her right has been and is likely to be infringed again irrespective of the magnitude of the harm. It is only a right threatened by the harm that cannot be repaired afterwards which deserves the protection of the remedy which an interdict affords. In my view the applicants have also failed to establish the second requisite for the grant of a final interdict.

[19] The applicants have all the right to recover full compensation for the damages occasioned by the negligent driving from the negligent drivers involved. They may also elicit the help of the South African Police Service

to vigilantly patrol this particular street especially on Friday and Saturday nights. It seem that visible and regular police patrols over the weekends may well have significant positive impact on the reduction of criminal driving patterns, which according to the applicants themselves, are largely attributable to either drunken driving or excessive speeding or both.

[20] In principle the applicants in collaboration with the respondent may also work out and implement some constructive measures to address the problem. The respondent has already extended a helping hand by undertaking to erect rail-guards in addition to the reflective chevron board, reflective painted stone-kerbs and stop road marking at the intersection. The respondent has demonstrated its willingness to co-operate by doing speed measuring study exercise in the street concerned. Furthermore, the respondent has already undertaking to do some further traffic study to assess how best the problem affecting the applicants can be addressed. It follows from all these that it cannot be convincingly contended, as Mr.

Coetzer did, that the applicants have no alternative ordinary and effective remedy other than the interdict. In my view they are not remediless. It seems to me that they have a few ordinary remedies available. Therefore I find that the applicants have failed to prove the third requisite of a interdict, interim or final.

- [21] The primary relief sought by the applicants is that a protective concrete block be erected by the respondent on the pavement parallel to their concrete fence. The respondent is agreeable provided such protective concrete block is erected on the pavement but as close as possible to the fence of the residential property of the applicants, or better still, on the property and not on the pavement alongside the erf boundary. However, the applicants will have nothing of those options. They insisted that the protective concrete block should be erected on the pavement and on the pavement only, way off their fence and right at the edge of the Lilac Avenue. According to the respondent the measure demanded by the applicants is not practically and legally feasible regard being had to the

circumstances of the intersection. Firstly the space between the fence and the edge of Lilac Avenue is too narrow. To erect a protective concrete block there, in accordance with the wish or demand of the applicants would breach the safety specifications and requirements.

- [22] If so erected the protective block would create a hazardous condition for motorists driving in Lilac Avenue. Should a motor vehicle in Lilac Avenue veer off the street in a desperate attempt, to avoid a child or another motor vehicle speeding up in Wildeals Avenue towards the intersection without an indication of a driver's intent to obey a stop sign, it would crash into the side of the proposed protective block. The consequences might be too ghastly to contemplate. The erection of the protective block on the edge of the street would greatly expose the respondent to the serious risk of civil action, should an accident occur occasioned by the protective block which was not strictly erected in accordance with legal specifications.

[23] Moreover, the respondent also mentioned that the protective concrete blocks were not designed to be used as perpendicular barriers to prevent motor vehicles from moving forward. The protective concrete blocks were designed to prevent motor vehicles from the hazards of deviating sideways on the road and dangerously encroaching on the wrong side, which was why such protective concrete blocks were erected parallel and not perpendicular to the road. The underlying idea for the parallel use of such protective barriers is primary to protect those actually mobile on the public road and certainly not to protect the interests of those sleeping in their private homes.

[24] In the replying affidavit the applicants alleged that elsewhere in the city the respondent was using protective concrete blocks but was unwilling to use them in Wildeals Avenue to protect them as residents. They cited Wilcock Road as an example. However, Mr. Coetzer could not argue that the protective concrete blocks there were used contrary to the purpose for which they were designed,

namely parallel and not perpendicular to the road. The crux of the matter is that protective concrete blocks are essentially supposed to be used to protect the driving public against the stray motor vehicles with the least possible risk of harm to straying drivers themselves. They are not intended to protect residents sleeping in their homes off the road.

- [24] There are numerous intersections in the city very similar to the one we here concerned with. Therefore, there is nothing unique about the geographic situation of the property of the applicants. There is no evidence to suggest that all T-intersections in the city are, to the respondent's knowledge, bedevilled by endless crashes. It has not been established therefore, that a reasonable person would have foreseen the harm to the applicant. This is the first leg of the enquiry – Prof J C van der Walt: **The Law of South Africa**, Volume 8, Delict, par 43. Such incidents were unheard of before 8 April 2004. Once the first leg has been proven, then the second leg of the enquiry kicks in. Here the question is whether a reasonable person who has

foreseen the possibility of harm would have taken appropriate measures to prevent such foreseeable harm from eventualising. In *casu* the second question of the enquiry does not arise.

- [25] Let us, nonetheless, suppose that the applicants have successfully jumped over the first hurdle and that they are now facing the second hurdle. In that event, it cannot be contended with any serious measure of conviction: firstly, that the respondent's conduct in constructing the intersection without simultaneously erecting a perpendicular protective barrier on the edge of the trafficable surface of the street was an omission which created a high degree of the crash risk because the incidents are apparently a new phenomenon; secondly that the gravity of the possible consequence if the risk of harm materialises, was of a high magnitude because the impact of the recorded incidents has been minimal; thirdly, that the respondent's conduct in constructing intersections of this sort is an important public utility designed to facilitate

free and safe flow, of traffic and its public advantages are not eclipsed by its particular disadvantages which really stem from the misuse and fourthly, that the burden of eliminating the risk of harm is economically affordable. If the respondent is compelled, on demand, to eliminate the risk of future harm by erecting protective barrier, a floodgate of similar demands will be opened. The costs therefore will be unaffordable by the respondent and many other municipalities. The four basic considerations of the second leg of the enquiry are not met - **NGUBANE'S** case *supra*.

- [26] The applicants will be wise to accede to the respondent's proposal. They cannot dictate terms and have the protective barrier erected according to their wishes and expose the respondent to a far greater risk of harm. To erect a protective barrier in such a perpendicular manner to the motor vehicles travelling up Wildeals Avenue would seriously endanger the lives of many road users. Certainly it would be unrealistic and expecting too much of municipalities with often pressing and more worthy and

deserving demands being made on their generally scarce financial resources to have to incur the huge expense of constructing, not parallel protective barriers but rather dangerous perpendicular barriers at every T-intersection in order to physically protect high private security walls of residents. Perhaps the respondent might also want to consider the merits and demerits of erecting one speed wall in Wildeals Avenue near the intersection. Such a decision will, of course, be in the respondent's free and absolute discretion. There may well be exceptional situations in which a municipality may decide to do something more than already done. However, it will be wrong to construe such an extra mile as a tacit admission of a previous omission to justify the inference that what was actually done was inadequate.

[27] In the circumstances I have come to the conclusion; that the applicants have made out no case for the relief sought, be it an interim or final interdict; that the respondent has created no hazardous condition in the street concerned which situation it has failed to control in order to protect the

road users; that the acts of interference complained of and against which the protective relief is demanded from the respondent, have nothing to do with a road which is itself dangerous in any manner whatsoever, but that such acts have everything to do with unlawful human behaviour; that the respondent has implemented reasonably adequate measures in the street to make it safe not only for the residents of the street but for the road users in general including those who have damaged the property of the applicants; that the respondent does not owe any legal duty to any individual resident which entitles such resident to demand specific individual protection of his proprietary interest from the respondent for wrongs committed by third parties off the road for whose actions the respondent is not vicariously liable. I would therefore dismiss the application.

- [28] The respondent has been successful in resisting the application. There is no reason why the respondent as the successful party should be deprived of the fruit of its success.

[29] Accordingly I make the following order:

29.1 The application fails.

29.2 The applicants are directed to pay the respondent's taxed costs jointly and severally, the one paying the other to be absolved.

M. H. RAMPAL, J

On behalf of the applicants:

Adv. J. C. Coetzer
Instructed by:
L & V Attorneys
BLOEMFONTEIN

On behalf of the respondent:

Adv. J. Els
Instructed by:
E G Cooper Majiedt Inc
BLOEMFONTEIN

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