

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No. 11720/24

In the matter between:

STELLENBOSCH MUNICIPALITY

Applicant

and

LINDA MADALENA DE CANHA N.O.

First Respondent

In her capacity as Trustee of the Cova Da Iria Trust

PAULO GABRIEL DE CANHA N.O.

Second Respondent

In his capacity as Trustee of the Cova Da Iria Trust

FRANCISCO DANIEL DE CANHA N.O.

Third Respondent

In his capacity as Trustee of the Cova Da Iria Trust

MARIA MADALENA DE CANHA N.O.

Fourth Respondent

In her capacity as Trustee of the Cova Da Iria Trust

SANDRA MARIA SINSKE N.O.

Fifth Respondent

In her capacity as Trustee of the Cova Da Iria Trust

FRANCISCO PAULO DE CANHA N.O.

Sixth Respondent

In her capacity as Trustee of the Cova Da Iria Trust

SONIA NATALIA DE CANHA N.O.

Seventh Respondent

In her capacity as Trustee of the Cova Da Iria Trust

JUDGMENT ELECTRONICALLY DELIVERED ON 8 APRIL 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] The applicant (*“the Municipality”*) seeks interdictory relief as follows: (a) directing the Cova Da Iria Trust (*“the Trust”*) to obtain a geotechnical investigation report within three months, at its own cost, for the twofold purpose of investigating the extent of excavations done on certain immovable property, and determining the steps required to restore the property to its natural ground-level; (b) directing the Trust, within three months of obtaining the report, to facilitate all steps necessary to restore the property to its natural ground-level.

[2] The Trust was founded in 1988, and on 26 April 1988 it purchased immovable property known as Erf 7[...], Stellenbosch, Western Cape (*“the property”*), which it continues to own, and registered it into the name of the Trust on 8 November 1989. It is common cause that in the early 1990s the Trust sought to commence development of the vacant erf and commenced with excavations for the purpose of constructing a foundation and parking area for a mixed commercial and residential building, which has yet to be erected.

[3] The result of the excavation was a hole, which is currently about 10 metres deep and 30 metres in diameter, and is described by the Municipality as a manmade dam or wetland with overgrown reeds and palm trees and a potential of unwanted environmental health conditions and an ongoing safety risk. Although the description is disputed by the Trust, the size and extent of the excavation is not. Neither is the description by a building inspector, Mr. Lincoln Phillip Africa, who conducted an inspection on 25 July 2023 and 24 August 2023 as unsightly. To date, the property remains vacant and undeveloped, consisting only of the excavation, which is next to a street, though it is currently fenced off.

[4] There is a dispute about whether the Trust was authorized to embark on the excavation, and neither side could locate any official paperwork for such authorization. To make matters worse, the controlling mind of the Trust from the time of its establishment was diagnosed with Parkinson's disease with vascular dementia in about January 2022, rendering him unable to assist with the facts of this matter, and he unfortunately subsequently passed away before the hearing of the matter.

[5] However, there is some correspondence available dating from 1997, which in the scheme of things is not too long after the appearance of the excavation. In a letter dated 23 September 1997, the Municipality addressed the Trust as follows:

“DANGEROUS EXCAVATIONS: ERF 7[...]...

I refer to the above and after quite a few phone calls regarding the unsafe conditions of the excavation, a site inspection was carried out by ourselves.

The excavation was found not safe in view of the present depth and due to the fact that no warning signs or any form of barricade have been erected.

In terms of section 12 3(a) of the National Building Regulations and Building Standards (Act 103 of 1997) I hereby instruct you to take the necessary steps to render the excavation safer before or on 1997-10-03...

Should you fail to comply with this request I will have no option but to take further legal steps against you..."

[6] The next available letter is dated 23 March 2001, and was also addressed by the Municipality to the Trust as follows:

"I refer to our previous conversation as well as your written request to extend the validity period of the building plans pertaining to the property. I apologise for not reverting back to you earlier in respect of your request.

The validity period for building plans is normally only extended for a period of one year, since building approval is granted based on specific period and circumstances. In this matter we made a mistake in not extending the period timeously.

After consulting the Building Control Officer, I confirm herewith that the validity period of building plan no 97/260 in respect of erf 7[...] is extended until 30 November 2001. No further extension will be granted..."¹

[7] Next is a letter dated 17 September 2001, again addressed by the Municipality to the Trust, as follows:

"NOTICE REGARDING ERF 7[...], STELLENBOSCH

¹ Translated by the Municipality into English.

...In terms of Article 6(1) the Town Clerk can serve the owner with a written notice regarding the wall which are ugly, collapsing and dangerous to the public's safety. You are hereby given 7 days from the date of this letter to take down the fence or to put up a new fence which will comply to the Council's conditions.

In reading this you must also close the hole which you dug to start build. Nothing has happened in +- 6 years and it is now a major problem with all the illegal activities, which take place on this erf because of the situation the erf has been left in..."

[8] On 2 August 2002 the Municipality addressed another letter to the Trust, stating as follows:

"UNSAFE CONDITIONS ON ERVEN 7[...]3, 7[...]4 TO 7[...]5 B[...] STREET

After numerous letters/corresponding and so on, you have still done nothing to rectify the unsafe conditions on this erven as mentioned above.

The hole that was dig (sic) for underroof parking is now full with water and anyone could fall into that water and drown or hurt themselves walking past your property.

You are hereby given 7 days to either fill the hole up or put up a fence around the property according to the Council's regulations and standards..."

[9] On 12 October 2006 the Municipality addressed another letter to the Trust, which read as follows:

"I wish to inform you that your plans for the temporary fencing on the above mentioned erf has been approved on the following conditions:

Town Planning

- 1. Recommend for approval subject to compliance with dimensions and materials on Plan A & B.*
- 2. Access to the property must be obtained from Paul Kruger Street.*

Building Control

- 1. Recommended for approval on condition that all work must be done in accordance with the NBR & Standards.*
- 2. This approval does not exempt the owner from complying with any relevant legislations.*
- 3. The fence can only be erected for a period of 12 months. The expiry date of this approval will be on 11th October 2007.*
- 4. For any further extensions to be granted, application must be made to this office before the approval period lapses."*

[10] According to the papers, no extensions were sought by the Trust after the lapse of the 12-month period granted in the letter of October 2006 for the erection of the temporary fence.

[11] It is common cause that there have been ongoing negotiations between the Municipality and the Trust to develop the property, which if concluded successfully,

would have resolved the issue regarding the excavation. But no building plans have been submitted by the Trust, although the latter has set out the efforts it has made to advance the construction of its building development on the property. The efforts set out amount to meetings held with various professionals, from 18 October 2022 to 11 June 2024, for the purpose of lodging an application to alter the current land use rights from conventional residential to general business zoning. However, the land use application has not been submitted to authorise development, and no deadline for such submission has been provided by the Trust. The Municipality also states that it remains none the wiser regarding the exact nature of the planned development, when the applications will be submitted or when the development will commence. No such details are provided in this application by the Trust.

[12] After the inspection was conducted on 25 July 2023 and 24 August 2023, the Municipality issued notices in terms of the National Building Regulations and Building Standards Act 103 of 1977 (*“the Act”*), on 31 August 2023 and again on 2 October 2023 (*“the Notices”*). The Notices were issued in terms of Regulation A25(9) of the National Building Regulations GN R2378 in GG 12780 of 12 October 1990, with effect from 1 October 2008. (*“the Regulations”*), and opened as follows:

“Inspections conducted 25 July 2023 and 24 August 2023 on the above property revealed that unauthorized excavations on erven SB7[...]2 and SB7[...] at... are not compliant with and/or rectified and/or ground rehabilitated. The unauthorized excavations are being presumed conducted during the 1990’s for a proposed development and abandoned with no success in attempts for compliance to previous Notices served. The excavations of approximately 10m deep and 30 m in diameter is a contravention of Section 4, section 10 section 12 and Part G of the [Regulations] as no prior approval of such excavations has been obtained from the local authority.”

[13] The Notices ordered the Trust to “*RECTIFY ALL EXCAVATIONS AND REHABILITATE the safety and stability of the property, and to submit a competent person appointed with a geotechnical investigation report, specifying the measures and timeframe to rehabilitate the property, to the satisfaction of the local authority in the prescribed manner within 30 days from the date of this notice*”. Whereas the first of the two Notices afforded the Trust 30 days to comply, the second, which was in identical terms, afforded it 14 days from service of the notice.

[14] The Trust did not comply with the Notices. The deponent to the answering affidavit denies receipt of either Notice, and states that they were in fact dispatched to the residence of the sixth respondent, his now deceased father, who at the time would not have understood the import of a notice of that nature due to his illness. The deponent has furthermore attached track and trace reports from the South African Post Office, dated 13 September 2023 and 12 October 2023, which indicate that the items were never collected and were returned to sender. The Municipality denies receiving the items back from the Post Office, or being alerted of any non-delivery thereof.

[15] On 19 January 2024 the Municipality’s attorneys sent a letter to the Trust, which elicited responses penned by the Trust’s deponent on 26 February 2024 and again on 4 March 2024. These proceedings were launched on or about 23 May 2024.

B. THE LAW

[16] The requirements for a final interdict are trite. An applicant must demonstrate (i) a clear right, (ii) an injury actually committed or reasonably apprehended and (iii) that it has no satisfactory alternative remedy.²

[17] Where, in motion proceedings relief of a final nature is sought, the legal principles set out in *Plascon-Evans*³ apply insofar as any disputes of fact may arise in

² *Setlogelo v Setlogelo* 1914 AD 221 227.

³ *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

the papers. That is, that a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such an order.⁴

[18] It may be different if the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.⁵ The court has to accept those facts averred by applicant that were not disputed by respondents, and respondents' version insofar as it was plausible, tenable and credible.⁶ It is otherwise undesirable to decide an application upon affidavit where the material facts are in dispute⁷, and a final interdict may be granted on application if no *bona fide* dispute of fact exists.⁸

[19] In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁹, the court extended the ambit of uncreditworthy denials to encompass not merely those that fail to raise a real, genuine or bona fide dispute of fact, but also allegations or denials that are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

[20] As for the interpretation of statutes, the Constitutional Court¹⁰ has stated as follows:

“A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle,

⁴ Harmse *Civil Procedure in the Supreme Court*, B6.45.

⁵ *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).

⁶ *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).

⁷ Harmse *Civil Procedure in the Supreme Court*, B6.45

⁸ *Plascon-Evans supra*.

⁹ *Plascon Evans Paints. Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

¹⁰ *Cool Ideas 1186 CC v Hubbard and another* 2014 (4) SA 474 (CC) at para [28].

namely:

- (a) that statutory provisions should always be interpreted purposively;*
- (b) the relevant statutory provision must be properly contextualised; and*
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."¹¹*

C. THE INTERDICT

[21] The over-arching basis for the relief sought is that the excavation was, and continues to be, unauthorized. This was stated in the Notices, which also made specific reference to sections 4(1),4(4), 10(1), 12(1) of the Act, Part G of the National Building Regulations (*"the Regulations"*) and section 15(1) and 90 of the Stellenbosch Municipality By-Law on Municipal Land Use Planning 2023 (*"the By-Law"*). The reliance on the By-Law was not pursued in the heads of argument filed on behalf of the Municipality or at the hearing.

[22] In the answering affidavit the Trust resists the relief sought on the basis of estoppel, acquiescence, and an argument that the excavation has altered the natural land level. However, these were not pursued in the heads of argument or in argument in Court. The main defence now is that the excavation is not unauthorised, and is therefore not unlawful. The Trust also argues that the Notices are unlawful and *ultra vires*, as the Regulations and the Act do not apply to the excavation, and the excavation is not dangerous. The Trust also tenders, instead of rehabilitating the excavation, to erect a brick wall around the perimeter of the property which would strengthen the measures already in place.

¹¹ See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[23] Starting with the issue of authorization of the excavation, as I have indicated, neither party could find a document to confirm that the excavation was in fact authorized. Whilst the Trust concedes that it has no knowledge of whether the excavation was authorised, it relies on the letter of 23 September 1997 pointing to the fact that it makes no reference to a lack of authorization for the excavation, as support of its argument that the excavation must have been authorized.

[24] Before discussing the relevant correspondence, I make mention that, apart from the letter of 23 September 1997 which was attached to the answering affidavit, the remainder of the letters for the period 2001 to 2006 were attached to the replying affidavit. The Municipality explains that it was taken by surprise by the Trust's denial of the fact that the excavation was unauthorized in its answering affidavit. It was in response to that denial that the letters were attached to the reply. From my observation, it is correct that the founding affidavit mentioned it as fact that "*many years ago*" the Trust "*engaged in unauthorized and therefore unlawful excavation work*", and this elicited a denial in the answering affidavit. The letters attached to the replying affidavit did not introduce a new case and there was no such complaint by the Trust. In fact, when the matter was postponed on 25 October 2024 the parties recorded in a joint practice note that the Trust was considering filing a further affidavit in response to the reply, but none was forthcoming in the five months that it took to hear the matter thereafter.

[25] Turning to the correspondence, indeed the letter of 23 September 1997 is silent on the issue of authorization and only addressed the danger and unsafe conditions thereof. The same applies to the letter of 17 September 2001 which, although it directed the Trust to 'close the hole', gave as a reason the fact that no building work had commenced in a period of about 6 years, and that the excavation had since attracted illegal activities.

[26] However, the letter of 17 September 2001 did order the Trust to 'close the hole', in other words, to reverse or rehabilitate the excavation. Thus, even if there was prior

authorization for the excavation, this letter was a clear revocation thereof. The same appears from the letter of 2 August 2002, in which the Trust was afforded 7 days to either ‘fill the hole up’ or put up a fence around the property in line with the Municipality’s regulations and standards.

[27] It appears that the Trust opted for the second route given in the letter of 2 August 2002, namely putting up a fence around the property. This appears from the letter of 12 October 2006 in which the Trust was informed that its plans for temporary fencing had been approved on, amongst others, the condition that the fence could only be erected for a period of 12 months which was to expire on 11 October 2007, and any extension of that approval had to be requested before the lapse of the expiry period. No such extension was sought by the Trust. Thus again, the authorization expired on 11 October 2007.

[28] The letter of 12 October 2006 is relevant in another regard, namely the other conditions mentioned relating to town planning and building control. In order to appreciate the import of these conditions, it is necessary to refer back to a letter dated 23 March 2001, which records that the Trust made a written request to extend the approval period for its building plans, and was granted until 30 November 2001. According to the letter, no further extension would be granted because, as appears from the letter, the Trust had requested extension for longer than the normal one-year extension allowed for building plans.

[29] It is common cause that no building plans were submitted by the Trust. That is what pertained as at 12 October 2006 when the Trust was granted an opportunity to erect a temporary fence. It is clear from the context that, in granting the temporary authorization for the erection of the fence, it was contemplated that the Trust would finally commence with construction. Hence the mention of the conditions relating to town planning and building control in the letter of 12 October 2006. Why else would the letter place conditions that: *“all work must be done in accordance with the NBR & Standards”*, for example? It could only have been in contemplation of building work on

the property. The specific mention thereof in the letter granting permission to erect a temporary fence could only mean that the permission for erection of the temporary fence was granted on condition that building was to commence. But, as already indicated above, that too lapsed on 11 October 2007.

[30] As a result, the validity of the building plans must have similarly lapsed. This is what had been communicated to the Trust in the letter of 23 March 2001, where it was explained that *“the validity period for building plans is normally only extended for one year as building plan approval is only authorized subject to a specific period and specific circumstances”*.

[31] While it is common ground that the parties engaged, at least during 2022, to facilitate aspects required for development of the property, and the Trust undertook to lodge a land use application, no such applications have eventuated. By July 2023 and August 2023 when the inspections were conducted, and August 2023 and October 2023 when the Notices were issued, nothing had changed in that regard.

[32] The Notices expressly stated that the excavation was unlawful. I am willing to accept, in light of *Plascon Evans*¹², that the Notices did not come to the attention of the Trust. However, it is clear from what is set out above that by then the excavation was operating outside the law, and that the Trust was well-aware thereof. It is no answer for the Trust to dispute the danger and safety hazards of the excavation, an issue I deal with below, in the face of the clear unlawfulness thereof.

[33] The significance of the unlawfulness of the excavation is underscored by Regulation G(3) which requires that, where the depth of an excavation is likely to be more than 3 m, prior written authorization together with accompanying precautionary measures must be obtained from the local authority. The Trust continues to operate outside these measures.

¹² *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[34] It is in that context that the Notices, which specifically referred to Regulation G amongst other provisions, must be viewed. But even after the issue of the Notices, and before the launching of these proceedings, the Municipality's attorneys of record made express mention of the unlawfulness of the excavation in a letter addressed to the Trust on 19 January 2024, where the following was stated:

- "1. This matter has a long history, going back to the early 1990's, when the... Trust commenced with illegal earthworks/excavations on erven (the Property).*
- 2. Over the years the Municipality has had ongoing correspondence and negotiations with the Trust to facilitate the development of the Property, which also included addressing the illegal earthworks/excavations. Despite these attempts, the intended development of the Property is yet to commence (in fact, the Trust must still obtain the necessary approvals to commence with works). In the meantime, the illegal earthworks/excavations remain as is and no applications has (sic) been filed in this regard.*
- 3. We confirm that the earthworks/excavations are not only illegal, inter alia in terms of the [Regulations] and the [Act], but that it is also constituted a health and safety risk. In this regard, and as you are aware, it was the site of a tragic passing of two young people during October 2022.*
- 4. We confirm that the Municipality has on numerous occasions advised the Trust of this (That the earthworks/excavations are illegal and constitute a health and safety risk) and has subsequently (as no approved building works have commenced) requested the Trust to take immediate steps to rectify all excavations and to rehabilitate the safety and stability of the Property.*

5. *In this regard, and whilst this is not an exhaustive list of the correspondence sent to the Trust, being notices dated 2 December 2022, 12 January 2023, 9 March 2023, 31 August 2023 and 2 October 2023.*
6. *Despite these formal notices no formal steps in compliance of the said notices have to date been taken by the Trust to rehabilitate the Property, to ensure that it is safe and secure and that it does not constitute a risk to the public. Whilst the Municipality takes note of periodic cutting of reeds and draining of water from the excavation, this is not sufficient to and does not address the formal request as per the said notices. We confirm that no formal communication in response to the notices served has been received.*
7. *Unfortunately, your e-mail under reply also does not address this issue and whilst your e-mail purports to provide certain timelines within which the Trust intends to commence with the building works, these timelines remain vague and provide little to no certainty as to when the intended works will commence.*
8. *In any event, and as stated above, It does not address the illegal earthworks/excavations on the property, nor does it provide any firm undertakings to remedy the illegal earthworks/excavations, pending the commencement and finalization of the intended building work.*

We therefore confirm that the Property and specifically the earthworks/excavations thereon, is in breach of inter alia the provisions of the NBRBS Act, read with the... and the Municipality cannot allow the Property to remain in its current state...

As such, and due to the Trust's continued failure to remedy the illegal earthworks/excavations, the Municipality has now instructed its attorneys to proceed with the necessary legal action to enforce compliance with, inter alia, the provisions of NBRBS Act..."

[35] The letter also attached other notices which were previously issued to the Trust on 2 December 2022, 12 January 2023 and 9 March 2023, in terms of which the Municipality notified the Trust of its intention to declare the property a problem property in terms of the Problem Property By-Law 2022. In his response to this letter dated 26 February 2024, the third respondent who is the deponent to the answering affidavit and a practicing attorney, did not dispute the unlawfulness of the excavation. Instead, he stated as follows:

"I would like to mention that our family trust is keen to come up with a solution to comply with reasonable requests from the Stellenbosch Municipality for the above property not to be considered a problem property pending the construction of a building thereon.

I will in my correspondence make a proposal to achieve such objective and am willing to put a time frame within which such proposal is to be implemented as gesture of good faith so as to not create an impression that there is any intent to delay such implementation ..."

[36] The last correspondence from the Municipality before the launching of these proceedings was dated 27 March 2024, and it stated as follows:

"...1. You incorrectly identify the perimeter fence as the main issue/problem. This is not the case. The primary issue is and remains the unlawful excavations and the failure of the trust to remedy same.

2. *Our client will continue to review the matter (including any steps taken to develop the land) and it remains open to discuss the matter with the trust, however, currently, and whilst the land remains in its unrehabilitated state, our instructions are to proceed with legal action to compel the trust to rehabilitate same...*"

[37] There was no response to this letter. It is no wonder that the Municipality was taken by surprise when the Trust denied the illegality of the excavation in its answering affidavit given that there is nary a word raised in that regard in response to the above correspondence from the Municipality.

[38] For all the above reasons, it is beyond dispute that the excavation is unauthorized, and has been unauthorized since at least 11 October 2007. The Trust's denial, in any event, amounts to a bare denial and cannot be genuine given that the Trust's deponent has no knowledge regarding whether authorization was in fact granted at the start of the excavation.¹³ His denial in the answering affidavit is in any event undermined, if not contradicted, by his failure to deny that fact in his correspondence of February 2024, and there remains no explanation for that discrepancy. As a result, the denial, which is contradicted by the evidence traversed above, deserves to be rejected.

14

[39] In terms of the Act, the Municipality may request an owner of property to obtain the report of the kind sought in these proceedings, in terms of section 12(3)(a), which provides as follows:

"If the condition of any building or the land on which a building was or is being or is to be erected or any earthwork is such that it is dangerous or is showing signs of becoming dangerous to life or property, the local

¹³ *Plascon-Evans supra*.

¹⁴ *Harmse Civil Procedure in the Supreme Court*, B6.45; *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA); *Harmse Civil Procedure in the Supreme Court*, B6.45

authority, irrespective of whether it was notified in terms of subsection (2), may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork to instruct at the cost of such owner an architect or a registered person to investigate such condition and to report to such local authority on the nature and extent of the steps to be taken, in the opinion of such architect or registered person, in order to render such building, land or earthwork safe.”

[40] The evidence already discussed indicates that the excavation in question is ‘land on which a building is to be erected’ and there was no dispute that it in any event amounts to ‘earthwork’. If it is ‘dangerous or is showing signs of becoming dangerous to life or property’, the Municipality may by notice order the owner to instruct at the cost of such owner an architect or a registered person to investigate such condition and to report to such local authority on the nature and extent of the steps to be taken, in the opinion of such architect or registered person, in order to render such building, land or earthwork safe.

[41] The difficulty facing the Municipality is that, in the Notices that are the subject of these proceedings, this provision was not referred to, and instead, the Municipality relied on various other provisions. It is a fundamental principle of administrative law that this Court may only consider reasons which formed the basis for the decision at the time, and that *ex post facto* reasons must be excluded from consideration.¹⁵ Even in its papers before this Court, the Municipality did not make any reference to section 12(3)(a), presumably because it appreciated the constraints of this fundamental principle.

¹⁵ *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* (89/2021) [2022] ZASCA 102; 2023 (2) SA 305 (SCA) (24 June 2022) para [19]. See also *Minister of Defence and Military Veterans v Motau and Others* 2014 (5) SA 69 (CC) footnote 85; *Umgeni Water v Sembcorp Siza Water (Pty) Ltd and Others*; *Minister of Water & Sanitation v Sembcorp Siza Water (Pty) Ltd and Others* 2020 (2) SA 450 (SCA) at para [52]; *Becker v Minister of Mineral Resources and Energy and Others* [2023] 2 All SA 73 (WCC) at para [85]. *National Energy Regulator of South Africa and Others v PG Group and Others* 2020 (1) SA 450 (CC).

[42] The result is that the relief sought in these proceedings must be considered in the light of the provisions referred to in the Municipality's Notices, to which I now turn. The first is section 4 of the Act, which provides as follows:

“4 Approval by local authorities of applications in respect of erection of buildings

(1) No person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act.

...

(4) Any person erecting any building in contravention of the provisions of subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he was engaged in so erecting such building.”

[43] In terms of section 4(1) of the Act, “[n]o person shall without the prior approval in writing of the local authority in question, erect any building in respect of which plans and specifications are to be drawn and submitted in terms of this Act”. An ‘erection’, in relation to a building, is defined to “include the alteration, conversion, extension, rebuilding, re-erection, subdivision of or addition to, or repair of any part of the structural system of, any building; and ‘erect’ shall have a corresponding meaning”. It is common cause that there has been no erection of a building on the property, as defined in the Act. Accordingly, this provision does not apply.

[44] Section 10(1) falls into the same pitfall. It provides as follows:

“Erection of buildings in certain circumstances subject to prohibition or conditions

(1) If any building or earthwork-

(a) in the opinion of the local authority in question is being or is to be erected in such manner that it-

- (i) will not be in the interest of good health or hygiene;
- (ii) will be unsightly or objectionable;
- (iii) will probably or in fact be a nuisance to the occupiers of adjoining or neighbouring properties;
- (iv) will probably or in fact derogate from the value of adjoining or neighbouring properties;

(b) is being or is to be erected on a site which is subject to flooding or on a site which or any portion of which in the opinion of the local authority in question does not drain properly or is filled up or covered with refuse or material impregnated with matter liable to decomposition,

such local authority may by notice in writing, served by post or delivered, prohibit the person erecting such building or earthwork or causing such building or earthwork to be erected from commencing or proceeding with the erection thereof or from so commencing or proceeding except on such conditions as such local authority may determine from time to time.

(2) Any person who fails to comply with any provision of a notice or condition referred to in subsection (1) shall be guilty of an offence and liable on conviction to a fine not exceeding R100 for each day on which he so failed.”

[45] The provision seeks to prohibit the erection of a ‘building’ or ‘earthwork’. Even assuming that an excavation is an ‘earthwork’, the evidence here is that the excavation at issue appeared sometime in the 1990’s, and there is no evidence that it is being or is to be erected. It is rather the building that is to be erected, although the details in that regard are scant. As a result, there is no information regarding the manner in which

such a building is to be erected, which is the subject of the proscribed conditions mentioned in subsections (1)(a) and (b). I am accordingly of the view that the provision is not applicable in this matter.

[46] The next provision relied upon by the Municipality is section 12(1), and it provides as follows:

“(1) If the local authority in question is of the opinion that-

(a) any building is dilapidated or in a state of disrepair or shows signs thereof;

(b) any building or the land on which a building was or is being or is to be erected or any earthwork is dangerous or is showing signs of becoming dangerous to life or property, it may by notice in writing, served by post or delivered, order the owner of such building, land or earthwork, within the period specified in such notice to demolish such building or to alter or secure it in such manner that it will no longer be dilapidated or in a state of disrepair or show signs thereof or be dangerous or show signs of becoming dangerous to life or property or to alter or secure such land or earthwork in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property: Provided that if such local authority is of the opinion that the condition of any building, land or earthwork is such that steps should forthwith be taken to protect life or property, it may take such steps without serving or delivering such notice on or to the owner of such building, land or earthwork and may recover the costs of such steps from such owner.

...

(6) Any person who contravenes or fails to comply with any provision of this section or any notice issued thereunder, shall be guilty of an offence and, in the case of a contravention of the provisions of subsection (5), liable on

conviction to a fine not exceeding R100 for each day on which he so contravened.”

[47] The Trust disputes Municipality may use this provision to obtain the relief on two bases. Firstly, it argues that section 12(1)(b) of the Act does not authorize the Municipality to compel it to procure reports and to report thereon, nor can it grant an order that the earthwork must be rehabilitated. It merely empowers the Municipality to order the earthwork be secured. Secondly, the Trust disputes that the property presents a danger to life or property. It denies that the excavation constitutes a wetland deserving of environmental protections, or that it poses any environmental health conditions, or any safety risk. It also emphasizes the fact that the excavation is fenced off, and is not readily accessible to the public. It states that it regularly drains the water when it collects after rainfalls.

[48] There does not appear to be any dispute, however, that the excavation is potentially doubly-hit by this provision because it is both ‘land on which a building is to be erected’, and that ‘the excavation is earthwork’. The next operative requirement is that the local authority should form an opinion that the land or earthwork is dangerous or is showing signs of becoming dangerous to life or property.

[49] Before considering the Trust’s denials regarding the danger posed by the excavation, it is necessary to point out that what the provision requires is for the Municipality to form an opinion, and secondly, that the opinion does not have to amount to a conclusion that the excavation is already dangerous, but can merely be that it is showing signs of becoming dangerous to life or property. The latter is an even lesser standard than the former.

[50] But, as a functionary exercising public powers, the Municipality is required to have a rational basis for its conclusions. In part, this is the relevance of Regulation G, in my view, which provides as follows:

“G1 GENERAL STABILITY REQUIREMENT

- (1) Where any excavation related to a building is carried out or to be carried out on any site and such excavation may impair the safety or stability of any property or service, the owner of such site shall take adequate precautionary measures to ensure that the safety and stability of such property or service is maintained.
- (2) While any such excavation remains open, and during the placing of any foundation within it, such excavation shall be maintained in a safe condition by the owner or person carrying out such excavation.
- (3) Where the safety or stability of any property or service is likely to be impaired by such excavation, or where the depth, at any point, of such excavation is likely to be more than 3 m, the owner of the site shall-
 - (a) obtain the prior written authorisation of the local authority for such excavation; and
 - (b) take the precautionary measures specified by the local authority or an approved competent person in such authorisation.
- (4) The owner of any site shall, at least seven days prior to the commencement of any excavation contemplate in subregulation (1), notify the local authority in writing of his intention to excavate.
- (5) Any owner or person who fails to comply with any requirement of this regulation, shall be guilty of an offence.”

[51] The context of this provision indicates that its concern is safety and stability of a site, hence the requirement to take precautionary measures. Sub-regulation 3 expressly places the *“impairment of the safety and stability of property or service”* side by side

with “*where the depth at any point of an excavation is likely to be more than 3m*”. In other words, the two conditions are placed on the same or equal footing, and both attract tight statutory regulation in the form of prior written authorization for the excavation and the taking of precautionary measures specified by the local authority or an approved competent person in the authorization. It is not unreasonable to conclude that the underlying reason is that, where the depth at any point of an excavation is likely to be more than 3m, there is a probability of an impairment of the safety and stability of property or service. Notably, the impairment of the safety and stability does not have to be established as a matter of fact. This is the reason for the statutory regulation by means of prior written authorization and taking precautionary measures.

[52] Even when putting aside the fact that the excavation in question is unauthorized, I am of the view that the Municipality was entitled to take the requirements of Regulation G as a guideline when considering safety and stability of the excavation. Of particular relevance to the facts of this case is the undisputed evidence that the excavation in question is far more than the 3m depth which is sought to be regulated by the provision. Even without considering the authorization or otherwise, it would be illogical, for an excavation of that magnitude to fall outside the local authority’s powers of regulation. At the very least this Regulation forms a rational, legal basis for the Municipality, when considering the extent if any of safety and stability of an excavation. And on the facts of this case, the Municipality was entitled to take it into account, as it did in its Notices, when taking action in terms of section 12 of the Act.

[53] But it is not necessary to speculate because, as I have already indicated the excavation was in fact unauthorized. The Municipality had every right to pursue the legal regulation of this excavation, and to be concerned regarding its safeguarding.

[54] The two Notices of 31 August 2023 and 2 October 2023 are not the first instance that the Municipality has expressed concern regarding the safety of the excavation. The correspondence adverted to earlier dating from 1997 documents the Municipality’s

concerns in this regard, in detail. And as I have already adverted, the correspondence is not disputed.

[55] The very first letter, dated 23 September 1997, was headed “*DANGEROUS EXCAVATIONS*”, and referred to “*quite a few phone calls regarding the unsafe conditions of the excavation*” and the fact that, an inspection had “*found the excavation ... not safe in view of the present depth and due to the fact that no warning signs or any form of barricade have been erected*”. The letter of 2 August 2002 was similarly headed “*UNSAFE CONDITIONS...*” and stated, amongst other things, that “*the hole ... is now full with water and anyone could fall into that water and drown or hurt themselves walking past your property.*”

[56] As I have already mentioned, although the Trust did erect a temporary fence pursuant to permission granted in October 2006, it did not seek extension thereof after the lapse of the 12-month period it was granted. The result is that, even if the temporary fence was authorized back in 2006, the efficacy of that measure has not been established against the current conditions and circumstances.

[57] For example, there is evidence in the record of a young couple who drowned in the excavation in or about 25 October 2022, whilst driving a car. Although the exact circumstances of the tragic incident are not clear, they were documented by the media who reported of the excavation as “*a dam*”, “*a quarry*” and “*an overgrown swamp*”, from which the car was retrieved after it was found submerged in water after a search. The car was only identified when a community member observed an object and alerted the authorities. In other words, the extent to which the car was submerged is extensive. It is clear that, whatever measures may have been taken to safeguard the excavation by the Trust as at that date, they were not adequate to avert this tragic incident.

[58] All of the above weighs against the Trust’s argument that the excavation is not dangerous. At the very least, there is every reason for the Municipality to form an opinion, which it has held for decades, that the excavation is dangerous or is showing

signs of becoming dangerous to life or property, within the contemplation of section 12(1). On this aspect, I am satisfied that the City has satisfied the requirement to show that it has a reasonable apprehension of ongoing harm caused by the illegal excavation.

[59] However, there are limitations to the powers accorded to a Municipality in terms of section 12(1). In terms thereof it may order by notice, demolition or alteration or securing of a building in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property; or altering or securing land or earthwork in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property; or take such steps itself, without giving notice, and to thereafter recover the costs of such steps from such owner.

[60] In the Notices, the Municipality ordered the Trust to *“rectify all excavations and rehabilitate the safety and stability of the property and to submit a report specifying the measures and timeframe for rehabilitating the property”*. I agree with the Trust that section 12(1) does not entitle the Municipality to demand a report which is the relief sought in these proceedings; that is the subject of section 12(3)(a) as discussed earlier. As a result, it does not have a clear right to the specific relief sought in these proceedings.

[61] There is another necessary requirement which makes it difficult to grant the final interdict sought by the Municipality, and it relates to whether the Municipality has satisfactory alternative remedy. It has not been established in these proceedings, on a balance of probabilities, that the Municipality has no other satisfactory remedy available than the relief it seeks. It is in this regard that the tender made in the answering affidavit of the Trust to erect a brick wall around the perimeter of the property to strengthen the measures already in place is relevant. Apart from complaining that it will not resolve the unlawfulness of the excavation, the Municipality has simply noted it in its reply. I was informed at the hearing that the Trust did submit an application for approval of a boundary wall to the Municipality for approval. That application was made on 17 February 2025, some two weeks before the hearing of this matter.

[62] The relevance of this aspect is again found in the statute. In terms of section 12(1) the Municipality is entitled to order the Trust to alter or secure the excavation in such manner that it will no longer be dangerous or show signs of becoming dangerous to life or property. This is, in part what was demanded in the Notices, but was not sought as relief in these proceedings. Apart from the relief it seeks, which is predicated on section 12)(3)(a), the Municipality has not dealt with any other form of relief that may be available to it.

[63] As a result, two necessary requirements for the granting of a final interdict have not been met, namely a clear right for the relief sought and the absence of another satisfactory remedy. The application must accordingly fail.

D. COSTS

[64] There is no reason why costs should not follow the result. I am alive to the fact that the unlawfulness of the excavation looms large between the parties and that, until delivery of the answering affidavit, it did not appear that the Trust disputed it. However, that is not the only issue raised between the parties, and ultimately the Trust has been successful.

[65] As regards the postponement of 17 October 2024, in terms of which the costs were to stand over for later determination, the joint practice note filed by the parties on 3 October 2024 makes clear that the postponement was due to the late filing of the Municipality's replying affidavit. The result was that the Trust was to possibly file a further affidavit to address aspects raised therein, and both parties' heads of argument were delayed.

[66] In the circumstances the following order is made:

1. The applicant's application dismissed.

2. The applicant is to pay the costs of this application, including costs of the postponement of 17 October 2024, both to include costs of counsel on scale B.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the applicant : Adv A van Aswegen

Instructed by : Enderstein Malubete Inc.
N Smith

For the respondents: Adv I Ferreira

Instructed by : De Canha Inc.
D de Canha