B V H PROPERTIES CC vs MUNICIPALITY OF WINDHOEK & 2 OTHER

HEARD ON: 1997.08.12

DELIVERED ON: 1997.09.30

This was an application for a declarator. Applicant wants ro remove an embarkment on his property which will have the effect of more stormwater being discharged on to the lower laying properties.

The First Respondent already constructed a road underneath the lower laying property and the removal of the embarkment will result in more storm-water from the property of the Applicant on to the lower lying properties.

A further consequence is that the storm-water pipes installed by the Respondent in the road to cater for the storm-water will not be sufficient and the removal of the embarkment and subsequent increase in the water flow may thus cause storm water damage to the road constructed by the Respondent.

The Court found that Respondent was authorised by statute to interfere with the rights of applicant. The Court found that there is an onus on the Applicant to prove that the Respondent either failed to take such reasonable steps as may be necessary to avoid harm to the Applicant alternatively acted negligently, when it constructed the road and when it made provision for the limited amount of storm-water to be discharged from the property of Applicant onto lower lying property. This conclusion is based on authorities to the effect that if a statute justifies an interference with private rights the exercise of such powers must be reasonable and carried out without negligence.

Since on the papers filed it was not disputed that the Respondent acted on the basis as it found the situation to be and to have been for the past 80 years no negligence or unreasonableness was established and absolution from the instance was granted.

2.

CORAM: KARUAIHE, A.J.

Heard on: 1997.08.12

Delivered on: 1997.09.30

JUDGMENT:

KARUAIHE, A.J.: In this matter an application was lodged by the Applicant for a declarator in the following terms:

1. **An order declaring that Applicant is entitled to remove the embankment situated on the remainder of Erf 2758, Klein-Windhoek; and**

Respondents are bound to receive the water which naturally drains on their property as a result of the removal of the embankment.

Second and Third Respondents did not oppose the relief sought by the Applicant and only First Respondent opposed the order sought by the Applicant. In fact First Respondent not only opposed the relief sought by the Applicant but requested this Court to grant to it specific relief, which Respondent stated is by way of counter application, in the following terms:

(1) **That the Applicant be ordered to re-open the artificial water way and to restore the status quo relating to the flow of water on the property to the position as it was before the Applicant interfered therewith, within the period of 14 (fourteen) days;**

(2) **That the Applicant be ordered to pay the cost of this counter application; and**

(3) **Such further alternative relief as this Court may deem meet.**

The facts and circumstances which were either common cause or not disputed in this matter could be summarized as follows:

The Applicant is the owner of an erf situated within the municipal boundaries of the city of Windhoek, being erf 2758, **Klein-Windhoek. It also follows that an erf within the municipal boundaries of Windhoek is subject to the laws and**

regulations governing the relationship between the First Respondent and the owners or occupiers of property within such municipal boundaries of the First Respondent. In particular it is clear that this relationship is governed by the Local Authorities Act, Act 23 of 1992 and any regulations which may have been issued thereunder. The map indicating the location of erf 2758, adjacent properties and in particular the road constructed by the First Respondent was also attached.

It further appears that the Applicant after having acquired erf 2758 from its previous owner applied with the First Respondent, as he was under an obligation to do, for subdivision of erf 2758. Subsequent to the approval of the subdivision a piece of land which is now known as erf 3363 was cut off from the existing erf 2758 for the development of a sectional title complex. A condition for the said sub division was that a three metre wide servitude be registered over the property in favour of the First Respondent over the proposed sewer line to be constructed in the future. It was also contented on behalf of the Applicant and appears not to have been contested by the Respondent that the proposed sewer line runs across (what is called) the eastern natural water course to the south and north of the embankment and in fact goes straight through the existing embankment.

About 3 years ago the First Respondent constructed the gravel road which is now indicated on the map as Michaelis Street and which run along the northern boundary of Applicant's erf.

The dispute between the parties originated from the fact that the gradient of natural

runoff for water on erf 2758 (hereinafter referred to as the erf) is south to north so that the neighbouring property on the northern side of the road lies at a lower level than that of the Applicant's property. Immediately below these properties, which are the properties that belong to the other two Respondents is the gravel road now a tarred road constructed by the First Respondent (hereinafter referred to as the Respondent.)

Two water courses with a catchment area south of the Applicant's property traverse the Applicant's erf from south north. These water courses ran more or less parallel and will also for purposes of this judgment be described as they are described in the papers as (a) the eastern natural water course and (b) the western natural water course respectively.

Approximately 80 years ago a predecessor in title to the Applicant constructed an embankment through the eastern natural water course, having the effect of diverting the storm water in a westerly direction over the Applicant's erf and linking up with the western natural water course referred to earlier herein. This diverted water course is described in the papers as the artificial water course. This water course had the further consequence that the flow of storm water in the eastern natural water course below the said embankment was reduced to a great extend as this water course now only had to cater for the water falling on the erf itself.

This has been the situation for the said period of approximately 80 years after the construction of the embankment and was apparently still the position when the First Respondent constructed the gravel road, now referred to as Michaelis Street and which was subsequently also tarred.

The point of dispute seems to have arisen during October 1994 when the Applicant advised the First Respondent of its intention to restore the flow of stormwater across the remainder of erf 2758 or the erf to its original or eastern natural water course. At that point in time First Respondent has already constructed the gravel road making provision only for the reduced flow of water in the eastern water course by installing one pipe only below the road for this purpose which was sufficient to cater for the water flowing from the said eastern water course. At the same time also it was contented and or alleged on behalf of the Respondent, that Respondent also made provision for the increased flow of water from the western natural water course by installing several pipes below the said road on the western side thereof. The increase in the flow of water in the western natural water course, it must be mentioned, was occasioned by the construction or the diversion of water from the eastern natural water course by the Applicant's predecessor in title. Confirmation of this fact was also given by a certain Ernst August Denker who is related by marriage to the person who constructed or diverted the water course.

When the Respondent constructed the road, provision was made for water flow on the basis as they found the existing water courses after it has been so diverted for the past 80 years, i.e. for the increased flow of the western natural water course and a reduced flow of water caused by the embankment in the flow of the eastern natural water course.

The existing or diverted flow of water at the moment prevents the Respondent from developing and sub dividing the remainder of erf 2758. To this end he wishes to remove the embankment in order to permit the storm water arising south of the

embankment to follow its original and natural course (the eastern natural water course). Applicant also at the same time needs to fill up and cover the artificial water way with soil. This action Applicant has apparently already undertaken. If the existing state of affairs are allowed to remain or continue it will cost Applicant to lose a substantial amount of its property for building and landscaping purposes and so it was contented it will detrimentally effect almost any scheme to subdivide and further develop the undeveloped portion of his property unless the construction of a concrete culvert is undertaken. The cost for undertaking this exercise will be 15 times more than the approximate cost for removing the embankment.

It was also consented on behalf of the Applicant that corresponding costs for the Respondent in making the necessary alteration to enable it and or the road which it constructed to cater for the increased flow which will be occasioned by the removal of the embankment is much less than that which may have to be incurred by the Applicant. It also appears that there seems to be a dispute between the parties as to whether the alterations and or the filling up of the ditch already undertaken by the Applicant has lead to or resulted in an increase in the amount of water running off with the eastern natural water course and subsequently also in a partial collapse of the embankment. As it is in my view for purposes of this judgment not necessary to decide this issue I do not intent to deal with it.

Both Mr Coetzee and mr Frank S.C. who appeared for the Respondent and the Applicant respectively have submitted well argued and well researched arguments and the Court is indeed indebted to them for their assistance in that regard.

As already stated earlier herein, the relevant statute governing the relationship between Applicant and Respondent is the Local Authorities Act, Act 23 of 1992. In terms of this Act as pointed out by Mr Coetzee for the Respondent, the Respondent has got certain statutory rights which inter alia include the power to provide, maintain and carry on a system of sewerage and drainage for the benefits of the residents in its area and the power to construct and maintain streets and public places. A local authority council may in terms of section 38(l)(a):

(4) **Acquire or construct and maintain and carry on, a system of sewerage and drainage, including sewerage works, public sewers and stormwater drains whether within or outside its area.**

(5) **....**

(6) **lay across, through or under any street or public place any public sewer, combined private sewer or storm water drain**

(7) **subject to the provisions of the water act, 1956 (act 54 of 1956) discharge storm water into any public water course**

(8) **divert, discontinue the use of, close up or destroy any public sewer or storm water drain (Sect. 38(l)(b) to (e).**

From the provisions of the said Act it appears that the Respondent has very wide powers despite the rights of owners and that the construction of the road and the

installation of the storm water pipe beneath it can be done in exercise of the statutory powers conferred on the Respondent by the Local Authorities Act. An interference with private rights is thus not only contemplated but in fact authorised. In the *Breede River (Robertson Irrigation Board) v Brink 1936 AD* **359 decision at page 366, the following is said:**

> *"If an interference with private rights is justified, then the exercise of the statutory power is limited by another consideration, namely that it must be carried out without negligence. If by reasonable exercise of the power the damage could be prevented, it is negligence not to make such reasonable exercise of such power.*
>
> *If a statute authorises a public body to make streets and roads, it may do so even though it involves an increase in the volume and the velocity of the water dealt with, prejudicial to lower proprietors, provided there is no negligence. Tlie public body must take "measures reasonably practicable" to prevent such injury. The onus lies on the party complaining of such injury to prove such negligence."*

In *Germiston v Chubb and Sons Lock and Safe (Ply)* **Ltd 1957(1) AD at 322 the following quotation from African Realty Trust case is quoted with approval:**

> *"It was for the Municipality in the first place to satisfy the Court that the legislator contemplated an interference with private rights then it was for the company to proof that the Municipality was not entitled to the protection of ,'*

statute because the injury complained of was due to a negligent exercise of its powers. At that stage the case depended on the existence of negligence, and it lay upon the Plaintiff in the action to establish it."

Mr Frank, on behalf of Applicant made much of the fact that the judgments referred to on behalf of the Respondent dealt with the rights of owners of lower lying properties as opposed to this particular instance where the dispute concerns the rights of the owner of a higher lying property.

In the judgment of the Appellant Division in the case of *Ready and others v Durban Corporation* **1939 AD 293 the following is said in the headnote:**

"Where a Corporation is sued in respect of loss occasioned to the Plaintiff by such increase and diversion, the onus lies on the Plaintiff to prove that by the adoption of certain precautions ... the great concentration in volume and velocity of storm water or its erosive effect on Plaintiff's land could have been avoided."

In my view applying the principle and not the form I could see no impediment why it could not be made applicable to the particular facts in this case.

In this regard I would also like to refer to the following passage in the Germiston CC case supra on page 323.

"The interference may and after all with be slight but inevitably the properties

will receive or run the risk of receiving more or less water than before. The velocity and direction of flow, and with them the risk of flooding will certainly be changed to the advantage of some land owners perhaps but unquestionably to the detriment of others. "

Section 44(1) (b), (c) and (d) in my view also needs mentioning. The said sections reads as follows:

44(1) - Any person who without the prior approval in writing of the local authority council and otherwise than in accordance with such conditions, if any, as may be determined by the local authority council-

(9) **...**

(10) **erects any building or other structure, whether movable or immovable, over any sewer or stormwater drain or erects any such building or structure in a position or manner as to interfere with or endanger the operation of any sewer or stormwater drain.**

(11) **...**

(12) **damages, endangers, renders in operable or destroys any sewer or stormwater drain or does any act likely to damage, endanger, render in operable or**

(e) ...

shall be guilty of any offense..."

It follows in my view from the above that there are clearly two hurdles that Applicant needs to overcome. The first being the possibility of committing an offense in terms of section 44 **whilst the second being discharging the onus placed upon it by the decision referred to above.**

This Court in my view only needs to deal with the question that having accepted the legal position to be as stated above whether indeed the Appellant has discharged the onus and thus put facts before this Court having the effect or on which this Court could come to conclusion that when the construction of the road was undertaken by the Respondent and when Respondent installed fewer stormwater pipes in the course of the flow of the eastern natural water course and more such pipes in the course of the flow of the western natural course its conduct did pass or did not pass the test enunciated in the decisions referred to above.

There is a duty on Municipality to show that it acted reasonably and that harm is not caused by it's failure to take reasonably practical precautions. *Diepsloot Residents and Landowners Association and another* **v** *Administrator Transvaal* 1994 **(3) AD at 336.** *See also*

New Hariot Gold Mining Company Limited v Union Government (Minister of Railways and Harbours) 1916 AD at p. 415

"It has been laid down in a long line of cases (see Ready and others v Durban Corporation 1939 AD 293, and the cases cited by Watermeyer C.J. at p. 298) that, *where a municipality has a statutory right to construct a road, in the course of that construction it may divert and concentrate and alter the normal flow of water for the purpose of draining that road,* **but when it conies to the discharge of that water it must use reasonable care to see that that water is not discharged in a manner which causes unnecessary damage to neighbouring land owners." (my emphasis)**

It is common cause and it was not disputed that Respondent constructed the road making provision only for the reduced water flow of the eastern natural water course and the increased water flow of the western natural water course as it found that to be existing position for the preceding 80 years and as also deposed to by August Denker on behalf of the Applicant. It is also common cause that the steps and the provision taken or made by the Respondent was at all relevant times sufficient and adequate to cater for the situation as it then existed. The time when the Respondent was approached by the Applicant alternatively notified by the Applicant of his intention to remove the embankment the said construction work has already been completed. It therefore follows on the papers filed with this Court that Applicant failed to show that the Respondent did not take reasonable practicable precautions or failed to adopt such reasonable methods and thus failed to discharge the onus resting upon him.

The defenses of vetustas and abuse of rights and prescription was also raised in this

, matter. Since it is not necessary for this Court in order to come to a decision, I did not deem it necessary to deal with any of them.

Having come to the abovestated conclusion the court now also had to consider whether the application should be dismissed, the counter application be allowed and or absolution from the instance be granted.

In so far as the relief claimed by the Respondent in paragraph 24 of its opposing affidavit (closing paragraph) is referred to as a counter application the Court is satisfied that it does not constitute a counter application as envisaged in rule 6(1) and in rules 6 (7)(a) and (b). The relief claimed in terms thereof is therefore refused.

The finding of the Court is that there is an onus on the Applicant and that the Applicant failed to deal with matters which would have or could have lead to the discharge of the onus and an appropriate order would be one of absolution from the instance.

See: Tsabalala **v** *Southern Insurance Association Ltd 1976, 2 SA 381 C.* **In the result the following order is made:**

(13) **There shall be absolution from the instance.**

(14) **Applicant to pay the cost of Respondent.**

KARUAIHE, A.J.