REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

APPEAL CASE: **A246/2022**
CASE NO: **30675/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

28 AUGUST 2023
DATE SIGNATURE

In the matter between:

IRENE FARM VILLAGES HOMEOWNERS' ASSOCIATION NPC	Appellant
and	
THE CITY OF TSHWANE METROPOLITAN	First Respondent
RIAAN VAN WYK	Second Respondent
KARL PETER MAURICE BOTMAN	Third Respondent
DIRK JACOBUS VAN AARDE	Fourth Respondent

JUDGMENT

TLHAPI J

INTRODUCTION

[1] This is an appeal arising from a matter heard in urgent court before Janse Van Neiuwenhuizen J over a number of days in June 2022 and finally argued on 1 July 2022. Judgment was handed down on 3 August 2022.

[2] The appellant, who was the first applicant in the court below, is Irene Farms Homeowners Association NPC ("Irene Farms"). The first respondent is the City of Tshwane Metropolitan Municipality ("City").

[3] Irene Farms asked for the following relief against the City:

> "2. That the respondent immediately, but not later than 5 days of the order commence with preventative measures to avoid further damage of the surrounding area by:
>
> 2.1 placing berm/s to divert water from the subsidence area;
>
> 2.2 testing the municipal services, specifically the main water line and sewer line for possible leaks;
>
> 3. In the event of leaks being detected after the testing in paragraph 2.2 above has been conducted, that the respondent immediately attend to repairs and or remedying of leaking services;
>
> 4. That the respondent commences with repair and reinstatement of the road surface at the corner of Duke Avenue and Queensway as the road served as the storm water draining system;
>
> 5. that the respondent furnishes the applicants with a formal plan of rehabilitation of the area of the subsistence within 20 days from date of order;
>
> 6. that the respondent takes preventative measures to ensure the continued supply of services relating to water, sewage, electricity in the event of a sinkhole or further damage occurring on the site of the subsistence.

7. That the respondent be ordered to pay costs of this application."

[4] The City counter-applied and asked for the following relief:

"2. The applicants are directed to submit a plan of action to the respondent within five days of the date of this order setting out *inter alia* the remediation of the stormwater drainage on the affected properties of the Estate, and the repairs to the cracks in the boundary walls of various properties.

3. The remedial work in the paragraph above shall be completed by the applicants by 31 August 2022.

4. The first applicant shall lodge its Dolomite Risk Management Strategy with the respondent within 7 days of this order."

[5] The court below made the following order:

"1. The application is dismissed.

2. The applicants are liable for the costs incurred by the respondent after the filing of the respondent's answering affidavit.

3. The counterapplication is struck off the roll due to lack of urgency with costs."

[6] Only Irene Farms appealed the order of the court below.

Relevant facts

[7] Irene Farm Villages Estate is a private estate which falls under the jurisdiction of the City. It is common cause that a subsidence formed on the Estate. The epicentre of the subsidence is in the intersection of two roads within the Estate, Queens Way and Duke Avenue, although it implicates three other properties apparently owned by the second, third and fourth respondents. Irene Farms says that the City is obliged to take measures to correct the subsidence and to prevent it from forming into a sinkhole.

[8] The remaining relevant facts are summarised in the judgment of the court below, particularly at paragraphs 7 to 14. I draw particular attention to the dispute of facts that emerges from that factual narration, and that Janse Van Neiuwenhuizen J identifies as such later in the judgment. In short, the dispute concerns the nature of the measures required to prevent further damage to the road surface in general, and to the feasibility of placing berms to divert water from the subsidence area in particular.

[9] The experts appointed by both parties initially reached agreement on the issue:

> "The emergency measure of the placement of a berm on the road to diver the surface water away from the subsidence is not feasible and will not preclude further deterioration of the subsidence."

[10] However, after their expert expressed that view, the applicants obtained a report from another expert, who found that the berms, if placed correctly, would divert the water from the subsistence.

In the court below

[11] The court below held that the matter was urgent only insofar as immediate measures to prevent the subsidence worsening is concerned (para 4). The court also noted that, at the time of the hearing of the matter, the City had complied with the relief claimed in paragraph 2.2 of the notice of motion (para 5). In the circumstances, the court below isolated the issue for urgent determination as whether placing of berms to divert water from the subsidence area would prevent further damage (para 6). This is the relief contained in prayer 2.1 of the notice of motion.

[12] The court below characterised this issue – correctly, in our view – as a dispute of fact which was incapable of being resolved on the papers. On that basis, the court below dismissed the application (para 15).

[13] With regard to the relief in paragraphs 4, 5 and 6 of the notice of motion, the court held that "I do not deem the relief urgent" (para 29), and did not give any consideration to those paragraphs in the course of the judgment. This, however, is not properly reflected in the order, which purported to dismiss the entire application, as if the court had entertained all the prayers.

[14] Interpreting the order in the context of the judgment, it is clear that the only prayer that the court dismissed was prayer 2 of the notice of motion. Prayer 2.1 was dismissed because it involved a dispute of facts and prayer 2.2 was dismissed because it had been rendered moot.

[15] With regard to the counter-application, the court below similarly found that the relief sought was "premature and manifestly not urgent" (para 38).

[16] The court below dealt with costs at paragraphs 16 to 26 of the judgment. In short, the court found that, in view of the fact that the City tested the main water line subsequent to the launching of the application and made its stance in respect of the unviability of the berms known for the first time in its answering affidavit, the court should award costs against the applicant only from the moment after the filing of the answering affidavit, when the applicants would have been in a proper position to assess the merits of their case (para 33). The court also found that the *Biowatch*[1] principle was not applicable to the facts of the case on the basis that, although the applicants relied on their constitutional right to receive services from the City, the

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1 *Biowatch Trust v Registrar, Genetic Resources and others* 2009 (6) SA 232 (CC)

nature and importance of the right were not the central issue in dispute and the City did not deny or challenge the applicant's right in this regard. Accordingly, the facts did not justify a deviation from the normal costs – that costs follow the result (para 32).

Before this court

[17] The City brought an application to lead further evidence in this court in response to a new case concerning the ownership of the roads around the properties affected by the subsidence Irene Farms purported to introduce for the first time on appeal. The City disputed Irene Farm's contentions with regard to ownership.

[18] Accordingly, before this court, there were two disputes of fact, namely, the dispute regarding the efficacy of the berms in addressing the subsidence problem (as identified by the court below) and the question of the ownership of the roads in the vicinity of the subsidence and the legal duties of the City in circumstances where it does not own roads. Each of these disputes of facts makes it inappropriate for a motion court to determine which party is responsible for the rehabilitation of the roads affected by the subsidence as well as whether the berms would be of any effect in the rehabilitation process. Disputes of fact cannot be dealt with by a motion court, let alone in urgent court, and certainly not on appeal.

[19] Given this court's agreement with the court below that there is a dispute of fact (and the arising of another set of disputed facts on appeal, to the extent that the court might consider the new evidence), it is unnecessary to deal with the details of the case any further than I already have.

[20] In my view, the court below misdirected itself only in one respect, namely by including prayers 4, 5 and 6 into the order dismissing the application. It is evident from the body of the judgment, and from paragraph 29 in particular, that the court found that these matters, like the counter-application, were not urgent and therefore did not deal with them at all. The court therefore ought to have struck prayers 4, 5 and 6 from the roll with costs.

[21] With regard to the costs order, a court of appeal will only interfere with the costs order of the court below if it has not exercised its discretion judicially. The court of first instance has a wide discretion to determine costs.[2] In my view, the court below did not misdirect itself in the exercise of its discretion in this regard.

[22] With regard to the City's application to adduce further evidence on appeal, although the application is dismissed, there is no reason to award costs against the City, as it brought the application only in response to allegations Irene Farms raised for the first time before this court.

Order

[23] The following order is issued:

(1) "The respondents' application to leave further evidence is dismissed.

(2) The order of the court below is upheld save for paragraph 1 which should be substituted as follows:

"1. The application in respect of prayer 2 of the notice of motion is dismissed.

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[2] *Fripp v Gibbon & Co* 1913 AD 354 at 363 and *Trencon Construction v IDC* 2015 (5) SA 245 (CC) par [85].

2. The application in respect of prayers 3, 4 and 5 is struck off the roll for want of urgency”

(3) The appellant is liable for the costs of this appeal.”

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TLHAPI J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree _____

BAQWA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree, and it is so ordered _____

STEINBERG AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD AND RESERVED ON: 18 JANUARY 2023
DELIVERED ON 28 AUGUST 2023

Appearances:

For the Appellant: Adv S D Wagener SC (instructed by) BARNARD INCORPORATED

For the First Respondent: Adv G I Hulley SC with Adv U Dayanand-Jugroop (instructed by) MB MABUNDA INCORPORATED