THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20236/2014
Not Reportable

In the matter between

L E THOM (PTY) LIMITED **APPELLANT**

and

BA-PHALABORWA MUNICIPALITY **RESPONDENT**

Neutral citation: *Thom v Ba-Phalaborwa Municipality* (20236/14) [2015] ZASCA 95 (01 June 2015)

Coram: Bosielo, Wallis and Willis JJA, Dambuza and Meyer AJJA

Heard: **21 May 2015**

Delivered: **01 June 2015**

Summary: Mandamus – municipality sought an order by notice of motion to be granted access through appellant's property to clear a nuisance – it alleged that it could only gain access to the site to be cleared through the appellant's property – appellant disputed this and alleged that there were other access points through which municipality could not gain access to the site – serious and genuine dispute of facts – whether the court below should have granted the order – the remedial work done by the appellant – is the appeal moot – whether the appeal will have any practical effect – section 16 (2)(*a*)(i) of the Superior Courts Act 10 of 2013.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam J sitting as a court of first instance):

The appeal is upheld and the order of the court below is set aside and substituted with the following:
'The application is dismissed.'

JUDGMENT

Bosielo JA (Wallis, Willis JJA and Dambuza, Meyer AJJA concurring):

[1] The appellant is the registered owner of a property situated at 15 Von Wielligh Street, Phalaborwa Extension 1, Limpopo Province. The respondent is a local municipality which has jurisdiction in the area, where the appellant's property is situated. In 2012 the appellant's property was flooded, when storm water directed into a stream across the municipality's land adjacent to it was unable to flow away, because the latter property had become overgrown and the stream was blocked by vegetation.

[2] As a result of the flooding, and pursuant to an application by the appellant, the North Gauteng High Court, Pretoria (Kubushi J) granted judgment in its favour on 17 October 2012 in the following terms:

‘1. The Respondent is ordered to immediately remove the nuisance caused by the blocking and silting of the stormwater drainage canal between Potgieter and Cohen Streets, Phalaborwa Extension 1 Township by immediately removing all soil, silt, foliage and/or any other material obstructing the flow of stormwater therein;

2. In the event of the Respondent failing to complete the remedial work necessary in order to comply with 1 above before 17 November 2012, the applicant is hereby authorised to do such remedial work;

3. Any costs expended by the Applicant pursuant to the remedial work authorised in 2 above, is immediately payable by the Respondent to the Applicant upon presentation by the Applicant of certified copies of all invoices to the Respondent reflecting the costs expended in connection therewith;

4. The Respondent is ordered to commence with the construction and installation of a subsurface drainage system along the entire length of the stormwater canal on or before 1 February 2013 and to complete the construction thereof on or before 1 May 2013;

5. In the event of the Respondent failing to commence with the construction of the subsurface drainage system in 4 above, *alternatively* in the event of the Respondent commencing with the construction thereof before 1 February 2013, but not completing same by 1 May 2013, the Applicant is authorised to attend to the installation of any of the three construction methods proposed in the report by N Kruger Consulting Engineers, dated 2 November 2011, attached hereto as Annexure “O”;

6. Any costs expended by the Applicant pursuant to the remedial work authorised in 6 above is immediately payable by the Respondent upon presentation by the Applicant of certified copies of all invoices reflecting the costs expanded in connection therewith to the Respondent;

7. The Respondent is ordered to pay the costs of this application on a scale as between attorney and client.’

[3] It is common cause that the respondent, despite numerous reminders by the appellant, failed to comply with the court order. As a result, the appellant, acting in terms of paragraphs 2 and 5 of the court

order, contracted Rimiro Construction Civil & Building (Rimiro) to do the remedial work during or about October 2013.

[4] It was only during or about March 2014 that the respondent sent a service provider Mame Projects CC to the site to commence with the remedial work. At this stage the appellant had already commenced with the remedial work. According to the respondent, the appellant unlawfully erected a fence which effectively denied its service provider access to the site to undertake the remedial work. It brought an urgent application for the demolition of the fence and an order that its service provider be granted access through the appellant's property. The main allegation was that there was only one access point to the site where the remedial work had to be done through the appellant's property on Von Wielligh Street.

[5] In its answering affidavit, the appellant pertinently denied that the respondent has to go through its property to reach or gain access to the site. It specifically stated that, contrary to what the respondent averred, its property does not border on Potgieter Street where the respondent required access but on Von Wielligh Street. Importantly, it alleged that the respondent could gain access either from Potgieter Street or by traversing other properties adjacent to the canal. The respondent disputed this saying that it could not get access for unspecified heavy machinery other than through the appellant's property.

[6] Self-evidently this presented a serious dispute of facts which could not be resolved on the papers. Neither of the parties requested that the matter be referred to trial or for oral evidence to resolve the dispute. Notwithstanding the serious dispute on the facts, the court below

proceeded to grant judgment in favour of the respondent on 20 May 2014. Aggrieved by the judgment, the appellant is appealing to this Court with the leave of the court below.

[7] An applicant who approaches a court for final relief on notice of motion where it has reason to believe that facts essential to the success of its claim will probably be disputed, chooses such a procedure at its own peril. This is such a case. The appellant pertinently disputed that the only access point to get to the site was through its property. It gave details of alternative access points which were available to the respondent.

[8] As already indicated in paragraph 5, the respondent knew that the issue of the access point was seriously disputed by the appellant. Notwithstanding such knowledge, it elected to adopt motion proceedings. As it was stated by this Court in *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) 398 (A) at 430H:

‘A litigant is entitled to seek relief by way of notice of motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed he chooses that procedural form at his peril, for the Court in the exercise of its discretion might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application. (*Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168.)’

To my mind this is a case where the court below should have referred the matter for the hearing of oral evidence on this disputed issue or possibly to trial. It follows that the court below erred in granting final relief in circumstances where there was a genuine dispute of facts on a material aspect of the case. *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1168; *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

[9] This conclusion would ordinarily have resulted in the appeal being upheld and the matter being referred back to the high court for the hearing of evidence. But another matter came to the fore during the hearing of the appeal. On 15 April 2014 the appellant's service provider prepared a report which indicated that the remedial work might be completed by 23 May 2014. Based on this, the court enquired from the appellant's counsel before us, what the current status of the remedial work was. Counsel for both parties confirmed to the court that the remedial work which had to be done in terms of the court order of 17 October 2012 had been completed. Self-evidently, this rendered the appeal moot. Section 16(2)(*a*)(i) of the Superior Courts Act 10 of 2013 (the Act) provides that:

'When at the hearing the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

[10] The order which the respondent sought and which was granted by the court below was, firstly to grant the appellant access to the storm water drainage canal between Potgieter and Cohen Streets, and secondly to remove any fence or obstruction on the appellant's property which denied the respondent access. As alluded to in the previous paragraph the remedial work has already been finished. The pertinent question is what practical effect any order as granted by the court below would still have for the respondent, as there is nothing to be done. Manifestly, such an order will be an 'academic exercise with no practical effect' now or in the future. Recently this Court reiterated the principle as follows in *Tecmed Africa (Pty) Ltd v Minister of Health & another* [2012] 4 All SA 149 (SCA) para 20-21:

'Finally, courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria* this Court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order

sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26 where the following was said:

"The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect".

The cumulative effect of all of the factors that I have alluded to is that no practical effect or result can be achieved in this case. And for those reasons the appeal was dismissed in terms of s 21A(1) of the Supreme Court Act 59 of 1959.'

However, were we to dismiss the appeal on this ground, manifest unfairness would arise because the appellant would be left to bear the burden of an adverse order for costs in the high court.

[11] I now turn to deal with the issue of costs. As already indicated in paragraph 5, the court order which is on appeal before us was made on 20 May 2014. According to a letter from Rimiro, they returned to the site on 1 March 2014 to continue with the remedial work. They estimated that they would complete the remedial work by 23 May 2014. Both parties are resident in the same area. The appellant's property abuts the site where the remedial work had to be done whilst the respondent has jurisdiction over the area where the site is. Even the most elementary investigation would have alerted them timeously that the remedial work had been done. This would have enabled them to avoid any unnecessary appearance with concomitant wasted costs before us. They failed to do so. None of the parties was able to offer any plausible or acceptable explanation. I find that both parties were remiss and are equally to blame. Equity and fairness dictate that each party must bear its own costs. In the light of my conclusion that the court below should not have granted an order without hearing evidence, its order cannot stand and each party should bear its own costs in that court as well.

[12] In the result the appeal is upheld and the order of the court below is substituted with the following:
'The application is dismissed.'

L.O. Bosielo
Judge of Appeal

Willis JA (partially concurring and partially dissenting):

[13] I agree with the order that Bosielo JA has proposed. In my opinion, however, it is the aggregate of the following considerations – rather than any one of them taken on its own – that leads one to this conclusion: (a) the obviousness of the error of the decision of the high court; (b) the bad behaviour of the municipality, including the squandering of the of public funds on needless litigation and (c) the injustice of allowing the order of the high court to stand, with the appellant being mulcted in costs.

N.P. Willis
Judge of Appeal

Appearances:

For Appellant	:	J G Bergenthuin SC Instructed by: Bernhard Van der Hoven Attorneys; Pretoria Rosendorff Reitz Barry, Bloemfontein
For Respondent	:	J A Motsepe (with him M H Mphahlele) Instructed by: Malesa Attorneys; Pretoria Mpobole & Ismael Attorneys, Bloemfontein