



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED ✓
19/09/2017 DATE
SIGNATURE

In the matter between:

CASE NO: 33788/17

PROPSHAFT MASTER (PTY) LTD

First Applicant

WIELAND SOUTH AFRICA (PTY) LTD

Second Applicant

KS PROPERTY (PTY) LTD

Third Applicant

and

EKURHULENI METROPOLITAN MUNICIPALITY

First Respondent

**THE MEC FOR THE GAUTENG DEPARTMENT
OF AGRICULTURE AND RURAL DEVELOPMENT**

Second Respondent

**THE MINISTER FOR THE DEPARTMENT OF
WATER AND SANITATION**

Third Respondent

JUDGMENT

DAVIS AJ

This matter came before me in the urgent court last week on Friday. By then the papers exceeded 500 pages, excluding heads of argument and other material handed up and, as indicated before the hearing thereof, judgment would be rendered by Wednesday of this week, which I hereby do.

[1] THE PARTIES:

1.1 The Applicants are three private companies which operate business entities and which are all land-owners in Eastleigh, Edenvale, a suburb in the area of jurisdiction of the First Respondent, being the Ekurhuleni Metropolitan Municipality ("*the EMM*"), a local authority established in accordance with the provisions of Section 12(1) read with Sections 14(2) and 19(2) of the Local Government: Municipal Structures Act, 117 of 1998.

1.2 The Second Respondent is the MEC for the Gauteng Department of Agriculture and Rural Development.

1.3 The Third Respondent is the National Minister for the Department of Water and Sanitation.

[2] THE RIVER:

2.1 The subject matter of this application is a section of a stream known as the Eastleigh Spruit which flows through the suburb of Edenvale on the East Rand of Johannesburg (*"the river"*). It is a tributary to the Jukskei River.

2.2 The river is supposed to be a low-level stream which begins in Klopperpark with smaller branches joining it from Hurleyvale and Buurendal at Horwoods Farm. It flows through the centre of Edenvale and joins the Jukskei River near the Sizwe Hospital.

2.3 More particularly, the direct focus of the application is a portion of the river which passes under Plantation Road Bridge (*"the bridge"*) and the three culverts beneath the bridge.

[3] **THE STATE OF THE RIVER:**

3.1 The Eastleigh area annually during the summer rainfall season experiences an increase in water flow in the river and the storm water system of which it forms part.

3.2 On 9 November 2016 flash floods occurred across Johannesburg and Ekurhuleni. The floods were widely and graphically reported in the media and caused extensive damage and even loss of life.

3.3 The entire Eastleigh area was declared a disaster area and remains a declared disaster area. This was done by way of a formal declaration by the Gauteng Provincial Government on 1 December 2016.

3.4 The EMM Council held an extraordinary meeting on 30 March 2017 in order to receive a report from the EMM Disaster and Emergency Management Services Department. The summary of the report reads as follows:

"The detailed assessment of damaged households, hostel and counsel basic services was conducted as from the 9th November 2016 and continued until January 2017 when all inputs and technical estimated costs were received from all stakeholders. This assessment indicated that there were massive damages occurred in the municipality (sic). The range of damages included informal and formal settlement flooding, bridges collapse, damage to roads, perimeter walls, collapsed trees falling on top of shacks, business properties flooded, disruption of services and flooding where storm water systems is (sic) unavailable or could not cope with the unusual and extreme rainwater."

3.5 Pursuant to these floods, the walls of the riverbed at the area which forms the subject matter of this application collapsed.

Dividing walls of one of the Applicants also collapsed from the force of the water.

- 3.6 Around January 2017 the river flooded again and further damage was caused to properties and the business operations of, *inter alia*, the Applicants.
- 3.7 A long chronology of appeals by the Applicants to the EMM since the occurrence of the floods to repair and rehabilitate the river has had no concrete results.
- 3.8 According to the Applicants the current state of the particular portion of the river is that two out of three of the culverts under the bridge are completely blocked with rubble and debris. This debris has dramatically escalated since the November 2016 flooding and has not been cleared or cleaned at all by EMM. Businesses adjacent to the river had to reinforce their foundations since the high water levels, largely due to built-up contained water is eroding their foundations and walls. Further downstream, an entire gabion lining has now collapsed and riparian forest is denuded and is collapsing into the stream bed. The riverbed is now so much less of a river that squatters have set up facilities on the riverbed and begun stripping down the land and taking down trees and live in dangerous and unsanitary conditions below the bridge.

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[4] **THE APPLICANTS' POSITION:**

Insofar as prejudice to the Applicants is not apparent from the situation already sketched above, the Applicants state their position to be as follows:

- 4.1 Recently the compounding of debris has increased to the extent that the Applicants "*... work in constant terror that with even the slightest rain the properties and business machinery, equipment, stock and infrastructure will be flooded and damaged. Staff will be at direct risk of harm due to flooding and electrical explosions. The property itself will destabilise due to collapsing walls and eroding foundations*".
- 4.2 Due to repeated claims as a result of the damages already caused, insurance companies are cancelling their short-term insurers of the properties adjacent to the river.
- 4.3 None of the damage which the bridge had sustained during the floods has been repaired and it is feared that any further structural damage could lead to its collapse.

and its relevant departments they cannot effect the repairs or rehabilitation themselves.

4.5 The position described in the Applicants' affidavits is substantiated by numerous photographs, the authenticity of which was initially doubted by the EMM, but this has subsequently been remedied in reply. It is notable that, despite officials of the EMM having visited the site during late August 2017, no evidence has been produced by the EMM to upset the factual matrix regarding the state of the river as described by the Applicant.

[5] **THE "*FLUID POWER ORDER*":**

5.1 On 22 June 2017 the EMM consented to an order of court sought by two land-owners (one being the Fluid Power Group of Companies) being in similar circumstances as the Applicants but whose properties are 400 metres upstream in the Eastleigh River. The relief claimed and the terms of the order consented to are virtually identical to the relief claimed by the Applicants herein (to which I shall refer more fully hereunder) save that the locality of the portion of the river differs.

5.2 Regarding the "*Fluid Power order*" and its consent thereto, all the EMM had to say why there should also not be a similar order in the present application is the following:

"Save to state that the court order granted was by consent of the First Respondent as indicated on the order and does not set a precedent nor is there a judgment dealing with the issue. Each case has to be decided on its own facts and circumstances. The Applicants thus cannot seek to rely on this order as authority."

5.3 EMM however reported on the order in an internal memo dated 10 August 2017 *inter alia* as follows:

"1. On the 22nd of June 2017 the High Court of South Africa, Gauteng Local Division Johannesburg granted an order against Ekurhuleni Metropolitan Municipality (EMM). In compliance with the order kindly receive our report or memorandum as follows:

(a) Steps to be taken to remediate the river situated at Fluid Power Offices, 26 Central Avenue Cnr. Fountain, Eastleigh Edenvale:

- (i) It is hereby confirmed that EMM has now assessed the damages in the above-mentioned address;*
- (ii) The damages referred to above will require inspection by specialist consultants and these consultants are required to certify the stability of the structures and then recommend remedial measures in order to declare them safe;*
- (iii) It is hereby confirmed that EMM has now issued instructions to proceed with work (IPWs) to the appointed consultants on 20 July 2017;*
- (iv) The appointed consultants will provide more accurate construction remedial cost once their investigations and designs have been completed;*
- (v) It is anticipated that the consultants' reports and designs will be completed by mid-August 2017;*

- (vi) Upon receipt of the designs and reports from the consultants the normal bidding processes for the procurement of contractors to implement the remedial measures will unfold;
- (vii) It is anticipated that such processes will be completed during the month of April 2018.
- (b) It is perhaps important to indicate that the estimated time frames highlighted above are subject to funding being available.
- (c) The order obtained against EMM was a wakeup call to department hence EMM has taken an initiative to remediate all areas which were damaged on the 9 November 2016 and these areas are as follows: ...

 - (ix) Plantation Road – downstream to Andries Pretorius Road ...
- (g) The Department of Roads and Storm Water at EMM will during the budget review period which will be between the month of November 2017 to January 2018 submit such request on an urgent

basis as there is a court order already granted against EMM.

(h) As required in terms of the court order EMM will ensure that our office provides monthly updates and/or progress reports in this matter."

5.4 Despite the aforesaid and save for the issuing of IPWs (instructions to perform work) to consultants to assess the issues forming the subject matter of the Fluid Power order and the present application, nothing further has been done by EMM regarding either the order itself or the state of the river. No clean-up or clearances of the culverts or any other area has been conducted, no internal mechanism by the EMM has been utilised and there is no indication that any of the possible provisions for services envisaged in Sections 76(a)(i), (ii) or (iii) of the Local Government: Municipal Systems Act, 32 of 2000 (the "*Municipal Systems Act*") have been explored. Counsel for EMM, Mr Mathopo, in a well-presented and determined argument on behalf of EMM repeatedly sought to assure the court that "*processes were in place*" and "*steps are being taken*". Despite this, his client, EMM, has failed to provide any evidence concerning any assessment having

been undertaken by EMM as envisaged in Section 78 of the Municipal Systems Act.

5.5 The Applicants' deponent states the position thus:

"Despite the court order, Ekurhuleni have done nothing to rehabilitate the river and to clean the bridge. The business community in Eastleigh have been waiting with bated breath to see if Ekurhuleni would finally 'kick into gear', alas this has not been the case and we have not even seen cleaners picking up litter. No attempt has been made to remediate the river."

5.6 Evidence has also been placed before the court by the Applicants that since 2011 council documents indicate that the estimated costs to mitigate, prevent and remedy the river had to be provided for. This predates the flooding. Despite this, so the Applicants say, no funds have been budgeted for and from the papers and the EMM documents already referred to above, this appears to be correct.

5.7 Furthermore, despite the EMM levying a "litter picking" account as an additional tax on businesses in the area, no litter or debris has been cleaned and neither had the EMM reported on this aspect or dealt therewith in the papers.

5.8 Relying on a confirmatory affidavit from an EMM councillor, the issue of cleaning the culverts beneath the bridge was apparently put to the EMM council at the beginning of August 2017 but, despite the EMM's own council reports, the decision to channel funds or efforts to cleaning the culverts had been declined. The EMM's counsel countered that due to the fact that the councillor's affidavit initially relied on in the founding affidavit had not been deposed to but only been deposed to in reply, the EMM had not been required to deal with these allegations. I shall deal with this aspect later when considering the EMM's opposition to the relief claimed.

[6] **RELIEF CLAIMED:**

It is against the abovementioned background that the Applicants claimed the following relief (which was claimed in both Part A of their Notice of Motion, as an interim measure and Part B thereof as a final measure. The relief claimed in Part A and Part B however is virtually exactly the same):

"Part A ...

2. *An interim mandamus interdict be ordered as follows:*

2.1 *That the First Respondent be directed and compelled to immediately and in future take all reasonable steps*

to remediate the river (including but not limited to constructing sheet pile walls alternatively stabilisation of the riverbanks with gabions) situated at 13 Terrace Road Eastleigh Edenvale and 56 Plantation Road Eastleigh Edenvale ('the river') and such remediation is to include any and all steps necessary to rectify and rehabilitate the riverbed and river walls and any other measure necessary to prevent and mitigate any and all flooding to the properties of 13 Terrace Road Eastleigh Edenvale and 56 Plantation Road Eastleigh Edenvale ('the properties');

- 2.2 That the First Respondent be directed and compelled to immediate and in future take all reasonable steps to clean the bridge located at Plantation Road Eastleigh Edenvale ('the bridge')(including but not limited to cleaning and clearing the culverts beneath the bridge of debris, rubble and vegetation) and which steps should include mitigation, remediation and prevention of the culverts beneath the bridge from becoming blocked or the flow of water from being blocked.*
- 2.3 That the First Respondent be directed and compelled to provide the Applicants with comprehensive*

feedback concerning the implementation of prayer 2.1 and 2.2 within 7 days of the granting of this order and thereafter to provide feedback once a month.

2.4 That the steps taken in prayer 2.1 and 2.2 be declared to be measures taken in terms of Section 67 of the National Water Act, 36 of 1998 and Sections 24M and 30A of the National Environmental Management Act, 107 of 1998 as read against Section 54 of the Disaster Management Act, 57 of 2002.

2.4.1 Alternatively the Second and Third Respondents are directed to decide concerning declaring the steps in prayer 2.1 and 2.2 to be measures in terms of Section 67 of the National Water Act, 36 of 1998 and Sections 24M and 30A of the National Environmental Management Act, 107 of 1998 as read against Section 54 of the Disaster Management Act, 57 of 2002 within 7 days of receiving such request from the First Respondent.

3. Alternatively and should the First Respondent refuse alternatively fail to comply with prayer 2.1 that the Applicants be granted leave to take all reasonable steps to

remediate the river (including but not limited to constructing sheet pile walls alternatively stabilisation of the riverbanks with gabions) and such remediation is to include any and all steps necessary to rectify and rehabilitate the riverbed and river walls and any other measure necessary to prevent any and all flooding to the property and for the costs of such remediation to be paid for by the First Respondent.

- 4. Further alternatively, and should the First Respondent refuse alternatively fail to comply with prayer 2.2 that the Applicants be granted leave to take all reasonable steps to clear and remediate the culverts beneath the bridge (including but not limited to clearing the culverts of rubble, debris and vegetation) and for the costs of such remediation to be paid for by the First Respondent.*
- 5. That the parties be granted leave to supplement the papers accordingly for the main relief.*
- 6. Further and/or alternative relief.*
- 7. Costs in the cause."*

[7] I interpose to state that the Second and Third Respondents had chosen not to oppose the application and in fact the Third Respondent had formally indicated that she will abide by whatever

order the court makes and has offered her co-operation to the EMM.

[8] **SERVICE DELIVERY BY THE LOCAL AUTHORITY:**

8.1 The Applicants claim a "*mandamus interdict*" against an organ of State. As a starting point then, a court should be mindful of the boundaries of the separation of powers. In dealing with interim relief pending a review, Moseneke DCJ had the following to say in this regard in National Treasury v Opposition to Urban Tolling Alliance 2012(6) SA 223 (CC):

"Before granting interdictory relief pending a review, a court must, in the absence of mala fides, fraud or corruption examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers."

8.2 On condition that the boundaries of separation are not overstepped, the same judgment determined with reference to Setlogelo v Setlogelo 1914 AD 221 that:

"... when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution ... if the right asserted

in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists. Similarly, when a court weighs up where the balance of convenience rests, it may not fail to consider the probable impact of the restraining order on the constitutional and statutory powers and duties of the State functionary or organ of State against which the interim order is sought. The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government...". (at paragraphs [46] and [47])

8.3 In the present instance the relief sought by the Applicants is founded on the fundamental right expressed in Section 24 of the Constitution of the Republic of South Africa, 1996 ("the Constitution") which provides as follows:

"Everyone has the right to an environment that is not harmful to their health or wellbeing and to have the environment protected, for the benefit of present and future generations, through legislative and other measures that –

(1) prevent pollution and ecological degradation;

- (2) *promote conservation; and*
- (3) *secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."*

8.4 The Applicants, to my mind, correctly, submitted that a person's sense of environmental security in relation to the potential risks and dangers of environmental disaster fall within the scope of protection provided by Section 24 of the Constitution.

8.5 The EMM has the further constitutional and statutory obligations and duties:

8.5.1 Section 152 of the Constitution provides that one of the objectives of local government is to ensure and oversee the provision of services to communities in a sustainable manner;

8.5.2 Section 153 of the Constitution places an obligation on local government to structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community and to promote the social and economic development of the community;

8.5.3 Section 154 of the Constitution calls for local government to exercise its roles and responsibilities in terms of co-operative government with national and provincial spheres.

8.5.4 Section 156 of the Constitution details the powers and functions of municipalities with reference to its executive authority on matters listed in Parts B of Schedules 4 and 5 respectively. Municipal public works in respect of the needs of municipalities and the discharge of their responsibilities to administer functions specifically assigned to them under the Constitution or "*any other law*" and storm water management systems in built-up areas are specific powers and functions in respect of which the EMM as local government has executive authority over.

8.5.5 The discharge of responsibilities in terms of "*other law*" referred to above, in the context of the present subject matter refers to the duties and obligations in terms of the National Environmental Management Act, 107 of 1998 ("*NEMA*") being the main piece of legislation giving effect to the Section 24 constitutional rights. It extensively provides for co-operative environmental

governance and for procedures for co-ordinating environmental functions exercised by organs of State. It furthermore places a duty of care and remediation of environmental damage on every person who causes, has caused or may cause degradation of the environment to take reasonable measures to prevent such degradation from occurring, continuing or recurring including the obligation to take reasonable measures to remedy the effects of pollution or degradation.

8.5.6 Seeing that the river and the Eastleigh area in question have been declared a disaster area the provisions of the Disaster Management Act, 57 of 2002 also apply. Although the disasters caused by the November 2016 floods (and the January 2017 floods) have already taken place, the EMM is obligated in terms of Sections 44 to 57 of this Act to on a continuous basis implement measures aimed at preventing or reducing the risk of further disasters and mitigating the severity or consequence of disasters which had already happened. This includes post-disaster recovery and rehabilitation.

8.5.7 The Municipal Systems Act, wherein the rights and duties of local authorities are set out, empowers and obligates the EMM to *inter alia* promote a safe and healthy environment in its municipality.

8.5.8 In addition, Section 25 of the Municipal Systems Act further places a positive duty on local authorities to adopt an integrated development plan. Such a plan would include the provision for sufficient budgets, the keeping of accurate records of hazards and capacities and the development and implementation of risk assessments and environmental assessments.

[9] **EVALUATION:**

9.1 There was very little if any contradictory evidence to the Applicants' version placed before court. Allegations of failure of compliance with the Fluid Power order, the EMM's own policy documents or reports and the accusations of inactivity and failure to take any positive or immediate steps of whatever nature as well as the allegations regarding the current state of the river were all, apart from bald denials, left intact. In Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008(3) SA 371 (SCA) the court outlined the approach that should be adopted in order to decide whether

affidavits disclose real, genuine or *bona fide* disputes of fact as follows:

"[13] A real, genuine and *bona fide* dispute of fact can exist only where a court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied."

9.2 The evidence in respect of which no real or *bona fide* dispute of fact has been raised, therefore indicate the following:

9.2.1 A disaster with environmental consequences occurred on 9 November 2016 (and was exacerbated by a subsequent similar but lesser disaster in January 2017).

9.2.2 No post-disaster rehabilitative work has been conducted by the EMM on the portion of the river in question since the disaster.

9.2.3 The storm water system in respect of the provision of storm water flowing down the river has been compromised. The executive authority over the control of this storm water system vests with the EMM.

9.2.4 In excess of 8 months since the disaster no steps have been taken by the EMM to even clear debris or culverts or prevent effluent and pollution to increase in the river or the contained water caused by the blocked culverts.

9.2.5 No explanation why, apart from instructions to proceed with work issued in July to consulting engineers, no other steps to either internally or externally provide for some service delivery in respect of the mitigation of the

detrimental consequences of the disaster or the current state of the river have been taken.

9.2.6 There is no explanation as to why, despite various engineering reports indicating at least interim measures or immediate action, none have been taken and this includes the absence of indications of exploration of alternate finance or budgetary allocations.

9.2.7 There is an absence of an indication by the EMM as to how and in what measure or fashion it has acted in compliance with its constitutional obligations or, put otherwise, what "*reasonable steps*" it has taken to comply with the statutory obligations imposed on it as a local authority.

9.2.8 The only counter to the Applicants' fear of nearing or imminent danger or harm or disastrous consequence of the present state of the river by further flooding, is the so-called "*crystal ball defence*". The EMM stated that a court should not be called upon to look into a crystal ball and speculate as to whether there would be flooding again or a repeat of the 2016 disaster. This approach ignores the fact that two of the tree culverts in the river are already blocked, the pollution and debris

are increasing, the increase of contained water and pollution is also increasing and even if the Fluid Power order is complied with upstream, it would increase or exacerbate the detrimental situation located further downstream. This argument also ignores the fact that the annual summer rainfall period is daily approaching. Whether there may be flash floods or not, any rainfall will only serve to increase and not diminish the problems currently experienced in the river.

9.3 It is therefore clear that the Applicants' Section 24 constitutional rights are being infringed upon and are being prejudiced without the EMM doing anything about it.

[10] **NATURE OF THE RELIEF TO BE GRANTED:**

10.1 The Applicants rely on the judgment of Kenton-on-Sea Ratepayers Association and Others v Ndlambe Local Municipality and Others 2017(2) SA 86 (ECG) for the granting of what has been referred to as "*a structural interdict or supervisory order*". This follows on the approach by the Constitutional Court in Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo 2010(3) BCLR 177 (CC) and in a case in which the EMM also featured, namely Pheko v Ekurhuleni Metropolitan Municipality

(Socio-economic Rights Institute of SA as amicus curiae)

2012(4) BCLR 388 (CC) at par. 50.

10.2 A structural interdict consists of five elements. First the court declares the respects in which the violator's conduct falls short of its constitutional obligations, second the court orders the violator to comply with its constitutional obligations, third the court orders the violator to produce a report within a specified period of time setting out the steps it had taken, fourth the Applicant is afforded an opportunity to respond to the report and finally the matter is enrolled for a hearing and, if satisfactory, the report is made an order of court.

10.3 In all instances however, "*appropriate relief*" should be granted and in the present instance in view of the order I intend to make and in view of the fact that the Applicants in any event envisaged coming back to court with supplementary papers, I do not find it necessary to order that a report should be tabled at court or that the contents of such a report should of necessity be made an order of court. A reporting provision by the EMM to the Applicants as representing the portion of the community in which the distressed part of the river is situated should suffice in the circumstances. Any reports done by the EMM can then neither be placed by the Applicants before the

court when they return or, if any further relief is claimed against the EMM without placing such a report before court, the EMM can then, insofar as may be necessary to justify a defence to any further relief, place such a report before court. I also do not find it necessary to make a specific declaration of constitutional non-compliance; such non-compliance and the facts already appear from the remainder of the judgment. In making the determinations regarding appropriate relief I also had regard to Dawood and Another v Minister of Home Affairs and Others; Thomas v Minister of Home Affairs 2000(8) BCLR 837 (CC), August v Electoral Commission 2000(8) BCLR 837 (CC), Nyathi v MEC for the Department of Health Gauteng 2008(9) BCLR 865 (CC) and Fose v Minister of Safety and Security 1997(3) SA 786 (CC) at par [100].

10.4 It is also clear from the relief claimed by the Applicants that they seek leave to effect the necessary rehabilitation themselves in the event of EMM not doing so and leave to then claim the costs thereof from the EMM. This, so the Applicants say, is necessary if one has regard to the EMM's persistent failure to date hereof and the Applicants' need or right to mitigate possible damages. The EMM objected to this kind of blanket authority and to my mind rightly so. The

Applicants relied on Agri Eastern Cape and Others v The MEC for the Department of Roads and Public Works 2017(3) SA 383 (ECG) wherein provision was made for the repair of potholes by individual farmers at the cost of the First and Second Respondents in that matter. The relief granted in that application however, incorporated an extensive mechanism to be followed prior to such repairs being undertaken which involved the obtaining of various quotations and the exchange thereof and further supervisory actions prior to the recovery of the costs. No such mechanisms have been suggested in the present application and I agree that a carte blanche given to the Applicants as prayed goes far beyond what is currently necessary to protect the Applicants' constitutional rights. It might also be that, after the order is granted, the EMM sufficiently remedies any deficiencies in its constitutional obligations to such an extent that no further relief may be necessary and to order any payment consequences or potential recovery consequences at this stage would be premature.

10.5 In prayer 2.4 of the Applicants' notice of motion they also claim a declaration to the effect that the rehabilitative or emergency measures claimed in paragraphs 2.1 and 2.2 of the notice of motion should be deemed to be measures taken in terms of

Section 67 of the National Water Act, 36 of 1998 and other statutory provisions. In my view the alternative claimed for is sufficient which leaves the decision regarding these actions in the hands of the Second and Third Respondents. Pursuant to my comments made earlier regarding the separation of powers, it would not be prudent for a court to take these decisions out of the hands of the functionaries statutorily obligated and empowered to do so. In view of particularly the Third Respondent's expressed indication of co-operation and the absence of any allegation of failure by the Second and Third Respondents to take any decision, the alternative relief claimed in paragraph 2.4.1 of the Applicants' notice of motion is also, in my view, also premature.

10.6 As to the issue of costs: The Applicants have in their urgent application claimed that costs of the interim relief sought in Part A thereof be costs in the cause. The Respondents have therefore not been called upon to defend themselves against a costs order which Ms Martin who appeared for the Applicants urged me to do already at this stage. Having regard to the formulation of the costs relief claimed in the notice of motion and the fact that the finality of the litigation is still envisaged to be in the future as well as the fact that further compliance or not with the orders which I intend to make might impact on the

issue or scale of costs, I find it premature to make final determinations of costs at this stage.

10.7 With reference to Setlogelo v Setlogelo (*supra*), Webster v Mitchell 1948(1) SA 1186 (W), Gool v Minister of Justice and Another 1955(2) SA 682 (C) at 688C-E and Reckitt and Colman SA (Pty) Ltd v SC Johnson & Son SA (Pty) Ltd 1995(1) SAA 725 (T), the Applicants have not only satisfied me that they have a *prima facie* right but that their constitutional rights are being infringed upon and that they have a well-grounded apprehension of further irreparable infringement on these rights if the interim relief is not granted. Furthermore, the Applicants have no other satisfactory remedy and the balance of convenience favours the Applicants to the extent that their constitutional rights should be protected which protection outweighs any "inconvenience" for the EMM in having to scramble to find funds or means, internally or externally to at least mitigate and ameliorate the possible disastrous condition of the river in question.

[11] **ORDER:**

Pending the finalisation of the application and any relief which the Applicants may seek in respect of Part B of the notice of motion, it is ordered as follows:

1. The First Respondent is directed to immediately and in future take all reasonable steps to remediate the river situated at 13 Terrace Road, Eastleigh, Edenvale and 56 Plantation Road, Eastleigh, Edenvale (*"the river"*) which remediation is to include any and all steps necessary to rectify and rehabilitate the riverbed and river walls and any other measure necessary to prevent and mitigate any and all flooding to the properties of 13 Terrace Road, Eastleigh, Edenvale and 56 Plantation Road, Eastleigh, Edenvale;
2. The First Respondent is directed to immediately and in future take all reasonable steps to clean the bridge located at Plantation Road Eastleigh (*"the bridge"*) including but not limited to the cleaning and clearing the culverts beneath the bridge of debris, rubble and vegetation and to take all reasonable steps to prevent the culverts beneath the bridge from becoming blocked or the flow of water thereto from being blocked;
3. The First Respondent is directed and compelled to provide the Applicants with comprehensive feedback concerning the implementation of paragraphs 1 and 2 above within 7 days from the granting of this order and thereafter to provide feedback once a month;

4. The parties are granted leave to place the aforementioned reports before court and to supplement their papers accordingly for purposes of any relief further claimed by them in this application;
5. Costs are reserved.



N DAVIS
ACTING JUDGE OF THE HIGH COURT

Date of hearing:	15 September 2017
Judgment delivered:	20 September 2017
Counsel for Applicants:	Adv (Ms) Martin
Attorneys for Applicants:	Ramsey Webber Incorporated, Johannesburg
Counsel for Respondents:	Adv Mathopo
Attorneys for 1 st Respondent:	Steven Maluleke Attorneys, Johannesburg