

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 1891/2021P

In the matter between:

F KAMY INVESTMENTS CC

FIRST APPLICANT

SUMMERTREE TRADING AND INVESTMENTS CC

SECOND APPLICANT

and

UMDONI MUNICIPALITY

RESPONDENT

ORDER

The following order is granted:

1. The respondent is directed to do all things necessary, including but not limited to, the appointment of an appropriate contractor and/or engineer, to replace and/or repair the failed storm water pipes in Aster Road, Umzinto, situated immediately above the first applicant's property;
2. The respondent is directed to ensure that paragraph 1 of this order is complied with within four months of the service of this order upon it.
3. The respondent is directed to ensure that upon completion of the work to be performed in compliance with the order in paragraph 1, the storm water system is fit for purpose and that in the ordinary course of events, storm water shall not escape therefrom.
4. The respondent is directed to ensure that upon completion of the work to be performed in compliance with the order in paragraph 1, Aster Road shall not in the

ordinary course of events, discharge water onto the gabion wall belonging to the first applicant.

5. The respondent is directed to pay the applicants' costs on an attorney and client scale.

JUDGMENT

MOSSOP J:

[1] The first applicant owns certain immovable property situated at 357 Aster Road, Umzinto (the property). Constructed on the property are certain commercial premises that the first applicant lets to the second applicant, from which the business of a cash and carry is run by the second applicant. At the rear of the property is a substantial embankment. At the top of the embankment is, inter alia, a tarred road, being Aster Road, and a storm water drainage system, both constructed at the behest of the respondent.

[2] Initially, the embankment was supported and retained by a loffelstein wall.¹ That wall failed in 2010 and was replaced by a wall constructed from gabions.² GAP Consulting Geotechnical Engineering (GAP) designed the replacement gabion wall (the gabion wall) for the first applicant. The civil engineer tasked with this project was Mr Gianmarco Pauselli (Mr Pauselli).

[3] The applicants allege that the storm water drainage system has not been maintained by the respondent, and is now more noteworthy for the quantity of water that escapes from the pipes that form part of it, which are either holed, obstructed, broken or displaced, than for the quantity of storm water that the pipes retain and direct away from the embankment. This, coupled with the excessive flow of water off Aster Road, over the top of the gabion wall, so the applicants contend, has caused the sand fill utilised in the construction of the gabion wall to be scoured away,

¹ A loffelstein wall is a dry stacking, interlocking retaining system.

² A gabion is a steel wire basket that is filled with rocks and other construction materials. The word 'gabion' itself means 'cage' in Latin or Italian.

eroding its support. The gabion wall has consequently shown signs of collapse on three separate occasions since its construction. The last of these near collapses prompted the bringing of this application.

[4] When the matter was called, I had the pleasure of hearing argument from Mr Hoar, who appeared for the applicants and from Ms Olsen, who appeared for the respondent. Both are thanked for their most helpful submissions.

[5] In their notice of motion, the applicants seek the following relief:

‘1. The Respondent is directed to do all things necessary, including but not limited to, the appointment of an appropriate contractor and/or engineer, to replace and/or repair the failed storm water pipes/infrastructure in Aster Road, Umzinto, situated immediately above the First Applicant’s property, and as more particularly identified in the written report of Camjet (Pty) Ltd dated 18 November 2020 furnished to the Municipality under cover of Cox Yeats attorneys letter dated 23 November 2020.

2. The Respondent is directed to ensure that paragraph 1 of this order is complied with within three months of the service of this order upon it.

3. The Respondent is directed to ensure that, upon completion of the works executed in

compliance with paragraph 1 of this order, no storm water can escape from the storm water infrastructure constructed in Aster Road immediately above the First Applicant’s property.

4. The Respondent is directed to ensure that, upon completion of the works executed in compliance with paragraph 1 of this order, no storm water can flow from the surface of Aster Road over the curb immediately above the first applicant’s property and into the first applicant’s property.

5. The Respondent is directed to pay the Applicants costs on an attorney and client scale.’

[6] On each of the first two occasions when the gabion wall was compromised, it was repaired at the instance of the first applicant. The damage was documented on each occasion in the form of photographs, which are attached to the founding

affidavit. The damage that was caused on the third occasion has also been photographed and those photographs are also attached to the founding affidavit. The gabion wall has yet to be repaired following the damage sustained on the third occasion.

[7] Upon the occurrence of the third instance upon which the integrity of the gabion wall was compromised, a meeting was held at the property on 31 August 2018 between, inter alia, the applicants' erstwhile attorney, Mr Bilal Malani (Mr Malani), and representatives of the respondent. In a letter dated 11 October 2018, Mr Malani recorded that at the meeting there had been consensus between those present that a hazardous position had developed and that the gabion wall was in danger of imminent collapse. There was also consensus that the respondent should adopt urgent remedial measures which included the repair of the storm water drainage system located along Aster Road. The respondent undertook to commence with urgent remedial measures to repair the storm water drains. Notwithstanding such consensus, the respondent did not act. At no stage has the respondent disputed the accuracy of what Mr Malani stated in his letter.

[8] There being no signs of activity on the part of the respondent, on 20 February 2019, GAP, at the request of the first applicant, directed a letter to the respondent setting out the history of the matter, and indicating that the gabion wall could not be repaired until the respondent itself repaired the storm water system. The author of the letter was Mr Pauselli. The letter broke down the history of the matter into the three occasions when the integrity of the gabion wall was threatened, and explained what happened, and why it happened, on each occasion:

(a) on the first occasion, during January 2011, the cause was attributed to uncontrolled storm water flowing off Aster Road. The road itself developed surface cracks, which were sealed off;

(b) on the second occasion, during November and December 2012, substantial cracks developed in Aster Road. The storm water system was found to be dysfunctional and the broken pipes allowed large volumes of to flow into and infiltrate the soil directly behind the gabion wall. Large scour cavities appeared below the road surface from soil being lost, resulting in the subsidence of Aster Road as a

consequence. As a consequence of such subsidence, additional storm water runoff was attracted to that area.

(c) insofar as the third incident during May and June 2018 was concerned, Mr Pauselli indicated that one section of Aster Road had subsided further. The storm water catch pits and the manholes along Aster Road had suffered further deterioration since the second incident and had become ineffective because of the negative camber of Aster Road. As a consequence, water bypassed the manhole inlets and flowed over the gabion wall causing damage to the second respondent's premises and stock. Mr Pauselli recommended, inter alia, that a camera survey of the storm water system be undertaken by the respondent in order to assess the damage to that system and to assist with the effecting of the necessary repairs. Mr Pauselli's letter, however, did not move the respondent to act, who did not even acknowledge receipt of it.

[9] On 6 November 2020 the applicants' current attorney, Mr Vlcek (Mr Vlcek), wrote to the respondent and indicated, inter alia, that there was a real risk of the gabion wall collapsing, with potentially dire consequences, because of the failure of the storm water system. He demanded that the respondent immediately instruct consulting engineers to consider the problem and agree upon remedial steps required to safeguard the safety of members of the community and the first applicant's property. No response was received from the respondent to this letter either.

[10] Five days after Mr Vlcek's letter, two municipal officials went to the premises and inspected the gabion wall and the storm water system. The same day, 12 November 2020, the respondent's manager of 'Legal and Estates', Ms Sayarika Reddy, wrote to Mr Vlcek and requested the indulgence of one week for the respondent to finalise its investigations into the applicants' complaint. Having been granted the indulgence by Mr Vlcek, the respondent did not revert to him after the requested period of a week.

[11] Rather than wait for the respondent to undertake a camera survey of the storm water infrastructure that Mr Pauselli had proposed should occur, the applicant assumed that responsibility itself, together with the concomitant expense, and

mandated an entity known as Camjet (Pty) Ltd (Camjet), to inspect and photograph the storm water system and prepare a report (the Camjet report).

[12] Before continuing with the narration of the history of the matter, it is perhaps appropriate at this juncture to consider the Camjet report. It is a document of substance: it is some 63 pages long and is replete with dozens of colour photographs taken by a robot operated camera placed within the storm water pipes. The format adopted in compiling the report is to divide the storm water system into parts, identify the part on a sectional diagram, note the position of a point that requires comment on that diagram, and demonstrate the point with a photograph. The photographs depict, inter alia, infiltration points, open joints and points at which tree roots have intruded into the storm water pipe as well as points where seepage is occurring. It is a technical document that would no doubt assist in the carrying out of repairs to the storm water system as it identifies areas where the pipes have failed or are leaking.

[13] The person who compiled the Camjet report, Mr Shalome Dukhea (Mr Dukhea), confirmed his report and the existence of the defects in the storm water pipes in a confirmatory affidavit. Mr Pauselli also delivered a confirmatory affidavit in which he confirmed his involvement in the matter and his findings. These two confirmatory affidavits excited some controversy and their alleged absence from the application papers brought about an application to strike out certain references from the founding affidavit by the respondent. The application to strike out was subsequently abandoned when the matter was argued and nothing more need be said about it.

[14] Reverting to the history of the matter, on 23 November 2020, Mr Vlcek wrote to Ms Reddy and requested a formal response to his letter of 6 November 2020. He also enclosed a copy of the Camjet report. No response was received to Mr Vlcek's letter.

[15] Undeterred, Mr Vlcek wrote another letter to the respondent on 1 December 2020, in which he indicated that the high court would now be approached. This finally elicited a response from the respondent's legal administration officer, Ms Karen Pratt

(Ms Pratt). She indicated that the matter had been submitted to the respondent's senior management for urgent attention and response. Two days later, on 3 December 2020, Ms Pratt wrote to Mr Vlcek and stated that the respondent's general manager for technical services had confirmed that a contractor would be on site to attend to the issue on 8 December 2020. Mr Vlcek wisely wrote again to Ms Pratt and requested that whoever would be on site at the instance of the respondent be furnished with a copy of the Camjet report.

[16] As may perhaps be expected, no contractor presented himself on site on 8 December 2020. Mr Vlcek discovered that the contractor appointed was an entity called GanTrans (GanTrans). He contacted GanTrans and ascertained that it lacked the capacity to assist and had therefore declined to come on site. On 10 December 2020, Mr Vlcek informed Ms Pratt of this development and on that day, another contractor arrived on site. This was Mr Bhengu (Mr Bhengu).

[17] Mr Bhengu had apparently been advised by the respondent that all that he had to do was to replace a storm water pipe in Aster Road. He was not provided with a copy of the Camjet report. The ever industrious Mr Vlcek spoke with him and advised him of the scope of the works that needed to be performed under the supervision of an engineer. Mr Bhengu said that he had no knowledge of any of this. However, on 11 December 2020, Mr Bhengu telephoned Mr Vlcek and said that having discussed the matter with the respondent's general manager, he had concluded that he would only be able to commence the work at the beginning of 2021. Appreciating that the builder's annual holiday break was fast approaching, the first applicant resigned itself to the fact that nothing could be done at that time of the year.

[18] The new year arrived and the builder's holidays came to an end. But by 22 January 2021, the remedial work had not been commenced. Mr Vlcek contacted Mr Bhengu, who stated that he had not yet been properly appointed by the respondent. As a consequence, Mr Vlcek wrote to the respondent on 1 February 2021, expressing his dissatisfaction with the fact that the remedial work had been dragging on for an extended period of time and that, in the circumstances, the applicants had

no choice but to approach this court for relief. This application was then launched. Needless to say, neither Mr Bhengu nor any other contractor came on site thereafter.

[19] However, after this application was launched, the respondent's attorney, Mr Kay Naidoo (Mr Naidoo) wrote to Mr Vlcek on 14 May 2021, and informed him, without any admission of liability, that the respondent intended to perform repairs and maintenance work to the municipal piping system in Aster Road, but that to do so, it required approval from the respondent's council for the funding of such works. A council meeting was due to take place at the end of May 2021, and funding for the repairs would be sought at that meeting.

[20] What happened at the end of May 2021 is not clear. However, three months later, on 6 September 2021, the respondent's attorney wrote to Mr Vlcek and stated that the issue of the repairs had been raised at the respondent's council meeting on 31 August 2021 (no explanation as to what happened at the council meeting at the end of May 2021 was provided) but that:

'Regrettably, the municipality budget cannot accommodate the repair in this financial year.'

In the circumstances, Mr Vlcek was advised that the respondent would now deliver an answering affidavit and its attorneys sought time to do so. The deponent to the answering affidavit that was subsequently delivered is the respondent's general manager of technical services, Mr Simphiwe Nkwanyana (Mr Nkwanyana).

[21] In the answering affidavit, Mr Nkwanyana deals with the merits of the applicants' case and provides counter allegations as to why the applicants' version cannot be sustained. In respect of the majority of those counter allegations, the respondent relies upon the observations, experience and recommendations of its expert. The principal defences raised by Mr Nkwanyana were the following:

(a) he denied that water was leaking through the storm water pipes, seeping into the ground and then impacting upon the gabion wall. The expert appointed by the respondent did not observe any cracks in the road surface adjacent to the wall caused by subsidence, which, it is submitted by Mr Nkwanyana, should be evident if this was the case. Some of the photographs attached to the founding affidavit reveal such cracks;

(b) he made the submission that if water was seeping under the road and permeating the gabion wall, then it would be expected that there would be a water flow out of the wall, or at least at its base, during a period of rainfall. However, the respondent's expert inspected the wall during a rainfall episode on 6 April 2021 and did not make such an observation. No particulars of the duration of the observation or where it was made from were provided;

(c) he repeated the expert's opinion that leakage from the storm water pipes was unlikely, given that the Camjet report stated that the depth of the water in the storm water pipes was at 10% of the volume of the pipes. Mr Nkwanyana states that the pipes were therefore not full nor were they pressurised. The expert held the view that leaking would be prevalent where water pressure forced water out through cracks in the pipe but, in the absence of such pressure, water will follow the path of least resistance. The expert was also of the view that the Camjet report does not indicate the volume of water seeping through the joints nor does it show any damages to the retaining wall as a result of such seepages. This latter fact is hardly surprising because the Camjet report was confined to the interior of the storm water system and did not focus on the gabion wall;

(d) he indicated that the expert was of the further view that the top of the gabion wall was not covered with vegetation, and that logic therefore dictated that water would enter the structure of the gabion wall from the top when it rains. The photographs show vegetation on the top of the gabion wall; and

(e) he repeated the expert's proposition that the gabion wall is designed to retain soil whilst allowing only water to seep through the stones. Water seepage should therefore not present a threat to the structural integrity of the wall.

[22] It will be discerned from the foregoing that virtually the entirety of the respondent's rebuttal of the applicants' case is predicated upon the views and opinions of its expert witness. The difficulty for the respondent is that it has never identified who that expert is. There is no affidavit delivered on behalf of the respondent by any person who identifies himself as the expert to whom reference is made by Mr Nkwanyana in his answering affidavit. In fact, the only person who has deposed to an affidavit on behalf of the respondent is Mr Nkwanyana himself. Mr Nkwanyana has never identified himself as being an expert capable of providing opinions on the issues in this matter.

[23] What Mr Nkwanyana states, while being interesting, is accordingly legally irrelevant.³ The observations, findings, and propositions of the respondent's expert witness is hearsay in the mouth of Mr Nkwanyana. I am at a loss to understand why the respondent would make reference to the observations and findings of its expert, yet never name him nor produce an affidavit from him. No application was made in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988 to have any of the hearsay evidence admitted. The consequence thereof is that there is nothing to rebut the principal allegations made by the applicants' experts regarding the reason why the integrity of the gabion wall has been repeatedly compromised.

[24] The respondent consequently finds itself in a difficult position. In an apparent attempt to extricate itself from this difficulty, the respondent contends that there are disputes of fact which render it impossible for this court to determine this application without the leading of oral evidence.

[25] Our courts are required to robustly approach disputes of fact. In *Soffiantini v Mould*,⁴ the court outlined this approach and stated as follows:

'In the case of *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*,⁵ Murray, then AJP, said:

"A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination . . . and to ascertain whether the denials are not fictitious intended merely to delay the hearing."⁶

[26] For a dispute to exist, there must be a competing factual version based upon admissible evidence. In the absence of any admissible evidence gainsaying the version of the applicant's witnesses, there is no dispute of fact in the matter. I must

³ *Zungu NO v Minister of Safety and Security* 2003 (4) SA 87 (D) at 90D; *Rautini v Passenger Rail Agency of South Africa* [2021] ZASCA 158 para 11.

⁴ *Soffiantini v Mould* 1956 (4) SA 150 (E).

⁵ *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165.

⁶ *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E–H.

therefore conclude that there are no material disputes of fact that require this matter to be referred to the hearing of oral evidence, and I decline any invitation by the respondent to make such an order.

[27] Besides the inadmissible evidence used to rebut the technical aspects of the applicants' case, there were three further arguments advanced on behalf of the respondent:

(a) the first was that there was no evidence that the gabion wall had been constructed according to the approved plans. The respondent, apparently, has no record of a certificate of completion in its files. That falls short of a positive averment that there is no certificate of completion. The applicants, in reply, say that there is one but have not put it up. This is because, according to Mr Hoar, it is irrelevant: the respondent cannot permit harm to occur to the first applicant's property, whether what is upon it is constructed lawfully or unlawfully. Given the conduct of the respondent as already described, I am not surprised that there is no record in the respondent's files of this certificate. But that does not mean that it does not exist. In my view, Mr Hoar is correct that the certificate is of no real consequence;

(b) the second point was that any harm suffered from the run off of water from Aster Road was as a consequence of the camber of the road, and that this camber had always been in existence but had not been taken into account by the applicants' expert when designing and constructing the gabion wall. That argument had an initial allure to it, which soon faded when Mr Hoar pointed out that the photographs reveal that the camber of Aster Road has changed as a consequence of the failure of its surface. Photographs reveal that the road surface was initially cambered away from the gabion wall, but as a consequence of the damage occasioned to Aster Road, water is now capable of flowing off Aster Road towards the gabion wall; and

(c) the final point related to the photographs relied upon by the applicants. Ms Olsen said that witnesses needed to speak to those photographs and needed to describe what was depicted therein. Mr Hoar pointed out that the deponent to the founding affidavit did precisely that in the founding affidavit, describing what could be seen in each of the photographs that were attached to the founding affidavit.

[28] None of these points materially assisted the respondent's defence.

[29] The respondent's conduct has been consistent with an acknowledgment by it of the existence of a problem with the storm water system in Aster Road and that road surface. Once alerted to the problem, the respondent did not deny the very existence of that problem in either word or deed. That was the position until the very moment that the respondent's council indicated that there were insufficient funds to pay for the remedial work required. It is only at that juncture that a defence was conjured up. The respondent's acknowledgment of the existence of the problem was initially manifested through the instructing of the first contractor, GanTrans, and, thereafter, Mr Bhengu to go on site and attend to the problem. The strength of the applicants' version, and the corresponding weakness in the respondent's position, was reinforced by the fact that the respondent acknowledged, in writing, that it intended to carry out repairs to the storm water system in Aster Road, and that it was prepared to formally make application to the respondent's council for funds to allow this to occur. I do not lose sight of the fact that the respondent made no admission of liability in doing so. But it is equally so that the respondent would not seek funds to repair a storm water system that it regarded as being complete, fit for purpose, and functional. To do so would be nonsensical.

[30] Counsel for the respondent submitted that the respondent had never stated that the storm water system did not require repairs. Its position was that the storm water system was not the cause of the failure of the gabion wall. A civil engineer, Mr Pauselli, has provided an explanation for the weakening of the gabion wall. It is not fanciful and is supported by evidence of the decrepit storm water system above the gabion wall and the poor state of Aster Road. Mr Dukhea has confirmed the existence of the defects in the storm water system and has provided tangible evidence thereof. There is nothing from the respondent that lessens the impact of the evidence of these two witnesses.

[31] I am accordingly satisfied that the applicants have on a balance of probabilities established that the damage to the gabion wall has been occasioned by the water escaping from the pipes of the storm water system, and from water being discharged from the surface of Aster Road onto the gabion wall.

[32] Something needs to be said about the conduct of the respondent. It has been tardy and impolite in the extreme, choosing not to reply to correspondence legitimately sent to it by the applicants' attorneys. It has, through its conduct, unnecessarily dragged this matter out for years. It has said that it will act and then did not act. It has ignored what it acknowledged was a potentially dangerous situation and has put the life and limb of its constituents at risk. This is not the service our country requires from a municipality. Such conduct is unworthy of an institution intended to serve the people. It warrants a punitive costs order.

[33] The respondent has raised certain criticisms concerning the manner in which the orders sought in the notice of motion have been framed:

(a) paragraph 1 is criticised for the fact that it references the Camjet report. The argument advanced in this regard is that the respondent, if it is to be ordered to repair the storm water system, must be free to repair it as it deems necessary. While the Camjet report may be a useful tool, it should not be elevated to being the standard required for the remediation of the storm water system nor should the respondent be in contempt of any order granted if it does not make use of the Camjet report. I am not certain that this is what was intended by paragraph 1, but perhaps it may be sensible to amend the relief to avoid reference to the Camjet report and to give the respondent a free hand in how it intends approaching the repairs; and

(b) paragraphs 3 and 4 are criticised as being impermissible and bad in law. The criticism was based on the fact that the respondent could never ensure that no water ever escaped from the storm water system or that no water ever flowed off Aster Road. Mr Hoar conceded that perhaps the demand that no water should escape from the system was relief that his client could live without. Perhaps he was over generous in that regard and I do not intend holding him to that concession. But he was less obliging regarding the run off of water from Aster Road, dealt with in paragraph 4 of the notice of motion. He maintained that controlling the run off from the surface of Aster Road was fundamental to the preservation of the first applicant's property. I think that he is correct in that regard. I intend amending the relief to avoid the respondent easily being accused of being in contempt of court.

[34] In the circumstances, I grant the following order:

1. The respondent is directed to do all things necessary, including but not limited to, the appointment of an appropriate contractor and/or engineer, to replace and/or repair the failed storm water pipes in Aster Road, Umzinto, situated immediately above the first applicant's property at 357 Aster Road;
2. The respondent is directed to ensure that paragraph 1 of this order is complied with within four months of the service of this order upon it.
3. The respondent is directed to ensure that upon completion of the work to be performed in compliance with the order in paragraph 1, the storm water system is fit for purpose and that in the ordinary course of events, storm water shall not escape therefrom.
4. The respondent is directed to ensure that upon completion of the work to be performed in compliance with the order in paragraph 1, Aster Road shall not in the ordinary course of events, discharge water onto the gabion wall belonging to the first applicant.
5. The respondent is directed to pay the applicants' costs on an attorney and client scale.

MOSSOP J

APPEARANCES

Counsel for the applicant

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Instructed by

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Pietermaritzburg

Date of Hearing :2 August 2022

Date of Judgment :10 August 2022