

SOUTH AFRICA / JUDGMENT

Featherbrooke Homeowners Association NPC v Mogale City Local Municipality (1106/2022) [2024] ZASCA 27 (22 March 2024) [2024] ZASCA 27

COURT

Supreme Court of Appeal

BEFORE

Makgoka, Mothle, Meyer, Kathree-Setiloane, Masipa

CASE / FILE NUMBER

1106/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1106/2022

FEATHERBROOKE HOMEOWNERS'

ASSOCIATION NPC

(Registration Number 2000/0067229/08)

APPELLANT

and

MOGALE CITY LOCAL MUNICIPALITY

RESPONDENT

Neutral citation: Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality
(1106/2022) [2024] ZASCA 27 (22 March 2024)

Bench: MAKGOKA, MOTHLE, and MEYER JJA, and KATHREE-SETILOANE AND MASIPA AJJA

Heard: 15 November 2023

Delivered: 22 March 2024

Summary: Court orders – need for clarity – court failing to make orders on disputes between parties in granting interdict – proper discretion not exercised – court order inchoate.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Makume, Thwala and Adams JJ sitting as a court of appeal):

1 The appeal is upheld with no orders as to costs.

2 The order of the Full Court of Gauteng Division, Johannesburg is set aside and replaced with the following:

‘1 The appeal is upheld, with no order as to costs;

2 The order of the High Court is set aside and replaced with the following:

‘1 The matter is remitted to the High Court to determine:

- (a) whether, in addition to Mogale City, any of the originally cited State entities is responsible for the remedial work at the Estate, and
- (b) an appropriate order in respect of each of the said State entities.’

Makgoka JA (Mothle and Meyer JJA, and Kathree-Setiloane and Masipa AJJA concurring):

- [1] This appeal is about a misstep by the Gauteng Division of the High Court, Johannesburg (the High Court) per Mahalelo J. That court failed to resolve the lis between the appellant, Featherbrooke Homeowners’ Association NPC (Featherbrooke), and each of the five originally cited respondents. Instead, it inexplicably made an order against only the respondent, Mogale City Local Municipality (Mogale City) in the form of a structural interdict.
- [2] On appeal to it by Mogale City, the Full Court saw nothing wrong with this inchoate order of the High Court. It simply upheld the appeal and set aside the order of the High Court and replaced it with an order dismissing Featherbrooke’s application with costs. Featherbrooke now appeals to us with the special leave of this Court.
- [3] The errors made by the two courts below have resulted in an unnecessary appeal to this Court, with attendant wasted costs and a delay in resolving the issues between the parties. This is regrettable.

Background

facts

- [4] Featherbrooke Country Estate (the Estate) is a residential complex situated in Mogale City Local Municipality (Mogale City) in the rural western part of Gauteng Province. Mogale City is a local municipality established in terms of s 12(1) read with ss 14(2) and 90(2) of the Local Government: Municipal Structures Act.[1] The Estate was declared an approved township in 1996. Its affairs are managed by Featherbrooke, a registered non-profit company.
- [5] The Muldersdrift se Loop River (the river) traverses the area of jurisdiction of the City of Johannesburg, right through the Estate in the area of jurisdiction of Mogale City, and ends in the Hartbeespoort Dam in the North West Province. According to Featherbrooke, historically, the river came down into the Estate as a manageable stream which was far smaller in volume and velocity. However, over the years, due to an increase in urban development and climate change, the volume and quantity of storm water into the river changed.
- [6] During annual rainfalls, the velocity of stormwater flowing through the Estate caused an increase in riverbank flooding. Flooding and stormwater placed pressure on the river embankments and beds, corroded them, and made them highly unstable and dangerous, resulting in flooding. This, Featherbrooke said, placed the Estate at risk of electrocution, exposure to sewage waste and damage to property. As a result, Featherbrooke said that since approximately 2010, it had sought the assistance of the Department of Water and Sanitation (the Department), Mogale City and City of Johannesburg. This was all in vain.

In the High Court

- [7] In May 2020, Featherbrooke launched a two-part application in the High Court against the following entities as first to sixth respondents, respectively: Mogale City; City of Johannesburg; Minister of Water and Sanitation (the Minister); the Member of the Executive Council of the Gauteng Provincial Government for Agriculture and Rural Development (the MEC); Johannesburg Roads Agency (Pty) Ltd; and West Rand District Municipality.
- [8] In part A, which was brought on an urgent basis, Featherbrooke sought an interim structural interdict jointly, severally and in the alternative, against these respondents. The following relief was sought: first, as against Mogale City, City of Johannesburg and the Johannesburg Road Agency, in the alternative, to ‘immediately and in future do all things necessary to repair, underpin, remediate and manage the stream beds adjacent to [Featherbrooke’s] security fencing . . .’. The remedial work sought by Featherbrooke included the insertion of gabions into the riverbed and embankments, and the moderation of the quantity, volume and flow of the Loop river through attenuation dams and culverts.

- [9] Second, Featherbrooke also sought an order for Mogale City, City of Johannesburg and the Johannesburg Road Agency, in the alternative, to repair State-owned infrastructure near the Estate, which is exposed due to chronic flooding of the river, including sewer and power-related infrastructure.
- [10] Third, as against the Minister, Featherbrooke sought an order in similar terms to the one sought against Mogale City, City of Johannesburg and Johannesburg Road Agency. In addition, Featherbrooke sought an order requiring the Minister to moderate ‘the quantity, volume and flow of the water in the [Loop River] flowing from the Walter Sisulu Botanical Gardens and into the river’; and to ‘do all that is necessary to prevent the erosion of the riverbank and to protect the integrity of [Featherbrooke’s] boundary security fence along the riverbank’. Also, to ‘immediately and in future do all things necessary to mitigate, remediate and prevent flooding of [Featherbrooke’s] housing Estate by the [Loop River] and or Featherbrooke’s boundary security fence’ by doing certain remedial work, including: (a) insertion of gabions into the riverbed and embankments; (b) moderation of the quantity, volume and flow of the Loop river through attenuation dams and culverts; (c) moderating the quantity, volume and flow of the water in the river from ‘the Walter Sisulu Botanical Gardens into the river; (d) prevention of the erosion of the riverbank and to protect the integrity of Estate’s boundary security fence along the riverbank.
- [11] Fourth, Featherbrooke sought an order that Mogale City, Johannesburg City, the Minister, the MEC and the Johannesburg Roads Agency, be directed to provide it with a report back on the implementation of the structural interdict. Fifth, Featherbrooke sought an order containing measures it would be entitled to embark upon in the event of non-compliance with the interdict.
- [12] In part B, Featherbrooke sought an order in terms of which any of the respondents would show cause why the relief sought in part A should not be made final.
- [13] In its founding affidavit, Featherbrooke alleged that an increase of the volume of stormwater into the river was due to an increase in urban development and hard surfaces, climate change and changing weather patterns. This had led to the following: (a) exposure of State infrastructure such as sewer lines and underground cables; (b) a collapse of the riverbeds and embankments; (c) a loss of riparian forest leading to accelerated erosion and bed collapse; and (d) damage to the Estate’s infrastructure.
- [14] The MEC and West Rand District Municipality did not oppose the application while Mogale City, City of Johannesburg, the Minister, and Johannesburg Roads Agency, opposed the application. City of Johannesburg and Johannesburg Roads Agency filed a joint answering affidavit. Each of the opposing respondents took a preliminary point that the matter was not urgent. Substantively, they all denied responsibility and relied on several bases, to which fuller reference will be made later.

[15] Part A (the urgent application) was heard on 9 June 2020. On 10 June 2020 it was struck from the roll for lack of urgency, with costs. However, the court gave the following directions in respect of the future hearing of the matter:

‘2 The respondents are authorised to supplement their answering papers by Monday 13 July 2020 at 16h00;

3 The applicant is authorised to supplement its replying papers by Monday 27 July 2020 at 16h00;

4 The parties are to deliver supplementary heads of argument and practice notes by Monday 10 August 2020 at 16h00;

5 The registrar is directed to enrol the matter on the opposed motion roll as a matter of urgency, alternatively the parties may approach the Deputy Judge President for allocation of the matter as a special

motion of long duration . . .’

[16] The directions envisaged in the above order were complied with. After the filing of the supplementary affidavits, the positions adopted by the respective opposing parties crystallized as follows.

Mogale City

[17] Management of the environment is a national and provincial competence. Hence, the remediation measures sought against it were constitutionally not within its powers. Specifically, the management of floods does not fall within the competence of a sphere of local government. As such, Mogale City argued that it would be constitutionally incompetent for it to be ordered to do the things that Featherbrooke required it to do in respect of the flooding, as these fall outside its legal competence. Thus, Mogale City disavowed any statutory responsibility to take remedial measures caused by the flooding. It said that Featherbrooke should look to the Minister in terms of the provisions of the National Water Act[2] (the Water Act).

[18] Regarding the relief sought by Featherbrooke to repair, remediate and manage the State-owned infrastructure in and near the Estate which is exposed due to the chronic flooding, Mogale City raised budgetary considerations. It averred that it had a maintenance plan which was supported by a process-approved budget. It thus could not simply be ordered to repair the infrastructure which was not budgeted for.

City of Johannesburg and the Johannesburg Road Agency

[19] In addition to the lack of urgency defence, the City of Johannesburg and the Johannesburg Road Agency raised a misjoinder defence. They asserted that since the Estate is situated in the area of jurisdiction of Mogale City, and that the river is owned by the Department, they have no role to play in the matter. They accordingly requested that the interim and final interdictory relief sought against them by Featherbrooke be dismissed. They further denied

that they owed any obligation to Featherbrooke as they are constitutionally only responsible for providing services to the residents within their area of jurisdiction, the Johannesburg Metropolitan area.

The Minister

[20] The Minister contended that the Department did not have any legislated obligation to take the remedial steps sought by Featherbrooke. In support of this contention, the Minister asserted that:

- (a) there was no link between the harm suffered by the Estate and any conduct or omission of the Department as the custodian of the river. Instead, Featherbrooke had attributed the increase in the volume of stormwater into the river to an increase in urban development, climate change and weather patterns.
- (b) the damage to the Estate was due to poor planning on the part of the developers of the Estate, and the Department was not involved in the grant of the approval for the establishment of the Estate.
- (c) in previous communications between the parties, Featherbrooke had accepted that it, and not the Minister, bore the responsibility to protect its boundary fence.

[21] On these grounds, the Minister asserted that it was Featherbrooke's obligation to undertake the requisite remedial measures, at its expense, to prevent harm to the Estate. To do so, Featherbrooke was required to apply for and obtain a water licence in terms of the Water Act. Its election not to apply for such a licence after being advised to do so, was fatal to Featherbrooke's application.

[22] The Minister also contended that Featherbrooke had impermissibly sought direct reliance on s 24 of the Constitution in breach of the trite principle of subsidiarity.[3] The Minister pointed out that the legislation envisaged in s 24 of the Constitution is the National Environmental Management Act.[4] Featherbrooke's failure to rely on NEMA, according to the Minister, was fatal to its case.

[23] The matter came before the High Court on 15 August 2020. Its judgment was delivered on 25 January 2021. The pivot of the judgment was that 'there is a legislated and constitutional duty on all spheres of government to mitigate and prevent future disaster type situations'. Having satisfied itself that such an interdict was warranted, the High Court ordered Mogale City to effect the remedial work sought, together with the ancillary relief sought by Featherbrooke with regard to regular reports by Mogale City to Featherbrooke on the implementation of the order, 'within 30 days of the order obtained in Part A' and thereafter, 'every three months'. The High Court further granted the parties 'leave to supplement the papers in Part B.' Costs were ordered 'to be determined at the determination of Part B.' The High Court subsequently granted Mogale City leave to appeal its order to the Full Court, with the proviso that '[t]he operation of [its order] is suspended pending [the] appeal'.

[24] It is perhaps opportune at this stage to comment on the nature of the order granted by the High Court against Mogale City. It is based on the relief sought by Featherbrooke, which was framed as an application for an interim interdict. But in substance, it was for a final interdict. This is borne out by the nature of the order it granted against Mogale City. Almost everything that Mogale City has been ordered to do is permanent, and imposes on-going obligations on it. No court would be able to reverse any of those in a subsequent hearing. The High Court failed to grasp this rudimentary conceptualisation, and erred by applying the test for an interim interdict, instead of one for a final order.[5] The order is, in substance, final. This rendered nugatory, the envisaged hearing in part B.

In the Full Court

[25] With no order having been made against any of the originally-cited State respondents, Mogale City was the only appellant before the Full Court. That court upheld Mogale City's appeal with costs and set aside the order of the high court. It reasoned that to remedy the situation at the Estate, Featherbrooke was obliged to obtain a water licence from the Department. Since it failed to apply for such a licence, its case had to fail. The Full Court also stated that the developer of the Estate had not complied

with s 144 of the Water Act by failing to clearly determine the flood lines. Thus, the court exonerated Mogale City of any responsibility

and held that it was a matter between Featherbrooke and the Department.

In this Court

[26] The parties adopted the same stances as they did in the High Court and the Full Court. The starting point is to identify the source of the flooding into the Estate. A major contributing factor to the damage caused to the Estate seems to be the velocity and pace of water which places pressure on the river's embankments and beds, resulting in corrosion and instability. Thus, the source of the problem is the stream of water, which leads to the collapse of the riverbeds and embankments, which in turn, results in flooding into the Estate. To remedy the situation, among other things, the water stream must be regulated or diverted. This is an

activity which is regulated by the Water Act.

[27] In terms of the Water Act, all rivers in the country belong to the government, under the trusteeship of the Minister. The purpose of the Water Act as set out in s 2, is to 'ensure that the nation's water resources are protected, used, developed, conserved, managed and controlled' in ways which take into account amongst other factors, 'managing floods and droughts'. [6] Below I briefly outline its relevant provisions. These are ss 21, 22, 36 and 37 of the Water Act.

[28] Sections 21 and 22 fall under chapter 4 of the Water Act, which is titled 'Use of Water'. Part 1 of Chapter 4 sets out the general principles for regulating water use. It provides that '[w]ater use is defined broadly,

and includes taking and storing water, activities which reduce stream flow . . .’ (Emphasis added.). Section 21 sets out what constitutes ‘Water use’ for purposes of the Water Act. This includes, among other things, the following: (a) impeding or diverting the flow of water in a watercourse;[7]

(b) engaging in a stream flow reduction activity[8] and (c) altering the bed, banks, course or characteristics of a watercourse.[9]

[29] Part 4 concerns ‘Stream flow reduction activities’. It allows the Minister, to regulate land-based activities which reduce stream flow, by declaring such activities to be stream flow reduction activities. Whether or not an activity is declared to be a stream flow activity, depends on factors such as the extent of stream flow reduction, its duration, and its impact on any relevant water resource and on other water users. Part 5 deals with ‘Controlled activities’. Section 37 identifies what constitutes a controlled activity. Among such activities, is ‘a power generation activity which alters the flow regime of a water resource’.[10]

[30] To recap, Mogale City was ordered by the High Court to: (a) insert gabions into the riverbed and embankment, and (b) moderate the quantity, volume and flow of the water in the river through attenuation dams and culverts. To implement these, Mogale City would be required, among others, to: (a) impede or divert the flow of water in a watercourse; (b) engage in a stream flow reduction activity;

(c) alter the bed, banks, course or characteristics of a watercourse; (d) engage in a stream flow reduction activity and (e) engage in an activity which alters the flow regime of a water resource’. This would violate each of the relevant provisions of the Water Act referred to earlier, if done without the permission of the Minister. It is evident from a cursory survey of the relevant provisions of the Water Act that the involvement of the Department is, on the face of it, implicated.

[31] Because the High Court did not provide any reasons for holding only Mogale City liable, to the exclusion of all other originally-cited respondents, we do not have the benefit of its reasons for that decision, and crucially, whether any of the originally-cited State entities had been formally absolved from liability. However, on a reading of the judgment as a whole, the High Court appears to have adopted the view that all spheres of government were responsible for ensuring that damage to the Estate is arrested, and that remedial steps had to be undertaken by the relevant entities.

[32] This is evident from the high court’s findings that:

(a) over ten years Featherbrooke had sought assistance from ‘state departments’ to remediate, mitigate and rehabilitate the river and protect state infrastructure alongside the river which causes threat to life and limb.

(b) No steps have been taken by any of the ‘relevant departments’ to remedy the situation, ‘except for the state departments to shift the blame from one department to one another’.

- (c) Neither Mogale City, City of Johannesburg nor the Minister have indicated if they had ‘acted in the discharge of their constitutional obligations or statutory obligations imposed on them; despite ‘the departments describing the situation faced

by Featherbrooke as a “disaster” and “urgent”;

- (d) there seems to have been no cooperative management between Mogale City and City of Johannesburg to remedy the situation.

[33] Finally, when it considered the requisites of an interim order, the High Court said the following:

‘[Featherbrooke] has no other satisfactory remedy and the balance of convenience favours [it] to the extent that its constitutional rights should be protected which protection outweighs any inconvenience for the respondents to find funds internally or externally to try and mitigate the risky condition of the river in question.’ (Emphasis added.).

[34] Given these findings, the High Court’s decision to order only Mogale City to effect remedial work, despite the court’s above-mentioned findings that the State-entities were all liable, is bafflingly inchoate, to say the least.

[35] Besides, this has had a negative practical impact, which is two-fold. The first is this. During the pre-litigation stage, there was no clarity as to which State entity, if any, was responsible for the much-needed remedial work. Featherbrooke had, as a result, carefully cast its net wide to include the relevant State entities. It asserted a case against each one of them in the alternative. Thus, Featherbrooke had delineated a lis between it and each of the originally cited State entities. The High Court was therefore obliged to resolve it in respect of each of the State entities.

[36] Its failure to do so impacted on how Featherbrooke prosecuted and argued the appeal, both before the Full Court and in this Court. In the High Court it attributed liability to do remedial work on the originally cited State entities jointly and severally, and in the alternative. In this Court, because of the order of the High Court, it was constrained to look only to Mogale City. By limiting the remedial work only to Mogale City, the High Court had, without any explanation, denuded and emasculated the remedy sought by Featherbrooke from it.

[37] Second, the order lacks clarity to the extent that Mogale City is expected to do things that only the Department can authorise it to do. The High Court failed to give effect to the salutary injunction by the Constitutional Court in *Eke v Parsons*[11] that court orders must be framed in unambiguous terms and must be practical and enforceable. It must leave no doubt as to what the order requires to be done. That Court explained it as follows:

‘If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental principle of our law that a court

order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person to whom it applies, the discretion to comply or disregard it.’[12] (Emphasis added.)

[38] During the hearing of this appeal, we invited counsel for the parties to embark with us on a fair and objective analysis of the order of the High Court. Counsel obliged, and we are grateful to them in this regard. At the end of that exercise, it became clear that some of the things Mogale City has been ordered to do, would need the involvement of the Department in terms of the relevant provisions of the Water Act which are referenced earlier in the judgment.

[39] The conclusion is therefore inescapable that the High Court did not exercise its discretion properly. Although the Full Court correctly set aside order of the High Court, this does not help address the failure by the High Court to decide the lis in respect of each of the originally cited State entities.

[40] What do we do? The answer is not easy. The originally cited State parties are not before us, as there is no cross-appeal by Featherbrooke against the order of the High Court excluding them. As a result, this Court does not have the power to make any order against any of them. The appropriate order, in my view, would be to set aside the order of the Full Court and remit the matter to the High Court, which must decide whether, in addition to Mogale City, any of the originally cited State entities is obliged to effect remedial work at the Estate, and the basis of such obligation.

[41] The court must make an order in respect of each of those entities it finds to bear the obligation. This could conveniently be done without a need for filing of further affidavits, or another hearing. The matter was fully ventilated in the High Court after the filing of affidavits (both original and supplementary), and before the Full Court. The only missing aspect in the judgment of the

High Court is the issue referred to above. But we are not prescriptive in this regard. Should the High Court require a further

hearing, or supplementary heads of argument on any issue, it is at large to give the necessary direction.

[42] Lest there be any uncertainty, the effect of what is set out in the preceding paragraphs, and the order we make, is that we have not determined the merits of the appeal by Featherbrooke against Mogale City. We simply restore the parties to the point when the High Court reserved judgment. As such, we neither accept nor reject the High Court’s findings and order that Mogale City is liable to effect remedial work at the Estate. The same goes for the Full Court’s order. We neither accept nor reject the reasoning which underpins its order, which is two-fold, namely:

(a) Featherbrooke was solely responsible for the remedial work at its expense, once it obtained a water licence from the Department; (b) neither Mogale City, the Department, nor any other State entity, bears any obligations to effect the remedial works.

[43] I make this point because there is likelihood that once the High Court had complied with the order we are about to make, the matter might find its way back to this Court. None of the parties should assert that the merits as between Featherbrooke and any of the parties had already been disposed of by this Court in this appeal.

[44] There remains the issue of costs. This case presents uniquely unusual circumstances, brought about by the errors of the High Court as set out above. For this reason, it would not be appropriate to mulct any of the parties with a costs order. Besides, none of the parties achieved substantial success on appeal. In the result, the appropriate order would be that each party should pay its own costs.

[45] The following order is made:

2 The order of the Full Court of Gauteng Division, Johannesburg is set aside and replaced with the following:

TM MAKGOKA

JUDGE OF APPEAL

APPEARANCES:

For appellant: J C Uys SC (with him S J Martin)

Instructed by: J J Badenhorst & Associates Inc., Roodepoort

Lovius Block Inc., Bloemfontein

For respondent: F J Nalane SC (with him S Qagana)

Instructed by: Mogaswa Inc., Roodepoort

Van der Berg Van Vuuren Attorneys, Bloemfontein.

[1] 117 of 1998.

[2] 36 of 1998.

[3] That principle is to the effect that where legislation has been enacted to give effect to a constitutional right, a litigant must either rely on that legislation or challenge its constitutionality. See *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33; 2010 (4) BCLR 312 (CC) para 50; *My Vote Counts NPC v Speaker of the National Assembly and Others*

[2015] ZACC 31; 2016 (1) SA 132 (CC) paras 44-66 and 160-161.

- [4] 107 of 1998.
- [5] An applicant for such an order must show a clear right; an injury actually committed or reasonably apprehended; and the absence of similar protection by any other ordinary remedy. *Setlogelo v Setlogelo* 1914 AD 221 at 227. These requisites have been restated by this Court in a plethora of cases, most recently in *Hotz and Others v University of Cape Town*
- [2016] ZASCA 159; [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) para 29; *Van Deventer v Ivory Sun Trading 77 (Pty) Ltd* 2015
- (3) SA 532 (SCA) [2014] ZASCA 169 para 26; and *Red Dunes of Africa v Masingita Property Investment Holdings*
- [2015] ZASCA 99 para 19. They were affirmed by the Constitutional Court in *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431 (CC) para 38.
- [6] Section 2(k).
- [7] Section 21(c).
- [8] Section 21(d).
- [9] Section 21(i).
- [10] Section 37(c).
- [11] *Eke v Parsons*
- [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 64.
- [12] *Ibid* para 74.

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