FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case Number: 1462/2014

In the matter of:-

LAURIKA KOEN Applicant

and

KEALY SAMANTHA BUBB 1st Respondent

PETER JOHN BUBB 2nd Respondent

HEARD ON: 14 AUGUST 2014

DELIVERED ON: 21 AUGUST 2014

MOLEMELA, J

[1] The applicant and the two respondents occupy adjoining residential properties. The applicant has brought an application for a mandatory interdict enjoining the respondents to construct a drainage channel on their erf, designed by a qualified engineer, so as to direct storm water from their erf to the street.

[2] It is common cause that when the respondents purchased their property, foundations for the extension of the house had already been laid by the previous owner and the respondents then went on to complete the top structure in accordance with those foundations. The respondents at some stage learnt that the improvements they had made on their property were not in accordance with the building plans that were approved by the municipality. It is not disputed that a part of the respondents' property extends beyond the common boundary by

approximately 0.33m. The applicant bought her property soon after the respondents had finished with the extensions to their property. The common boundary consists in part of a common pre-cast concrete wall and in part a wall of the applicant's outbuilding.

[3] It is furthermore not disputed that rainwater accumulates at the low point of the respondents' erf near the parties' common boundary wall. It is common cause that the applicant installed paving as well as a drainage system in the respondents' erf at her own expense in order to dispose of this water. The system consists of an inlet on the respondents' erf connected to a subterranean pipe running across applicant's erf to a discharge point in the street.

[4] The applicant averred in her founding affidavit that the respondents have blocked the inlet and have planted vegetation around it which prevents water from entering the inlet, resulting in the system no longer being able to dispose of storm water. The upshot of all this, according to applicant, is that water accumulates against the outbuilding wall and the boundary wall, causing flooding of the applicant's outbuilding and consequential damage to the wall. According to the applicant, this state of affairs is, *inter alia,* due to the fact that the natural flow of storm water from the respondents' erf to the street was cut off by improvements made to the respondents' house.

[5] The respondents aver that the system that is currently in place is effective and worked perfectly well even on an occasion when the city had experienced heavy rainfall. The respondents assert that they have a video recording which shows how effectively the storm-water is dissipated through the current system. The respondents deny that they have blocked the drainage inlet and that they have failed to keep the inlet free of debris. They also deny that water dams up against the boundary and outbuilding wall.

[6] The respondents' initial stance as set out in their papers was that the matter be referred for oral evidence as there were several disputes of fact that could not be resolved on the papers, especially considering that such issues could conclusively be determined by considering video evidence, which could only be presented via *viva voce* evidence. They contended that the video evidence would serve to refute the applicant's claims and prove the efficiency of the drainage system that is in place. They further contended that expert evidence, possibly coupled with an inspection *in loco,* would have to be adduced in order to decide the issue pertaining to the natural flow of water in the area in which the parties reside.

[7] Subsequent to the applicant's argument on the merits, in which the applicant unequivocally argued against a referral of the matter for the hearing of oral evidence, the respondents' counsel withdrew his initial proposition. The respondents' counsel submitted that since the applicant was not amenable to a referral of the matter for oral evidence, the respondents' application ought to be dismissed. He pointed out that since none of the two parties were in favour of a referral of the matter for oral evidence, the court ought not to make such a referral *mero motu.* I will return later to this aspect.

[8] A consideration of the papers reveals that the applicant, in her founding affidavit, largely based her claim on two assertions: firstly, that the respondents were blocking the inlet with plants and a plastic bag and, secondly, that the respondents failed to keep the inlet clear, resulting in the drainage system not allowing water to go through. The essence of her claim was that it was the aforesaid conduct of the respondents that led to the system being ineffective.

[9] The respondents in their answering affidavit denied any wrongful conduct on their part and placed reliance on video evidence that would conclusively refute the applicant's claims. The applicant in her replying affidavit then went on to raise an issue that she had not raised in the

founding affidavit, averring that the draining pipe was simply not capable of controlling the flow of water. It needs to be borne in mind that the pipe in question is the one channelling water from all sources and not only from the respondents' property.

[10] The respondents also vehemently denied that water dams up in their property at the boundary of the applicant's property or that the extensions had the effect of preventing rainwater from flowing from their erf to the street. According to them, rainwater from their erf did not flow onto Champagne street even before the extension was effected. They also dispute that the system that is currently in place is ineffective and aver that it works well and there is no need for its replacement.

[11] This matter turns on the determination of whether or not the existing system operates adequately and effectively to convey water from the problem area to the discharge point. The issue that goes to the heart of this application is whether the drainage system that is currently in place has proven ineffective due to the respondents planting a tree and other plants in the area of the weir and blocking the inlet with a bag. This is an issue that cannot be determined on the papers, given the disputes of fact that have already been alluded to. As stated before, none of the parties have requested that the matter be referred for the hearing of oral evidence. I am not inclined to do so *mero motu.* I have taken into consideration that counsel for the applicant alluded to unnecessary costs which this step may cause the applicant to incur. I have also taken into account that there are numerous factual disputes in this matter. It is apposite to refer to the remarks made by the court in the case of **Joh-Air (Pty) Ltd v Rudman** 1980 (2) SA 420 (T) where it was stated as follows:

> "It requires in my view a bold step by a presiding judge in an opposed application to refer the matter to evidence or trial *mero motu*, because it is a real possibility that the applicant had decided not to ask for such procedure to be followed because he may not want to be involved in the cost thereof; his

> prospects of success after studying the answering affidavits, may be slender; it may possibly lead to an undesired protracted hearing; the amount involved may be small; the respondent may be a man of straw or on account of any of the other usual considerations in deciding whether or not to apply for the provisions of Rule 6(5)(g) to be invoked." (My underlining for emphasis)

[12] The applicant argued that the issues can be resolved on the basis of the common cause facts notwithstanding the numerous factual disputes that have already been alluded to. He submitted that the issues could be determined on the basis of the common cause facts alone, as set out in paragraph 1.1 to 1.8 of his heads of argument. I disagree with this contention. As I see it, the high water mark of these common cause facts is the respondents' acknowledgment that rainwater collects at the low end of their erf near the common pre-cast boundary wall, which is an area corresponding more or less with the problem area marked by the applicant.

[13] I am of the view that the aforesaid common cause facts do not detract from (i) the respondents' denial that the roof that over-extends over the boundary increases the applicant's problem; (ii) the respondents' denial of the allegation that the extensions to their property had the effect of preventing rainwater from flowing from their erf onto the street; (iii) the respondents' contention that the encroachment played no role in the dissipation of water and was thus of little factual consequence to the present proceedings; (iv) and the respondents' denial that they do not keep the inlet free of debris or that they block it in any way.

[14] Furthermore, the respondents disputed that the natural flow of storm-water in the area in which the parties reside is from a north-western direction. The applicant sought to prove this aspect by placing reliance on an affidavit deposed to by an expert, Mr Tolken. Mr Tolken's expert opinion is that the measurements and the survey of certain points confirmed that the natural flow of storm-water is indeed from north-westerly direction. He also attached a plan which purported to show the natural slope of the respondents' erf, which according to him served

as proof of the natural flow of storm-water. This opinion, however, did not form part of the applicant's founding affidavit and instead formed part of the replying affidavit, apparently to refute the respondents' express challenge of this aspect in their answering affidavit. It is trite that in motion proceedings, an applicant's case must be made in the founding affidavit, not in the replying affidavit. See **Swissborough Diamond v Government of the Republic of South Africa and others** 1999(2) SA 279 at 323J – 324D. The contents of the expert's affidavit can unfortunately not be considered and thus do not come to the applicant's assistance. The dispute about the natural flow of water therefore remains. All the afore-said factual disputes are material to the determination of the application as they have a bearing on whether there is a need for another method of disposal of rainwater to be put in place or whether the drainage system currently in place is adequate as a result of the respondents' wrongful conduct.

[15] It is trite law that motion proceedings are about resolution of legal disputes based on common cause facts and cannot ordinarily be used to resolve factual disputes because they are not designed to determine probabilities. See **Plascon Evans Paints v van Riebeeck Paints** 1984 (3) SA 623 (A). **NDPP v Zuma 2009 (2) SA 277 (SCA) at para 26.** Given the materiality of the factual disputes that cannot be resolved on the papers and the fact that the disputed facts were in fact foreseeable, considering the correspondence already exchanged between the parties prior to the launching of the application, I am satisfied that the only appropriate order is one dismissing the application with costs.

[16] On the issue of the reserved costs pertaining to the postponement of the matter on 12 June 2014, it is common cause that the postponement was at the instance of the respondents. No fault is attributable to the applicant for enrolling the matter for 12 June 2014, as the enrolment was in accordance with the rules. The respondents applied for postponement so as to be afforded the right to be legally represented

on the date of the hearing. The representative of their choice was not available on 12 June 2014 and this rendered a postponement inevitable. It is trite that a party applying for a postponement seeks an indulgence from the court. There is no reason why the respondents should not be ordered to pay the wasted costs occasioned by the postponement of the matter on 12 June 2014.

[17] WHEREFORE I make the following order:

1. The application is dismissed with costs.
2. The respondents are ordered to pay the applicant all the wasted costs occasioned by the postponement of the matter on 12 June 2014.

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M.B. MOLEMELA, J

On behalf of applicant:	Mr J.J. Maree Instructed by: Schoeman Maree Inc BLOEMFONTEIN
On behalf of respondents:	Mr E.J.B. Lingenfelder Instructed by: EG Cooper Majiedt BLOEMFONTEIN

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