

SUMMARY OF THE JUDGMENT

MY HOUSE FLOODED: MUNICIPALITY'S FAULT?

Abbott v Overstrand Municipality (99/2015) [2016] ZASCA 68 (20 May 2016)

In this matter the owner of a home on the banks of a river in Hermanus sought the review of the local authority's refusal to take steps to prevent flood damage to his house. The issues centered around whether the municipality had a legal obligation to take such steps and whether a claim based on an alleged legitimate expectation that the municipality would take such steps, lay in the hands of the owner.

The Judgment can be viewed [here](#).

FACTS

Since 1982, Mr Abbott owned an immovable property bordering on the Klein River, in the district of Hermanus, Western Cape Province. After his house was damaged due to river flooding, he instituted an action against the local authority (Overstrand Municipality) for an order that:

- a) an established practice existed in respect of the breaching of the berm at the mouth of the estuary whenever low-lying properties were threatened with damage;
- b) the practice can only be lawfully departed from if the municipality takes reasonable steps to protect his (Mr Abbott's) house from damage resulting from a departure from the established practice;
- c) the municipality must take reasonable steps to prevent the flooding of his house.

The Klein River forms part of the Klein River estuary, an estuarine lake that seasonally opens and closes on normal river flow regimes. The estuary stretches from the sea (or mouth of the estuary, when closed) at Hermanus, to just beyond Stanford, some 17.5 kilometres upstream.

The estuary can be divided into three sections: The lower reaches comprise the mouth area and the inlet channels. When the mouth is closed it is separated from the sea by a sand-berm (the berm). To establish connectivity with the sea, the berm needs to be eroded by water from the estuary itself or by the sea, or needs to be artificially breached. The second part of the estuary is known as the 'vlei' and comprises a large unconstrained main water body and tidal channels to where the estuary becomes a narrow confined channel. The remainder comprises the Klein River which stretches to a few hundred metres past the bridge at Stanford. Mr Abbott's property is situated here, approximately 16 kilometres upstream from the mouth of the estuary.

Mr Abbott alleged that his property was damaged by flooding in circumstances where the

municipality was obliged, but failed, to take steps to prevent such damage. He argued that in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), alternatively in terms of common law, the municipality's decision to refuse to take any steps to prevent damage being caused to his house by the flooding of the Klein River, had to be reviewed and set aside.

Mr Abbott alleged that it had been the established practice of the municipality for many years to artificially breach the berm at the mouth of the estuary when the water level in the estuary exceeded 2.1 metres above mean sea level, so as to prevent flood damage to low-lying riparian properties. In 2010, it departed from this settled practice by deciding to artificially breach the berm only at a much higher level, without taking steps to protect the properties of those affected by such decision and that this decision was the cause of the damage to his house. He alleged further that the municipality advised him in writing that it was not legally bound to take any steps to prevent his house from being flooded.

Mr Abbott argued that the municipality had the necessary authority to manage the estuary and to protect the riparian properties against flood damage, in terms of (i) various pieces of legislation and also (ii) in terms of a pre-constitution resolution, embodied in a council minute of the then Hermanus Municipality in September 1991, and the contents of a public newsletter distributed by the municipality thereafter. The council minute recorded that the municipality should take over control of the management of the estuary, including 'die oopmaak van die mond'. He alleged (iii), in addition, that the municipality had for many years exercised various levels of control over the estuary, in particular by following a policy of breaching the berm at the lower level to protect low-lying riparian properties and that this had given rise to a legitimate expectation on his part that the practice would only be departed from if reasonable steps were taken by the municipality to protect his property from flooding.

The municipality opposed the application and the claim was dismissed in the Western Cape High Court. The present matter deals with the appeal.

HELD:

- The application was in effect one in terms of s 6(2)(g) of PAJA for the review of the municipality's failure to take a decision to prevent damage being caused to Mr Abbott's house by the flooding of the Klein River. Therefore, to succeed with the application, Mr Abbott had to show that the municipality was under a legal obligation to take steps to prevent damage from being occasioned to his house by the flooding of the Klein River.

Was there a legal obligation to act?

- No such obligation or power existed because:
 - In terms of the constitution, municipalities have executive authority and the right to administer the local government matters listed in certain Schedules to the Constitution, and any other matter assigned to it by national or provincial legislation.
 - The local government matters listed in the relevant schedule did not confer any authority on the municipality relative to the breaching of the berm in the estuary and the protection of riparian property owners against flooding. By contrast, Part A of Schedule 4 of the Constitution lists the areas of 'Environment' and 'Nature conservation' as concurrent national and provincial functions. This means that any powers which the municipality may wish to exercise with regard to the estuary had to be assigned to it by national or provincial legislation.
 - In the present matter there was no proof that such legislation existed as no power or duty to manage or control the estuary and to take measures to protect riparian properties has been assigned to the municipality by national or provincial legislation.

The pre-1991 resolution

- This submission took no account of the re-allocation of public powers and responsibilities by and in terms of the Constitution in 1996. In any event, the municipality did not assume control of the management of the estuary and the breaching of the berm after the resolution, but at most was represented on committees, consisting of various interested parties which attended to these matters.
- On the facts, in any event, it was not shown that there was continuous or repeated flooding, but rather that there was one such incident. It was also not shown that the flooding occurred, as alleged, after the municipality's decision in March 2010 to artificially breach the berm at the higher water level. It appeared rather that any flooding of Abbott's house was probably not related to the breaching of the berm.

The application for review under PAJA accordingly had to fail.

Doctrine of legitimate expectation

- Abbott attempted to invoke the doctrine of legitimate expectation to substantiate his claim for substantive relief, i.e. an order directing the municipality to take reasonable steps to prevent his house from flooding.

- Our Supreme Court of Appeal has however confirmed that the doctrine of substantive legitimate expectation has not yet been adopted as part of our law. Our courts have applied the doctrine in the narrow procedural sense only, i.e. as being confined to the right to a hearing before the legitimate expectation is disappointed, and not in the wider sense of conferring substantive benefits on the party having the expectation.
- The inquiry for determining the existence of a legitimate expectation is primarily factual and the focus is on objective facts giving rise to the expectation. Abbott in any event failed to establish the factual basis for his alleged legitimate expectation, i.e. to prove the existence of an established practice where the berm was artificially breached at a certain water level as a protective measure taken for the benefit of his property.

The appeal was accordingly dismissed.

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