

# SUMMARY OF THE JUDGMENT

## HOA NOT ALWAYS REPRESENTATIVE OF ITS OWNERS' RIGHTS

### South African National Roads Agency Ltd v Numeria Trading Pty Ltd and Others (27873/12) [2015] ZAGPPHC 463 (22 June 2015)

*In terms of road legislation, township developers and property owners can be obliged to receive and dispose of storm water discharged or diverted from a nearby national road. The present matter dealt with such an application by Sanral, citing the developer and an HOA in the scheme as parties that must be ordered to comply. But, the court was asked, in light of the onerous duties and financial implications imposed on owners if Sanral's application was successful, was it adequate to cite the HOA as party to the proceedings and not also the individual owners?*

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

### FACTS

Some time ago, Numeria Trading (Pty) Ltd (Numeria) developed a township known as Bendor X87 on the north-eastern side of Polokwane. The township was established on the western side of the N1-27 national road and on the southern side of the R81 national road. In terms of one of the conditions for approval of the township, Numeria built a brick wall along the boundary of the township opposite both of these national roads.

The township had been subdivided into separate erven which had been registered into the names of their owners. All the individual owners belonged to one of two home owners associations (HOAs) that were established in the development in terms of the municipal township approval.

In 2009, the South African National Roads Agency Ltd (Sanral) constructed a new national road and service road for the N1-27. Underneath these roads, in the area opposite the township, Sanral constructed 6 large culverts connected by canals to cater for the flow of water through the road reserve. The most easterly culverts released their water approximately 10m from the western boundary wall of the township. The construction of these roads and culverts lead to a situation where the storm water which was fed though the newly constructed culverts underneath the roads, accumulated against the western boundary wall of the township, ran towards the intersection with the R81 and then around a corner of the boundary wall where it ultimately, in severe weather conditions, flooded the R81. This was never a problem prior to construction of the new roads.

This dilemma prompted Sanral to launch proceedings seeking an order against Numeria and one HOA to construct a drainage system to allow acceptance of storm water from the road reserve into the township in accordance with provisions of the South African National Roads Agency Ltd and National Roads Act 7 of 1998 (the Roads Act) . Only one of the two existing HOAs was cited in the papers before the court.

The Roads Act obliges owners of land adjoining a national road to take all measures that are necessary to prevent damage to the roads. Amongst others, subsection (4) provides that an owner will be liable for any damage to the national road if same resulted from a breach of the aforementioned obligation. Subsection (5) makes provision for a notice in writing by Sanral to the owner or occupier of land to do certain things or to refrain from doing certain things in order to comply with the provisions of the Act. This includes, amongst other things, to comply with a demand for the removal, filling in, alteration, relocation or establishment of any dam, canal, trench, wall, sluice, pipe, excavation, structure or other works, or the cessation of such an act, on the land. Refusal by the owner or occupier of land to comply with such a notice entitles Sanral to approach the court for an order to comply with the notice. The court may order such a home owner or occupier to take any other measure that the court considers fit in the circumstances.

Section 47 of the Act further provides that Sanral may divert storm water from or under a national road onto any land but must pay compensation for any damage caused by the diversion of this storm water except in the circumstances mentioned in subsection (2), which reads that:

*“(2) Where a township is established on land adjoining a national road, the person establishing the township must receive and dispose of the storm water discharge or diverted from the national road, and the Agency will not be liable for any damage caused in the township by the storm water.”*

As only one of the two HOAs in existence in the township was cited as party, the developer took the point in limine that (i) the other HOA had to be cited too and/or (ii) that all home owners had to be cited individually.

Sanral contended it was not necessary to cite all owners and that citation of the HOAs would be adequate as these bodies, in terms of the township subdivision approval, had to be established to accept responsibility for the "upkeep and security of the township" and that the individual owners are, through their membership of the HOAs, ultimately liable for such upkeep and security.

Sanral submitted, firstly, that the boundary wall was a security wall and was thus something which fell within the province of the HOA. Secondly, that holes could merely be drilled through this wall to receive the water into the township in order to resolve the problem.

**HELD:*****When must a party be joined?***

- The test whether it is necessary to join a party to proceedings, is to determine whether that party has a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court in the proceedings concerned.

***Applied to the facts***

- The potential consequences if an order as sought by Sanral is granted would, contrary to their argument, affect individual home owners' rights.
- Indeed, the HOAs act in a governing capacity and generally take care of issues such as, for example, upkeep or maintenance and security. But the present matter was much more involved and did not relate to maintenance and security at all.
- The maps of the township and the suggested slope of the land made it clear that a large portion, consisting of many individual properties, many of which had already been built-up, would be affected if the storm water is to be received by the township in bulk and in a concentrated form.
- An order that the developer and HOAs "construct the necessary drainage system to allow acceptance of storm water from the road reserve into the township" would clearly detrimentally affect the proprietary rights of many, if not all of the individual owners of the erven inside the township and increase their obligations with regard to compliance with the Roads Act.
- The effect of the relief sought thus affected much more than anything that may be done to the boundary wall. Major waterworks would have to be constructed inside the township as envisaged by the evidence before the court, which responsibility exceeds the obligations placed on the HOAs by the municipality in its township development conditions.

The HOAs were not in a position to represent the individual homeowners in respect of issues affecting their proprietary rights and as a result the court held that it was necessary that all owners had to be cited in their individual capacities. *(The court did not make a finding whether it was also necessary to cite both HOA, having found that in any event it was necessary that the individual owners had to be party to the proceedings.)*

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