

SOUTH AFRICA / JUDGMENT

Barnard and Another v Minister of Environmental Affairs and Others (9952/2019) [2025] ZAGPPHC 705 (14 July 2025)

[2025] ZAGPPHC 705**COURT**

North Gauteng High Court, Pretoria

BEFORE

Nicholson

CASE / FILE NUMBER

9952/2019

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Source record**FLYNOTES:**

CIVIL LAW – Delict – Contamination

of crop farm –

Improper

application of herbicide – Expert testimonies confirmed
picloram contamination caused crop damage – Herbicide
applied off-label and unlawfully – Use of prohibited
herbicide on crop farm – Breach of constitutional and
statutory duties – Failing to ensure proper herbicide
application – Neglecting to mitigate damages after being
notified – No contributory negligence – wrongful and
negligent conduct – Violation of environmental laws

–

Defendants liable.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

Number: 9952/2019

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO THE JUDGES: YES/NO

(3)

REVISED: YES/NO

Heard: 2 to 10 June 2025 and 12 June 2025
Judgment
reserved on 12 June 2025
Judgment
delivered on 14 July 2025
BARNARD
PETRUS JOHANNES
FIRST PLAINTIFF
RÖNTGEN
NICOLAAS
SECOND PLAINTIFF
And
MINISTER
OF ENVIRONMENTAL AFFAIRS
FIRST DEFENDANT
MINISTER
OF AGRICULTURE, FORESTRY
SECOND DEFENDANT
AND
FISHERIES
MINISTER
OF WATER AFFAIRS AND FORESTRY THIRD DEFENDANT

JUDGMENT

NICHOLSON AJ

Introduction

- [1] This is a delictual action for damages alleged to have arisen pursuant to crop damages suffered by the Plaintiffs arising from the "Working for Water program" (WfW)'s contamination of its irrigation dams 2 and 3, but most especially 3, by the application of a dangerous herbicide, Kaput 100 Gel, containing the active ingredient, picloram, whilst doing eradication of alien vegetation on first Plaintiff's farm.
- [2] The first Plaintiff was the registered owner of the farm Hartbeesfontein, Alma District, Limpopo province (the farm) at all relevant times. He passed away on 15 February 2022 and the executors of the estate late Petrus Johannes Barnard (Barnard Snr/ First Plaintiff) have replaced him in this action.
- [3] It is the Plaintiffs' case that Barnard Snr and the second Plaintiff, Mr Röntgen, were engaged in commercial farming on the farm, cultivating a variety of crops such as pumpkins, watermelons and tobacco for commercial gain, and raising livestock such as cattle and sheep.
- [4] On 21 January 2015, Barnard Snr applied in writing, for assistance from the WfW in the clearing of invasive, alien plants on the farm.

- [5] In terms of the application form for clearing assistance, also referred to as the Landowner's agreement, the WfW was a joint initiative of the Department of Water Affairs, the National Department of Agriculture and the Department of Environmental Affairs and Tourism, Defendants three, two and one respectively, although the first Defendant is the only Department actively defending the matter, given that it concedes that, should there be a finding against the Defendants in this matter, accountability will lie with the first Defendant. (For this reason, the court shall refer to the Defendant and not the Defendants throughout)
- [6] An agreement (the application/ the Landowner's agreement) was reached between the parties on or about 21 January 2015, when the application form was signed by the parties and the application was approved.
- [7] In terms of said agreement, work should have commenced within a period of six (6) months from the signing of the agreement. This did not happen and, Plaintiffs assert that the agreement became null and void in terms of clause 6 thereof.
- [8] Despite the agreement having become null and void, WfW commenced work on the farm and performed the eradication work in October 2015 and again in a follow-up treatment in June/ July 2016. It was during this follow-up treatment in 2016, that the Plaintiffs assert WfW caused contamination on the farm that resulted in the present action.
- [9] It is further the Plaintiffs' case, that the Defendant owed a legal duty of care not to cause harm to the Plaintiffs by contaminating the crops, soil and irrigation water on the farm while engaged in the eradication work but, contrary to the above, the Defendant performed the work in a grossly negligent and unlawful manner by applying the dangerous herbicide, Kaput 100 Gel, containing picloram, to vegetation in and around the farm's irrigation dams and its catchment area.
- [10] The herbicide so applied, was extremely harmful to Plaintiffs' crops, soil and irrigation water and caused Plaintiffs to suffer substantial damages. (In the event of liability on the part of the Defendant being found, the quantum is to be the subject of a separate trial).
- [11] The Defendant raised a number of defences in relation to the Plaintiffs' claim, including a denial that the Plaintiffs were engaged in commercial farming at the relevant time.
- [12] They also asserted that the WfW personnel who applied the herbicide Kaput 100 Gel, were neither in the employ of the Defendant or under their supervision but, were in the employ and under the supervision of an independent contractor, one Ms Nkhule Ansie Lehutjo, who was performing the work on the basis of a Memorandum of Agreement (MoA) with the Defendant.

- [13] The Defendant also contends that the purported agreement which the plaintiff asserts had lapsed and was null and void before the WfW personnel commenced their work, had in fact been concluded and or revived tacitly in October 2015 when the performance was offered and accepted on the farm, and it was thus in full force and effect at the time that the initial and follow-up eradication work was done.
- [14] It is the Defendant's case, that the Plaintiffs are bound by this tacit agreement which, inter alia, contained an indemnification by first Plaintiff of all the Defendants from any claims arising from the execution of the eradication work.
- [15] The Defendant submits that the first Plaintiff, Barnard Snr, failed to give notice to the Defendant in terms of the tacit agreement, within 30 days after completion of the work, of any claims arising from the work done and that the Plaintiffs are thus non-suited.
- [16] The Defendant denies it owed the Plaintiffs a duty of care, the allegations of negligence and that the herbicide applied by the WfW programme caused damage to the crops, soil or irrigation water.
- [17] Furthermore, the Defendant contends that, in the event that delictual liability is established, there was contributory negligence on the part of the Plaintiffs in the causation of the damage.

The Issues before the court

- [18] The court is thus tasked with determining whether or not a tacit agreement was in existence as alleged by Defendant, that governed the relationship between the parties, and that would then allegedly, have the effect that the Plaintiffs are non-suited or that the first Plaintiff has indemnified the Defendant against a claim such as the one instituted, or if no such agreement existed, entitling the Plaintiffs to institute a delictual claim based on the wrongful and negligent breach of a legal duty of care.
- [19] The Court must also determine whether or not the Defendant owed the Plaintiffs' a duty of care and, if so, whether or not they discharged same.
- [20] Finally, in the event that the court determines that the Defendant owed the Plaintiffs a duty of care and failed to discharge same, the court must determine whether or not there was contributory negligence on the part of the Plaintiffs with regards to the damage suffered.

Common cause

- [21] At commencement of the trial, it was common cause that the plaintiffs were and remain crop farmers on the farm and that the second plaintiff was, at the relevant time, engaged in tobacco farming on the property.

- [22] It was also common cause that Barnard Snr entered into an agreement with WfW for the eradication of alien plants on the farm and that the agreement had lapsed after a period of six months, although the consequences of the "lapsing" of the agreement was not common cause; that the work that was performed on the farm in 2015 was performed to the satisfaction of all parties; and that the issues before the court arose from the follow-up treatment that took place in 2016.
- [23] It was also clear at commencement of the trial, based upon the joint expert report submitted to the Court, that the experts for both parties had focused exclusively on the merits of the matter and most specifically on the damage caused by picloram on a tobacco crop in their report.
- [24] They confirmed that all the signatories to the joint report had access to the respective reports filed on the merits. Only Prof CF Reinhardt and Mr A Scholtz had attended to a physical inspection of the farm and damage to the crop shortly after the incident occurred. The remaining experts, Drs Verdoorn and van der Waals based their assessments on a detailed consideration of the various specialist reports that were filed by both parties.
- [25] In terms of the joint report, the experts agreed that:
- (a) "In 2016, "a registered herbicide, Kaput 100 Gel, was applied by an appointee of the WfW program as a follow-up treatment of invasive alien plants on the farm;
 - (b) Kaput 100 Gel contains picloram and triclopyr as active ingredients. Picloram has a longer half-life than triclopyr, and therefore is much more likely to be detected in laboratory analysis of soil, surface water and ground water than triclopyr. Picloram is prone to significant leaching from treated plants into soil and water, while triclopyr is not prone to significant leaching from treated plants into soil and water. Triclopyr is readily degraded to 3,5,6-trichloro-2-pyridinol (TCPY) which does not have herbicidal properties. Therefore, as triclopyr does not readily leach from treated plants into soil and water, it is not likely to be detected due to its rapid degradation to TCPY;
 - (c) The gel was applied in a water catchment area leading to the main irrigation dam, as well as on invasive plants in the irrigation dam, including close to the irrigation water suction area;
 - (d) Picloram is extremely hazardous to broad leaf plants, that include tobacco, pumpkins, sweet peppers, and tomatoes. With tobacco being the most sensitive to the chemical;
 - (e) The presence of picloram in the irrigation dam was confirmed by a South African Bureau of Standards (SABS) report. The SABS report confirmed the presence of Picloram in both dams two and three on the farm.
 - (f) The records of the Defendants confirmed that 24 kg of Kaput 100 gel was applied in the specified area;

- (g) At the time of the incident, water from the irrigation dam was used to irrigate transplanted tobacco seedlings in the field;
 - (h) The use of agricultural remedies (pesticides) such as Kaput 100 Gel is strictly regulated by law. See, the Fertilizers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1947 (Fertilizers Act) and its supporting regulations;
 - (i) Furthermore, the Kaput 100 Gel label carries very clear use restrictions that prohibit the application of the product close to sensitive crops and water bodies (dams and rivers) and also states clearly that any deviation from the label instructions constitutes a contravention of Act 36 of 1947.
 - (j) Irrigation of the plaintiffs' tobacco plants with the contaminated water destroyed the plaintiffs' crop.
 - (k) Very low concentrations of picloram are known to destroy such crops and, despite the fact that the SASS report did not reflect picloram detection in the seedlings or the soil, the damage to the crop was due to picloram contamination as identified in physical signs of such toxicity. It was also agreed that the low concentrations of picloram that are sufficient to cause toxicity symptoms on tobacco, are below the detection limits for extractions of soil samples subjected to the analytical procedures employed by the SABS Laboratory.
- (I) The water in the irrigation dam, referred to as "Dam 3" in the respective reports, was rendered useless for purposes of irrigation for immediate future use. It was recommended that the water and silt/sediments in the dam be tested again prior to the dam being used for irrigation purposes for sensitive crops. Such testing cannot only be analytical of nature but must also include growth tests using the silt/sediments and water with/on tobacco seedlings to ensure that undetectable and unquantifiable concentrations of picloram are not present as can only be determined by growth experiments."

In conclusion, the experts were of the view that that the plaintiffs had suffered damage to their crops following contamination of the irrigation water and soil as a consequence of the incorrect application of Kaput Gel in a manner inconsistent with the product label and in contravention of the prevailing legislation. And that the merits regarding the picloram damage on the specific tobacco crop should be conceded."

- [26] The expert witnesses who testified for the Plaintiffs in the matter were not subjected to extensive cross examination in this regard and in closing arguments, the Defendant conceded that the failure to cross examine these witnesses to any real extent was testament to the fact that the Defendant accepted the testimony that there had been off- label application of Kaput 100-Gel containing the hormonal toxin picloram on the farm, in the irrigation catchment area, and that this had resulted in contamination that led to crop damage.

[27] It should be noted, in the event of the court finding for the plaintiffs on the merits, the extent and duration of the damage is to be determined at a later trial to determine the quantum of the damages.

The legal principles

[28] As in *Natal Fresh Produce Growers' Association and Others v Agroserve (Pty) limited and others* 1990(4) SA 749 (N) at 1990(4) SA 754 to 755, the Plaintiffs case is based on delict, specifically the *actio legis Aquiliae* as it applies in our law. To succeed they must prove that the defendant's conduct was wrongful in the delictual sense. In making the determination, the court applies the general criterion of reasonableness that, in turn is determined in according with the legal convictions of the community, a process that engages the court in policy considerations and an evaluation and balancing of conflicting interests of the parties, with due regard to the social consequences of recognising or denying the existence of liability on the part of the Defendant. See in this regard *Minister van Polisie v Ewels* 1975(3) SA 590 (A) at 596 F to 597 F; *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979(3) SA 824 (A) at 832. • *Marais v Richard en 'n Ander* 1981(1) SA 1157 (A) at 1168 C to E; *Coronation Brick (Pty) Ltd v Strachan Construction Co. (Pty) Ltd* 1982(4) SA 371 (D) at 380 A to E and 384 C to E; *Lillicrap, Wassenaar and Partners v Pilkington Brothers (S.A) (Pty) Ltd* 1985(1) SA 475 (A) at 498 C, 499 A, and 503 F to H. As stated by Grosskopf AJA., in the last-mentioned case,

at 500 D, 503 I- 504 A, and 504 G, our law adopts a conservative approach to the extension of liability under the *actio legis Aquilia* to circumstances not covered by existing authority; it will not extend the scope of the action to such new situations "unless there are positive policy considerations which favour such an extension".

[29] In order to succeed with their delictual claim, the onus is on the Plaintiffs to establish the five elements of the delict on a balance of probabilities, viz. conduct on the part of the defendant(s) in the form of a positive act or an omission, wrongfulness, fault, causation, and harm. In other words, they must prove on balance of probabilities that they have a right not to be injured in their property, which property has been damaged through the wrongful act or omission of the Defendant.

The evidence led before the court

[30] The plaintiff led five witnesses. Three were experts who testified, inter alia, on the dangers of picloram as a herbicide when incorrectly used and on the impact of the off-label use of the herbicide in the present case on the first Plaintiff's farm and the first and second Plaintiff's crops.

[31] As the fact that there was damage and that same was the direct result of the incorrect use of picloram was conceded by the Defendant in closing, it is not necessary to explore this testimony in any detail here, although this will be extremely relevant in the assessment of the quantum of damages in any subsequent trial.

- [32] The unlawfulness of the off-label use of Kaput 100 Gel was addressed extensively by the Plaintiff's third expert witness and is extremely relevant in determining where the liability for the damage caused lies in this matter. This will be dealt with in some detail below.
- [33] The expert witness, Mr Scholtz, testified on 3 June 2025 and Prof Reinhart on 4 June. Both spoke to their reports and the joint expert report. They were credible witnesses whose testimony remained unshaken during the brief and extremely perfunctory cross-examination by the Defendant. Both experts warned of the significant dangers of the use of picloram on a crop farm, especially near tobacco crops, and condemned the use of Kaput 100 Gel on the farm and, most especially, on plants in and near the irrigation dam on the farm.
- [34] Both gave clear testimony that the symptoms that were observed in the tobacco crop were indicative of picloram poisoning and that the contamination of the water in the dam was the probable cause of the crop damage.
- [35] They also testified that the use of picloram is legislated and that it should never be used off label, that is, without careful adherence to the restrictions and directions for use on the label for the chemical.
- [36] The testimony of the above two expert witnesses was followed by testimony of the plaintiffs' two factual witnesses, the second Plaintiff, Mr Röntgen, (second Plaintiff) and the son of the first Plaintiff, Mr Barnard (Mr Barnard Jnr).
- [37] The court found both witnesses to be credible, candid and co-operative. Their versions of the events that led to the current action were consistent and corroborated each other in all material respects.
- [38] Both witnesses had the same understanding and expectations of the WfW programme. Both regarded the WfW as a government programme with the purpose of assisting farmers in clearing alien species. They knew the WfW was run by the Defendant and that it was part of a public works project to create employment in the area. They were also both of the view that they had no concern about participation in the programme under the auspices of the Defendant as they held the reasonable expectation that the Defendant would look after the environment and that they would do a proper job given their government affiliation.
- [39] Neither the second Plaintiff nor Mr Barnard Jnr were party to the signing of the application to the WfW and, in fact, the second Plaintiff was not aware the application for the work to be done had been submitted until the team arrived on the property in 2015 to execute the initial clearing. He was never provided with a copy of the application or any other contract or policy documents that were relied upon by the Defendant in the matter. He did not see the agreement between WfW and the first Plaintiff, did not know the terms and conditions applicable to said agreement and was not aware of any pre or post inspection documents or pre-treatment notices issued with regards to the work to be done. Most especially, he was not aware of,

or present at, any joint site inspection on the farm prior to or following the first or second treatments.

- [40] The second plaintiff is a land user on the farm. He is a commercial tobacco farmer and, like Mr Barnard Jnr, lives on the farm with his family. He has a close relationship with the Barnard family and he works on the basis of a share-crop arrangement with the first Plaintiff and now with his son, Mr Barnard Jnr.
- [41] As stated above, the second Plaintiff was not involved in the original contracting with the Defendant in respect of the WfW and first became aware of their work on the farm when they arrived in 2015 to perform an alien plant clearing and he observed the work team which arrived on the farm in a vehicle he described as a double-cab bakkie with a canopy and a WfW logo on the back.
- [42] At the time, he went down to the worksite and asked what the workers were doing and then inspected the chemicals they were using. It was his testimony that he did not meet the contractor or the "supervisor" and that during his conversation with the WfW workers, no one stood out as leading the work. Ms Lehutjo, the Defendant's "contractor" denied that anyone had visited the site in 2015 or enquired about the chemicals used, however, given Mr Röntgen's statement that he did not meet the contractor, it is possible that this visit took place during her absence.
- [43] He testified that the workers indicated to him they would be using Hatchet, Springbok and blue dye during the clearing and, although he specified that he is not an expert in herbicides, he did know that some pesticides can be harmful but, he was satisfied these chemicals could be safely used.
- [44] He further testified that he was not aware WfW were coming back in 2016 for a follow-up treatment and that he was on leave when they arrived. As a consequence, he was not aware of their presence on the farm until he saw them leaving the farm on completion of the work, on the day after he returned from leave.
- [45] He was not informed of their arrival date and he was not informed about the herbicides to be used during the follow-up treatment.
- [46] The second plaintiff testified that he did not inspect the site where WfW had worked as he assumed they had simply repeated what had been done in 2015, using the same chemicals. He had no reason to suspect there was any problem with the treatment and, as it was winter he did not have reason to visit the dams.
- [47] The Defendant made much of this "failure" to inspect the work in their cross-examination, however, Mr Röntgen remained consistent in his testimony that he had no reason to visit the site at the time.

- [48] Mr Röntgen testified that the team would have gained access onto the farm through the farm gates that remain open during working hours to facilitate deliveries and the like as the gate is not visible from the farmhouses and there is very poor cell phone signal. Again, much was made of the free access onto the farm through the open gates during cross-examination when the Defendant stated that it was its view that this was unsafe and negligent on the part of the farm owner.
- [49] The second plaintiff first noticed the problem with the tobacco crop on 21 October 2016 when he immediately phoned Mr Schlemmer, an employee of the Defendant who worked with WfW, who immediately sent him a copy of the herbicide usage sheet which reflected the use of, inter alia, Kaput 100 Gel.
- [50] The second plaintiff and Mr Schlemmer arranged a site inspection and experts were called in to advise on the nature of the problem. These experts were Mr Scholtz and Prof Reinhardt and they confirmed picloram damage to the crops and identified picloram as the culprit in the damaging of the crops. Samples were taken and the plants, soil and water were tested for the presence of picloram. Although the soil and plant samples were such that the picloram levels were below the detectable level for the SASS tests, there was detectable contamination in both dams two and three on the farm, with dam three being the main irrigation dam for the farm.
- [51] The second plaintiff met Mr Malemela, the WfW project co-ordinator for the area for the first time on 26 of October 2016 during a site visit to view the damage.
- [52] The second plaintiff only became aware of the use of Picloram on the farm on 25 October 2016, when he was so informed by Mr Schlemmer. It was his view that the restriction "Boerdery" on the application form should have been sufficient basis for the Defendant to avoid using a herbicide such as Kaput 100 Gel with the active ingredient picloram, on the farm.
- [53] The second plaintiff also indicated that he would have expected the Defendant to notify the first plaintiff of the chemicals they intended to use before they were applied on the farm, especially in a sensitive area.
- [54] It was the second Plaintiffs testimony further, that he did not know that the work was being carried out by a contractor, what the nature of the relationship was between the contractor and the Defendant or the details of the agreement that the first Plaintiff had concluded with the WfW. He emphasised that he did not meet or engage with the contractor, Ms Lehutjo at any time, or with Mr Malemela, the Defendant's project coordinator for WfW until the current issue arose.
- [55] The second Plaintiff expressed the opinion that, although the work done in 2015 was done in good faith and to the satisfaction of all parties, the work done during 2016 as part of the follow-up treatment could not be regarded as having been done in good faith insofar as the herbicides used were used off-label and "the results speak for themselves".

- [56] Mr Barnard Jnr was the second factual witness for the Plaintiffs. He is the son of the first Plaintiff and he was an active participant in the farming activities on the farm throughout the relevant period, acting in the role of farm manager. He farms fruit and vegetables, although there are also cattle and sheep on the farm. He is the current owner of the farm.
- [57] Mr Barnard Jnr testified that Mr Malemela, the project co-ordinator for WfW in the area, approached him and gave him the application form. This form he asserts, was never filled in and a second form was made available that he left with his parents for consideration. (Nothing turns on whether or not one or two forms were given to the witness, although much is made of this by the Defendant's witness, Mr Malemela).
- [58] Mr Barnard Jnr testified that his mother, who is more competent in English, completed the form and his father signed same.
- [59] When the form was completed, the restriction of "Boerdery" (Farming) was reflected.
- [60] Mr Barnard Jnr testified that before the application was completed and submitted, he engaged Mr Malemela on his concern about the water on the farm and any risk of contamination. He testified that Mr Malemela reassured him that they (WfW) would take particular care, not working too close to the water and using hessian around the plants to contain any risk of contamination.
- [61] Mr Barnard Jnr testified that he was never advised that WfW would make use of a contractor.
- [62] Mr Barnard Jnr testified that the first treatment took place after the agreement had become null and void in terms of clause 6, in that more than six months elapsed after the approval of the application before the work commenced.
- [63] The witness was not made aware by Mr Malemela that more than one treatment would be required, and no pre-treatment notices or documents relating to the contractor were given to the Plaintiffs and no joint inspections took place.
- [64] It was Mr Barnard Jnr's testimony that the WfW team arrived in 2015 in a silver double-cab bakkie with a white canopy and a WfW logo on the back of it, although he conceded in cross-examination that the bakkie may have been white. They performed the work and they left the farm. There was no problem experienced on the farm during or after the first clearing work.
- [65] In 2016, the team was not expected back on the farm. The witness stated that he was not aware that a follow-up treatment would take place and, at the time, he was working on planting on leased property and was not present on the farm during working hours. Although both he and the second plaintiff live on the property, the area where the eradication work was done is not easily visible from either dwelling.

- [66] He testified that access to the farm is possible during working hours as the gates to the farm are left open for deliveries, etcetera. He corroborated what the second plaintiff had said, that this is necessary because the gate is not visible from the farm buildings and the cell phone signal is poor. Again, the Defendant made much of this in cross-examination and in the closing argument that there was contributory negligence on the part of the Plaintiffs.
- [67] Mr Barnard Jnr testified that he was not informed about the follow-up treatment but that he noted the presence of the bakkie on the farm at some point during the follow-up treatment in 2016. He did not engage with them at the time as he was busy elsewhere and did not have the time. Again, the Defendant argues that this indicated contributory negligence on the part of the Plaintiffs.
- [68] The witness denied ever meeting the contractor, Ms Lehutjo. He also denied participating in a joint inspection of the work or signing the joint site inspection report, a document produced by the Defendant for the first time in court on the date of commencement of the trial. He was adamant that the signature for the landowner/land user was not his, something corroborated by the second Plaintiff.
- [69] He stated that he is not an expert in pesticides/ herbicides but, he would expect same to be applied in accordance with the label and the applicable legislation.
- [70] Mr Barnard Jnr indicated that he trusted and expected the Defendant to look after the environment.
- [71] Under cross-examination, Mr Barnard Jnr was challenged on several aspects of his testimony. He conceded that he knew that the people clearing on the farm in 2015 and 2016 were the team from WfW but remained steadfast in his testimony that he was not party to the agreement, the alleged joint inspection in 2016 and that it was not his signature on the Joint inspection report, a document that remains deeply problematic for the court.
- [72] The final witness for the Plaintiffs was their third expert, Dr Verdoorn who is an expert toxicologist. It was his testimony that he had been approached to train the WfVV teams but that this arrangement had fallen through and that he had since been privy to a number of complaints about the WfW's use of pesticides off-label.
- [73] The witness testified to the fact that the off-label use of picloram is not only a contravention of Section 24 of the Constitution, 1996 but also of sections 2,9, 24 and 30 of National Environmental Management Act 107 of 1998 (NEMA). Furthermore, application in terms of the label is mandatory and, in this case, the use of picloram in and around the dams on the farm was a clear violation of the label directions for the application of Kaput-100 Gel.

- [74] The witness also spoke extensively about the duty on users to study the label and to foresee the potential consequences of its misuse, a view corroborated by the Defendant's own expert, Dr Van der Waal, when he stated that the off-label application of picloram was "a problem". The level of this duty escalates depending upon the level of training of the user and, failure to abide by the label instructions amounts to a criminal offence.
- [75] The witness also testified that by law, only a registered Pest Control Operator (PCO) may use a herbicide or pesticide in a commercial arrangement. In this case, neither the "contractor" not the WfW project co-ordinator were so registered.
- [76] Dr Verdoorn also testified that although pre-treatment notice of where, when and how a treatment will be effected to address a specified pest or in areas of sensitivity is not mandatory, it is good practice.
- [77] Finally, he testified that in his expert opinion, the WfW failed in its duty of care to the Plaintiffs by failing to inform them that a different herbicide/ pesticide would be applied in 2016 from those used in 2015
- [78] The Defendant led five witnesses. The first was Dr van der Waals, an expert who was party to the joint expert report and who added nothing further with regards the merits of this case, although his testimony will be important with regards to any determination on quantum.
- [79] The second witness for the defence was Mr Roux, an employee within the environmental branch of the Department of Environmental affairs since 2011, where he holds the position of Deputy Director, dealing with non-infrastructural projects for the Mbembe district of Limpopo. He was, in 2015 and 2016, the Regional Programme Leader for the Waterberg, Sekukune, Mbembe and Tzaneen management areas and the line manager for Mr Schlemmer, assistant Director/ Area manager who was, in turn, the line manager for Mr Malemela, project coordinator/ project manager for WfW in the relevant area.
- [80] Mr Roux spoke to the process and procedures followed in the procurement process applicable to the appointment of contractors to render services to the Defendant under the auspices of, inter alia, WfW.
- [81] He gave a detailed analysis of the process by which the opportunity is advertised, a Request for Quotation(RFQ) is issued and a quotation is submitted, the supporting documents that accompany the quotation, the appointment processes and the contract that is entered into with a successful "contractor".
- [82] The witness only dealt with the 2016 appointment of Ms Lehutjo, who led the team that did the eradication of the alien plants on the farm in 2015 and 2016. The only document supplied with regards to the 2015 clearing was the herbicide usage sheet.

- [83] The witness indicated that an appointment of a contractor in one year is not a guarantee that they will be appointed again to do the follow-up clearing in a subsequent year. Each application is dealt with afresh. This was not entirely consistent with the view expressed by Mr Malemela for the defence, who stated that the work would be re-awarded to the contractor if the Department were satisfied with the initial work done.
- [84] It was Mr Roux's testimony that the contractors and their teams receive 48 days of training in a 24-month period. How much training the contractor and the workers get in reality is actually unclear given that the contract periods are for relatively short periods of less than a year and the training offered is given a few days at a time and not as a single block.
- [85] Mr Roux's testimony was that the Department does not share the contractor arrangements with the landowner or user and the Department is responsible for the appointment, payment, training, provision of tools and equipment, payment of the contractor's UIF and supervision of the contractor. The Contractor's terms and conditions of employment also include the application of the policies and procedures applicable to employees of the Department. Thus, the court views the relationship between the contractor and the Defendant as a matter exclusively between themselves. The Plaintiffs were never privy to the details of the relationship, thus, if the Defendant seeks to shift the accountability it would need to act against the third party. The Plaintiff had no relationship with the contractor
- [86] The witness also stated that the Department controls the selection and issue of the herbicides to be used and how and where they are used on the farms where the WfW deploys teams. They did not require the teams applying the herbicides to be PCOs and Ms Lehutjo was not such a PCO.
- [87] Mr Roux testified that Mr Malemela was the project co-ordinator/ manager and that he was responsible to co-ordinate with the landowner/ user. This should have included a pre-treatment site inspection.
- [88] Mr Roux indicated that he became aware of the issues with regards to the work done by the contractor on the farm in October 2016, when Mr Schlemmer reported this to him. He escalated the matter to his superior, the Director, and likewise forwarded Mr Schlemmer's report, prepared for the Department and the Chief Director, to the Director who shared it with the Chief Director.
- [89] He testified that on receipt of the complaint, Mr Schlemmer visited the farm and having reported the matter to his superior, Mr Roux, the Chief Director sent two experts to assess the situation (Drs Goodall and Harding). The findings of these experts were included in the investigation report submitted by Mr Schlemmer, although neither of these experts testified in the matter.

- [90] Finally, Mr Roux testified that the Department had taken no steps to rehabilitate the farm after being made aware of the contamination on 28 October 2016. Nor had the Department taken any steps to compel the contractor to rehabilitate in terms of the memorandum of agreement with her.
- [91] The witness indicated that he could not comment on the submission put to him that one cannot contract out of a crime or that the failure to rehabilitate was a breach of the Defendant's statutory duty of care in terms of section 28 of NEMA.
- [92] The Defendant's third witness, Ms Lehutjo, the "contractor", addressed her relationship with the Defendant. The absence of any contract in respect of the 2015 work was put to her. She was also questioned about the fact that there were three versions of the 2016 Memorandum of Agreement (MoA) where differences were reflected regarding the signatories, and the "purported "Joint Site Inspection Report.to her.
- [93] Ms Lehutjo testified that she submitted a quotation in 2015 and again in 2016 in terms of which she was awarded the work by the Department and the WfW to do the alien plant eradication on the farm in both years.
- [94] She testified that she worked with Mr Malemela who issued the list of herbicides to be used on the farm and she collected same from the Defendant's store.
- [95] She testified that she took instruction exclusively from Mr Malemela.
- [96] She also testified that she was not aware that the Defendant sought to shift any liability for any damage to herself in terms of her MoA with the Defendant and the third-party notice in the matter had not been served on her.
- [97] The witness testified that she was awarded the work and she selected her own team of workers. She then selected the persons from her team who would train in the application of the herbicides. This was done on a random basis.
- [98] She confirmed that neither she nor the workers were registered PCOs.
- [99] Ms Lehutjo testified that she had been introduced to the landowner/ user of the farm prior to each visit to the farm and that Barnard Jnr signed the joint site inspection report but, she had not been present at the time as he signed after she had conducted the inspection with Mr Malemela. She did not change this testimony on cross-examination, despite the Plaintiffs' position being put to her.
- [100] Finally, she testified that the Defendant had not requested her to do any rehabilitation work on the farm, although she had been informed of the complaints received when the current action was initiated.
- [101] The Defendant called Mr Malemela to testify. In his testimony, he confirmed he was the project co-ordinator whose duty it was to co-ordinate various of the WfW teams in the area.

- [102] Mr Malemela was not a credible witness. Under cross-examination, he failed to give direct answers on the simplest of questions. He came across as evasive and uncooperative.
- [103] It was Malemela's duty to inspect the sites and to indicate what herbicides would be used where and how.
- [104] Mr Malemela testified that he is an expert in pesticides/ herbicides and he has a Bachelor of Science Degree. He was not, however, a POC at the relevant time.
- [105] Mr Malemela indicated that he did not enquire of the landowner if there were other land users and that he did not understand the term "Boerdery" in the restriction portion of the application submitted. He confirmed that he made no attempt to clarify this term either from the landowner or his line manager, Mr Schlemmer, who speaks Afrikaans.
- [106] The witness indicated that he had visited the farm on a number of occasions, including in the wet and rainy season, and that he knew where the dams were, although both he and Ms Lehutjo emphatically denied that the clearing was done in water at any time.
- [107] In his testimony, he displayed an appalling lack of comprehension of the terms and conditions of the landowner agreement/ application given that this was the basis on which the Defendant purports the work was done.
- [108] Mr Malemela testified that he dealt only with Mr Barnard Jnr and not with the landowner, the first Plaintiff, Mr Barnard Snr.
- [109] He testified that he introduced Ms Lehutjo to Mr Barnard Jnr on the occasion of both the commencement of the 2015 and 2016 work. This is denied by Mr Barnard Jnr.
- [110] Mr Malemela confirmed that he signed off on Ms Lehutjo's work and that he was satisfied with same.
- [111] Mr Malemela also testified that a joint site inspection was undertaken after the 2016 work was completed. This was not attended by the landowner or user but by himself and Ms Lehutjo, where after, Mr Barnard Jnr declined to inspect the work, indicating he had done so and was satisfied with it. Mr Barnard Jnr was asked to sign off the work, which he then did in Mr Malemela's presence. This is disputed emphatically by Mr Barnard Jnr.
- [112] The witness was strident in asserting that the signature on the document for the landowner/ user was that of Mr Barnard Jnr and that it was signed in his presence. He went so far as to assert that he would not have forged the document or committed a fraud as there was, at the time, no indication that there was any problem with the work.
- [113] The two versions with regards to the signature on the document remained unresolved after cross-examination and, as the two versions are directly contradictory, the only inference to be drawn is that either the witness or Mr Barnard Jnr is lying in this regard.

- [114] Mr Malemela testified that he did not have access to GIS maps and did not know the location of the dams on the farm and that they were in a catchment area. This was shown in subsequent testimony to be untrue.
- [115] It was also Mr Malemela's testimony that it was Ms Lehutjo's responsibility to comply with the directions on the herbicide label and that, once he was aware of the complaints about the work done on the farm, he escalated the matter to his superior, Mr Schlemmer.
- [116] The witness did not come across as entirely reliable. He was evasive in the answering of a number of questions and seemed so intent on ensuring he did not concede anything that might cast himself in a poor light, that the quality of his testimony was severely compromised.
- [117] The final witness for the defence was Mr Schlemmer, a former employee of the Defendant, now retired. He was a co-operative witness and his testimony was clear, concise and apparently truthful.
- [118] Mr Schlemmer was, at all relevant times, Mr Malemela's line manager.
- [119] He testified that landowners involved with the WfW would have worked with Mr Malemela and not with the contractor who is not permitted to take instruction from the landowner.
- [120] Mr Malemela would have had access to all the GIS data and would have determined, based on that and the site visit, the herbicide to be used on the farm
- [121] He was contacted by the second Plaintiff when crop damage was observed and he requested the herbicide usage sheet for the job. When he became aware, on seeing the herbicide usage sheet on this job for 2016, that 24 kilograms of Kaput 100 Gel had been used, he nearly "blew a gasket" because he knew the possible devastating effects the use of this herbicide could have if used incorrectly.
- [122] In his testimony, he indicated that after being made aware of the complaint and having visited the site and considered the reports of the Defendant's initial two experts (Drs Harding and Goodall) who had recommended that a specialist tobacco agronomist should be engaged, he filed an investigation report with this recommendation. This recommendation was never acted upon.
- [123] He also conceded that several requests had been made on behalf of the Plaintiffs for rehabilitation on the farm and that he too had requested his superiors to take remedial action, to no avail.
- [124] With regards to Mr Malemela's testimony, he indicated that indeed Mr Malemela does not speak Afrikaans but confirmed that he should have sought clarification with regards to the meaning of the restriction "Boerdery". He also confirmed that both Mr Malemela and Ms Lehutjo should have read the Kaput 100 Gel label.

[125] Finally, he could not comment on whose signature was affixed to the joint site inspection report, save to say it was not the signature of the first plaintiff.

Application of the legal principles to the facts in light of the evidence led

[126] In light of the evidence led, it is clear that an agreement was reached between the first Plaintiff and the Defendant in 2015. This agreement was, however, patently null and void when the work was performed in 2015 and again in 2016. Thus, although it is clear that the first Plaintiff entered into an agreement with WfW, it appears that it was not properly read or understood. Furthermore, it is also apparent that neither Mr Malemela, for the Defendant, nor Mr Barnard Snr read the agreement or understood its terms and conditions.

[127] Despite this, the work was tendered and accepted and was, in fact, completed to the satisfaction of all parties in 2015. With regards the creation of a tacit contract created through offer and acceptance of the performance, see *Reid Bros (South Africa) Ltd v Fischer Bearings Co. Ltd* 1943 AD 232 per Watermeyer ACJ at 241 and *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A) at 429 to 430.

[128] Such a tacit agreement could not and did not, however, revive the null and void landowner's agreement.

[129] It is also true that, had the incorrect herbicide not been applied, the Plaintiffs would, in all probability, have been as satisfied with the outcome of the 2016 follow-up treatment as they had been on the first occasion. However, the incorrect herbicide was used and the outcome was disastrous.

[130] It appears that the Defendant undertook, and the Plaintiffs accepted the work done in 2015 in the mistaken belief that the agreement was still valid and enforceable. The agreement was, however null and void and thus it could not be relied upon in 2015 and again in 2016 when the follow-up treatment occurred. Such a contract is regarded in law as never having existed and it is thus without any legal force or effect. In other words, there can be no performance by either of the parties in terms thereof. See in this regard. *Khumalo v Industrial Development Corporation of South Africa and Another* (J1233 /20200

[2023] ZALCJHB 303; (2024) 45 ILJ 123 (LC) (27 October 2023) at par 42, and *Cooper N O and Another v Curro Heights Properties (Pty) Ltd* (1300/2021) [2023] ZASCA66 (16 May 2023) pars 14 and 20.

[131] Furthermore, if the court were to be convinced, which it is not, by the Defendant's argument that the contract was revived by the conduct of the parties, it may not cherry pick the applicable clauses. In this instance, there are significant and substantial parts of the agreement that were not complied with by either party.

[132] No evidence was led of the creation of a new oral agreement.

- [133] Nothing is proven in respect of Ms Lehutjo's relationship with the Department in 2015 and, likewise, nothing is proven with regards to a contractual relationship between the Plaintiffs and the Defendant in
2016. In light of this, the contractual links between the 2015 and 2016 interventions are tenuous at best.
- [134] Patently, the Defendant did not, itself, comply with the terms of its own purported contract in 2015 or in 2016 in that no work plans were filed, there is no evidence of any joint inspection including all the parties and, the 2016 joint site inspection report submitted to the court on the day of commencement of the trial, is a) a disputed document, fraught with contestation, and b) not in fact a reflection of a joint inspection as both parties agree that the Plaintiffs were not present or represented at the purported joint inspection.
- [135] On the matter of the joint site inspection report, the veracity of the document was challenged by the Plaintiffs who brought into question the allegation by the Defendant that same was signed by Mr Barnard Jnr. Mr Barnard Jnr firmly denied the signature on the document was his and, despite Mr Malemela's insistence that it was signed by Mr Barnard Jnr in his presence, the court remains sceptical about same given the timing of the "discovery" of the document and the failure of the Defendant to produce a similar report for the work done in 2015. No effort was made to produce any evidence of what Mr Barnard Jnr's signature looks like and no request was made by the Defendant for Mr Barnard Jnr to produce a sample signature for purposes of comparison. Furthermore, the contested document does not reflect the use of picloram and thus, that the herbicide used in the second treatment was different from that used in the first treatment.
- [136] The Defendant relies on the Agreement dated 21 January 2015, Part 4, clauses 9 and 10 to deny any liability in respect of the damage suffered by the Plaintiffs on the basis that the WfW staff would not be liable for any acts or omissions done in good faith in the execution of the work and that the landowner/ user indemnifies the WfW programme from all claims of whatsoever nature arising from the assistance rendered, save where such claims arise from the fraudulent actions of the WNI/ Programme, its employees or agents.
- [138] If the court were to consider the agreement to be valid and enforceable, which it does not, the indemnity provisions that form the core of the defendant's defence are invalid and unenforceable as the Plaintiffs could not have indemnified the Defendant against criminal actions and gross negligence.
- [139] Section 49(1) of the Consumer Protection Act 68 of 2008, requires that notices that purport to limit the supplier's risk or liability or impose an obligation on the consumer to indemnify the supplier or any other person to be drawn to the attention of the consumer in a "conspicuous manner and form that is likely to attract the attention of an ordinarily alert consumer". In this instance, the failure of the Defendant's representative to sit down with the first Plaintiff and to explain the implications of the contract has the effect that the indemnity contained in clause 10 of the application document was not specifically brought

to the first Plaintiffs attention and, although the Plaintiffs had time to familiarise themselves with the terms of the agreement, they may not have understood the implications of the clause. Further, indemnities are generally interpreted restrictively and against the drafter, in this case the Defendant (contra proferens principle), see in this regard *Masstores (Pty) Ltd v Murray & Roberts Construction Ltd. (Pty) Ltd & Another* 2008(6) SA 654 (SCA), *Drifters Adventure Tours CC v Hircock* 2007(2) SA 83 (SCA) and *Fujitsu Services Core (Pty) Limited v Schenker South Africa (Pty) Limited* 2023(6) SA 327 (CC).

- [140] The indemnity would, in any event, only have applied in instances where the work was performed in terms of the contract, in good faith. In the present case, the fact that the Defendant, in the person of Mr Malemela, prescribed the off-label application of an unsuitable herbicide by the contractor, cannot possibly be regarded as action in good faith.
- [141] Given the fact that the landowner's agreement was void, just as the Defendant required Ms Lehutjo to submit a new quotation to perform the follow-up treatment in 2016, it would also have needed to agree the terms and conditions of the follow-up treatment with the first Plaintiff. Despite this, there was not even so much as a notification to the first plaintiff that a follow-up was planned for the relevant dates.
- [142] When the work team arrived on the farm in 2016, the first, and second Plaintiffs were not present and the farm manager, Mr Barnard Jnr, was engaged in farming activities off-site. Thus, when the activities commenced, there could be no question of an offer and acceptance of the work constituting an agreement between the parties as there was no acceptance of the offer to perform the work.
- [143] The fact that the work team was noticed by Barnard Jnr whilst on the farm, after they had commenced the work, and by the second Plaintiff when they were leaving the premises after completion of the work, and that they were not asked to leave, does not mean that the Plaintiffs agreed tacitly or otherwise to the terms and conditions that were set out in the void 2015 landowner's agreement.
- [144] That the Contractor was deployed by the WfW co-ordinator means that they were sent by the Department to perform the work and the landowner/ users were within their rights to assume that the WfW and the Department would oversee the work. The Plaintiffs were in fact, confronted with a situation in which the work was already in progress and in which any intervention at that stage would have been meaningless.
- [145] Further, as the WfW team had worked previously on the farm to everyone's satisfaction, there was no reason for them to believe that the team would perform differently on this occasion and Barnard Jnr, recognising they were from WfW thus simply left them to it and, thus, it appears, the team worked only under the supervision of the contractor and the WfW co-ordinator.

- [146] The use of picloram during the performance of the follow-up treatment in 2016 was off label and illegal and was described by the Plaintiff's experts as criminal conduct. The parties could not have agreed to such criminal use. See in this regard *Kruger v Wawiel Park (PTY) Ltd* (4538/2014) [2022] ZAFSHC 357 (23 December 2022) and *Le Roux and Others v Dey* (Freedom of Expression Institute and Restorative Justice Centre as amici curiae) [2011] ZACC 4; 2011
- (3) SA 274 (CC), which dealt also with the reasonableness of the allocation of liability at par 122.
- [147] Performing the work in a manner that is unlawful, that is applying herbicides that are notoriously dangerous if used in or near water in a catchment area and within a dam, cannot be viewed as doing the work in good faith, thus the Defendant and their contractor remain liable for any damage caused as a consequence of their wrongful actions.
- [148] Based on the expert witness reports and testimony, there can be no doubt that there was damage to the plants, soil and irrigation water on the farm. There can further, be no doubt that the source of the damage was the application of Kaput 100 Gel, with the active ingredient Picloram, administered to the alien species during the eradication treatments administered by the WfW programme on the farm during June/ July 2016. Thus, that the Plaintiffs suffered damage as a consequence of the wrongful action has been established before the court and it is clear also that the persistent nature of picloram toxicity implies that, not only have the Plaintiffs suffered damage to date but, they may continue to suffer damage for an undefined period into the future. Ongoing tests will be required to inform the decision when the fields may again be used safely for the crop farming activities the farm engaged in prior to the picloram application. The extent of the damages will, as stated above, be the subject of a separate trial.
- [149] Furthermore, the First Defendant has conceded that it is the accountable party in the event of any finding of liability against the Defendants .
- [150] The off-label use of the herbicide Kaput 100 Gel, containing picloram is a criminal offence and, as such, the Wfw Programme, managed by Mr Malemela on behalf of the Defendants, acted grossly negligently in the performance of their duties. The actions of the contractor who was part of a job creation programme, with no qualifications relevant to pesticide and herbicide application and a team of indigent and unemployed local workers, worked directly and exclusively in accordance with the instructions of the Mr Malemela in his capacity as the Defendant's project co-ordinator, responsible to check the area, identify the species to be eradicated and select the herbicides that should be used on their eradication.
- [151] The Defendant should have ensured that any workers deployed under the WfW were properly trained and informed on the use of the various herbicides, both for their own safety and that of the clients on whose property the work was performed. In addition, the project co-ordinator, the contractor and the herbicide appliers should all have been PCOs.

- [152] In light of the above, the court is of the view that the Defendant's assertion that liability rests with Ms Lehutjo and not with themselves cannot be sustained.
- [153] There are several difficulties with the State's case with regards to Ms Lehutjo being an independent or distant contractor. All the testimony and evidence before the court indicates that the Plaintiff would have had no dealings with the contractor, save insofar as she should have been introduced to them when the work commenced on each occasion. Her instructions, tools, equipment, training, oversight and control were the responsibility of the WFW, thus the State and, it was the State that instructed her on what herbicide to obtain and where to apply it.
- [154] Thus, the evidence does not support the view that she was indeed a removed contractor. She was contractually bound to the State's rules and regulations and was required to perform her duties in terms of her MoA with the Department to the satisfaction of the State. (See clauses 4.4 and 4.6 respectively). The applicable rules and regulations also bound her to the State's Conditions of Employment and Code of Conduct, and her herbicide application process was subject to the State's Operational Standards and Policy.
- [155] Furthermore, the so-called "claim" against Ms. Lehutjo was never served on her and was, insofar as was necessary, postponed sine die at the commencement of this trial.
- [156] The determination of the existence of an employment relationship has been made by the courts using the control test or dominant impression test. In this instance, Ms Lehutjo was controlled by WFW in every respect, even in terms of the choice of herbicide and the location for the application of the same. See in this regard *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991(1) SA 1 (A), *Gibins v Williams, Muller, Wright & Mostert* 1987(2) SA 82 (T) at 90 and *Stein v Rising Tide Productions CC* [2002] 2 All SA 22 (C).
- [157] The general rule is that an employer is not liable for delicts of independent contractors unless the employer is personally at fault. It is thus important to establish whether Ms Lehutjo was an employee or a distant contractor as alleged by the Defendant. See, *Smit v Workmen's Compensation Commissioner* 1979(1) SA 51 (A) where Joubert JA analysed the relevant Roman- Dutch authorities and concluded at 62D-638 that:

"It is clear from the aforementioned authorities that one of the important legal characteristics of *locatio conductio operarum* (dienstcontract) in Roman-Dutch Law is the duty of the employee (*locator operarum*) irrespective of whether he happens to be a domestic servant or any other type of employee, to obey the lawful commands, orders or instructions of his employer (*conductor operarum*) in regard to the performance of his services. It follows that the employer (*conductor operarum*) has a concomitant right under (*locatio conductio operarum*) to supervise and control the manner in which the employee (*locator operarum*) is to perform his services. Control is a wide concept. It includes inter alia the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right

of the employer to inspect and direct the work being done by the employee."; see also Neethling, Potgieter & Visser op cit 364-365 and the cases discussed by these writers).

Problems experienced by the South African courts in the application of this control test for determining a master-servant relationship ultimately resulted in the courts acknowledging that, although the control test is an important factor in the enquiry, the crucial test, particularly in marginal cases, is whether or not the "dominant impression" of the relationship is that of a contract of employment:

"The presence of such (an employer's) right of supervision and control is indeed one of the most important indicia that a particular contract is in all probability a contract of service. The greater the degree of supervision and control to be exercised by the employer over the employee the stronger the probability will be that it is a contract of service. On the other hand, the greater the degree of independence from such supervision and control the stronger the probability will be that it is a contract of work ... Notwithstanding its importance the fact remains that the presence of such a right of supervision and control is not the sole indicium but merely one of the indicia, albeit an important one, and that there may also be other important indicia to be considered depending upon the provisions of the contract in question as a whole.

In many cases it is comparatively easy to determine whether a contract is a contract of service [locatio conductio operarum] and in others whether it is a contract of work [locatio conductio operis] but where these two extremes converge together it is more difficult to draw a border line between them. It is in the marginal cases where the so-called dominant impression test merits consideration ... the presence of a right of supervision and control ... is not the sole determinative factor since regard must also be had to other important indicia in the light of the provisions of the particular contract as a whole" at 62D-63G).

On the issue of control and dominant impression see too, *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976(4) SA 446 (A) at 457A, *Medical Association of South Africa and others v Minister of Health and others* (1997) 18 ILJ 528 (LAC) 536C to E, *South African Broadcasting Corporation vs McKenzie* (1999) 20 ILJ 585 (LAC) at 590F to 591D and *LAD Brokers (Pty) Ltd v Mandla* (CA14/00)

[2001] ZALAC 9; 2002 (6) SA 43 (LAC); [2001] 9 BLLR 993 (LAC); (2001) 22 ILJ 1813 (LAC) (29 June 2001).

[158] In this instance, the defense witnesses all confirmed that Mr. Malemela controlled the herbicide. He recommended the herbicide, even changing the type and quantity of product between the two treatments. He did this without disclosing the same to the Plaintiffs. He specifically instructed Ms. Lehutjo to fetch the herbicide, apparently without reading the label and in contravention of the label.

- [159] Mr. Malemela knew that the farm had dams, had access to the GIS data reflecting the waterways and dams, and should have applied his mind to what herbicides to use and where. Ms Lehutjo simply followed his instructions as failure on her part to do so would have constituted insubordination. In light of this, the Defendant cannot escape liability.
- [160] Even if the court were to be of the view that Ms Lehutjo was indeed an independent contractor, generally, an employer can also not shift all responsibility onto a contractor in circumstances where it is also liable, as is the case here. See *Pienaar and others v Brown and others* 2010(6) SA 365 (SCA).
- [161] In finding and allocating liability, the court must assess the respective individual liability of both the contractor/ employee and the Defendant.
- [162] The applicable test to determine liability is whether a reasonable man would have foreseen the risk of danger in consequence of the work he employed the contractor to perform and whether a reasonable man would have taken steps to guard against the danger and, if so, whether such steps were in fact taken. See *Saayman v Visser* 2008(5) SA 312 (SCA).
- [163] The approach to the liability of an employer for the negligence of an independent contractor is set out in *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 (1) SA 1 (A) at p- par 12 per Goldstone AJA. In that case it was said that whether an employer could be held liable for a delict of an independent contractor would depend on the degree of care the circumstances demanded from the employer in relation to the oversight of the contractor's work. Whether the circumstances demanded the exercise of care would depend upon proof that the employer owed the plaintiff a duty of care to prevent the damage done by the independent contractor.
- [164] The court, having assessed the evidence, is of the view that, as every aspect of the work performed by the contractor was controlled, monitored and assessed by the Defendant, she was not an independent contractor as asserted. Further, there can be no question, as is dealt with more fully below, that the Defendant owed a duty of care to the Plaintiffs in the performance of the work for which the contractor was engaged and that they failed in this duty in circumstances that they could reasonably have foreseen and against which they could and should have taken reasonable steps to prevent, the liability for the wrongful action lies with the Defendant, a position it regards as reasonable, taking public and legal policy considerations and constitutional norms into account.
- [165] As with the indemnity clause in the original landowner's agreement, the exclusion clause is equally of no value to the Defendant in shifting liability, amongst others, because the agreement was null and void.

- [166] It is the court's view that in the current case, the conduct of the Defendant, through the actions and omissions of its employees amounted to gross negligence and criminal conduct. The Defendant cannot contract out of the statutory obligations imposed by the NEMA, the National Water Act 36 of 1998, the Fertilizers Act (sections 7(2)(a) and 10), Regulation R1716 of 26 July 1991, and the Pest Control Operator Regulations 98 of 18 February 2011 (sections 10(1) and 11(1)).
- [167] The Defendant's assertion that liability for damages does not arise in the present case because the claims were not lodged timeously in terms of the landowner agreement, that is within 30 days of completion of the work, must also fail. Firstly, because the landowner agreement was void and thus not applicable, and secondly, because the Plaintiffs notified the Defendant immediately they became aware of the damage, that is when the crop showed signs of damage. There was no basis on which a claim could have been lodged earlier as the damage was not detectable until the impact of the contamination was seen on the crop. The herbicide used in the follow-up treatment was not identifiable from a visual inspection of the work performed and was not disclosed to the Plaintiffs until the complaint was lodged when the crop began to fail.
- [168] It was grossly negligent and reckless for a Defendant charged with safeguarding the Environment to deploy, through their WfW programme, workers onto farms who lacked the most basic qualifications to perform the work of alien plant eradication, working as they were, with chemicals that could, and indeed in this case, did have the most devastating effect on the economic viability of the farm through contamination.
- [169] The Defendant drafted the application form for the assistance that the first plaintiff submitted but, it appears, itself, to have been unaware of its provisions, despite its insistence that the landowner should have familiarised himself with all the details. This is evidenced by the fact that the project manager was unaware that the contract had lapsed and, on the court's reading of the contract, also appears to have been ignorant of the arbitration clause in the contract. Thus, if the Defendant was truly of the view that the contract regulated the relationship and the indemnity should be applicable, so too the current conflict should have been referred to arbitration. The contract is not, however applicable.
- [170] In short, the work was performed in 2015 without incident and the parties were happy with the outcome. The issue arises with regards to the 2016 follow-up treatment which Plaintiffs deny being aware of until the work was already in process and in respect of which no terms and conditions appear to have been discussed with the Plaintiff's, with complete reliance being placed by the Defendant of an agreement that had been voided by elapse of time.
- [171] The contractor, Ms Lehutjo, deployed by the Defendant was not a registered (PCO) and, despite indicating in her testimony that she had at one time been trained in herbicide application, appeared to have no detailed knowledge of the herbicides her team were applying. She simply, blindly followed the instructions of the Department's project co-

ordinator, himself not a PCO, who selected and instructed the use of Kaput 100 Gel for eradication of species that included species not identified on the label, off-label in an area that was a catchment/ wetland area.

[172] In light of the above, it is unsustainable to argue that Ms Lehutjo and Mr Malemela acted in good faith throughout, as neither read the label on the herbicide, thus, although the Defendant's position that neither the contractor nor the Defendant can be held liable for damage suffered as a consequence of actions that were made in good faith, is correct, it is of no assistance to them in the current matter where the actions were unlawful and grossly negligent. On the issue of good faith, see *Dews and Another v Simon's Town Municipality* 1991 (4) SA 479 (C) per Foxcroft, J and *Milne NO v Singh NO and Others* 1960 (3) SA 441 (N) per Caney J.

[173] Having been advised of the contamination and its impact on the farm and its owners/ users, the Defendant failed to take any steps to mitigate the damage or rehabilitate the situation. It did not even advise the contractor of the issue prior to institution of the current action, despite the fact that in its view, the contractor should be held liable for any damages arising from the work.

[174] It is distressing to note that the Defendant in this matter is the very organ of State whose mandate it is to protect the environment. It is a sad indictment that none of the State officials from this Department, save perhaps for Mr Schlemmer, were familiar with their roles and responsibilities in safeguarding the environment.

[175] In this instance, the plaintiffs were owed a duty of care which is grounded in Section 24 of the Constitution which confers on everyone:

'... the right to an environment that is not harmful to their health or we/f being', and 'to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

[176] The above Constitutional right is supported by a raft of legislative provisions, primary amongst which is the NEMA. As articulated by the SCA in *Global Environmental Trust and Others v Tendele Coal Mining (Pty) Ltd and Others*(1105/2019) [2021] ZASCA 13 (09 February

2021) at par 31:

"Both the MPRDA and NEMA are statutes that give effect to the right to have the environment protected for the benefit of present and future generations, enshrined in s 24 of the Constitution. It is a settled principle that courts are required to interpret statutes purposively, in conformity with the Constitution and in a manner that gives effect to the rights in the Bill of Rights."

- [177] The Defendant, which cannot contract out of its Constitutional or statutory obligations, failed in the performance of its roles and responsibilities and took no action to mitigate the damage once it came to its attention.
- [178] Furthermore, despite the fact that section 24(4) empowers the Director General, Mr. Roux, to issue a Directive to the person who caused the pollution, Ms Lehutjo, to remedy and/or rehabilitate the farm, this too was not done. In fact, aside from the initial investigation initiated by the Defendant through Mr Schlemmer, no further action was taken by the Defendant to address the complaint.
- [179] Contributory negligence with a causal link to the damage suffered on the part of the Plaintiff's was not established despite the Defendant's arguments that the Plaintiff's failed to properly control access to their farm, knew that there were to be two follow-up treatments but failed to enquire about when the second treatment would take place and which herbicides would be used on that occasion, knew and appreciated the dangers of picloram usage but took no steps to prohibit its use on the farm.
- [180] Irrespective of one's subjective views on the practice of leaving the farm gates open for access during business hours, the explanation for this practice to facilitate the daily commercial operations of the farm was plausible given the poor cell phone signal and the fact that the gate is unsighted from the various dwellings on the farm, a fact that the Defendant did not contest.
- [181] The fact that neither the second Plaintiff, who only became aware of the WfW team being on the property in 2016 on their final departure, nor Mr Barnard Jnr, who became aware of the WfW workers at some point during the period they were on the farm in 2016, engaged with the team also has no causal link to the damage suffered. The WfW team were under the exclusive control of the project co-ordinator and would/ could not have followed any instructions from either the second Plaintiff or Mr Barnard Jnr.
- [182] It was reasonable for the Plaintiffs to expect that a Department whose purpose it is to safeguard the environment would take due care with regards to the qualifications, training and supervision of workers they were sending onto farms to do alien species eradication work.
- [183] Thus, given that work had been done without incident in 2015, the Plaintiffs would have had no cause for concern around the work performed by the team as they did not know what herbicides were being used. They trusted the project co-ordinator who was qualified in such matters to guide the selection of the herbicides approved in 2016.
- [184] No satisfactory reason was ever offered for why the same herbicides were not used both in 2015 and in 2016. Mention was made by one witness that this is to avoid the species from developing resistance but no evidence was led on this point.

- [185] The plaintiffs could not have foreseen the -possibility that the WfW team was on site to apply a different herbicide from that applied in 2015, both off label and in a manner that constituted a criminal offence, especially as they had been given no pre-application notification of the herbicide application in terms of the Fertilizers Act. The onus in this regard rested on the Defendant.
- [186] There was no obligation on the Plaintiffs, even in terms of the initial landowner's agreement which became null and void, to make enquiries from the Defendant with regards to follow- up treatments or the herbicides to be used during such treatments.
- [187] There was no reason for the plaintiffs to believe that the State was on the farm, illegally, committing a criminal offence by administering an herbicide off label.
- [188] The Defendants led no evidence to suggest that the plaintiffs knew about the application of a different herbicide that is prohibited for use on a crop farm, such as the farm in this instance.
- [189] Finally, the first Plaintiff clearly indicated farming as a restriction on the application, drawing the Defendant's attention to the fact that the farm was a working farm.
- [190] In light of the above, no contributory negligence on the part of the Plaintiffs is found in this case.

Costs:

- [191] With regards to the costs, all the experts agreed that picloram was the cause of the crop damage and that same was the result of an incorrect application of Kaput 100 Gel on the farm during the follow-up treatment in June/ July 2016. They also agreed that the merits of this matter with regards to the aforesaid should be conceded. Despite this, the Defendant failed to formally make the concession prior to, or on commencement of the trial, with the result that, although they did not extensively cross-examine the expert witnesses for the Plaintiffs, they allowed them to be called and taken through extensive examination in chief and, in fact, led their own expert witness. The concession was implied in the manner of cross-examination and finally, formally in the closing argument. There was thus considerable court time spent on hearing evidence that could simply have been conceded from the outset.
- [192] The Defendant's litigation is financed through the State purse. That of the Plaintiffs is subject to their limited personal means and they would thus have benefitted from any limitation of the duration of the trial that could have followed an earlier concession by the Defendant.

In light of all of the above, it is ordered that:

1. the determination on quantum and merits are separated in terms of Rule 33 (4).The determination on quantum is postponed sine die.

2. Insofar as is necessary for this court to rule on this matter, the Defendants' claim against the third party is postponed sine die.
3. The Defendant is liable for the Plaintiff's damages, both past and future, arising from the picloram contamination on the farm Hartbeesfontein following the Working for Water programme's follow-up alien species eradication treatment that was performed In June/July 2016.
4. The Defendant to pay the costs.

CAROLINE NICHOLSON

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 02 June to 12 June 2025

Date of judgment: 14 July 2025

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