

SOUTH AFRICA / JUDGMENT

Le Roux NO and Others v Botha NO and Others (427/19) [2020] ZASCA 67 (17 June 2020) [2020] ZASCA 67

COURT

Supreme Court of Appeal

BEFORE

Navsa, Mocumie, Makgoka, Ledwaba, Gorven

CASE / FILE NUMBER

427/19

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 427/19

In the matter between:

CAREL WYNAND LE ROUX NO FIRST

APPELLANT

NIEL FICK NO SECOND

APPELLANT

ANDRONIKUS GRIESSEL NO THIRD

APPELLANT

(in their capacities as trustees of the Goudyn Plase Trust (IT221/97))

and

THEUNIS CHRISTOFFEL BOTHA NO FIRST

RESPONDENT

THEUNIS CHRISTOFFEL

BOTHA (JNR) NO SECOND

RESPONDENT

HILDE BOTHA NO THIRD

RESPONDENT

(in their capacities as trustees of the TC Botha Trust (IT318/97))

THEUNIS CHRISTOFFEL BOTHA FOURTH

RESPONDENT

MINISTER OF WATER

AND SANITATION FIFTH

RESPONDENT

MEC ENVIRONMENTAL AFFAIRS AND

DEVELOPMENT PLANNING,

WESTERN CAPE SIXTH

RESPONDENT

Neutral citation: Le Roux NO and Others v Botha NO and Others (Case no 427/19) [2020] ZASCA 67 (17 June 2020)

Coram: NAVSA, MOCUMIE and MAKGOKA JJA and LEDWABA and GORVEN AJJA

Heard: 4 May 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 June 2020.

Summary: Servitudes – water drawing and leading – disputes – matter settled – costs – considerations.

ORDER

On appeal from: Western Cape Division of the High Court (Binns-Ward J, sitting as court of first instance):

1 The order of the court below is set aside and the following order by consent between the appellants and the first to fourth respondents is made in substitution:

- a) That the trustees of the Goudyn Plase Trust (the Goudyn trust) connect the pipe from the tap below Dam 3 to the pipe in aabb at a place pointed out by the trustees of the TC Botha Trust (the Botha trust), but not further than 5m from the said tap, at the Goudyn trust's cost.

- b) That a mechanism for the division of water be designed and installed by a suitable professional person, located as a matter of practical preference at the existing emergency abstraction point currently in situ, the costs thereof to be shared between the two trusts equally.
- (i) This mechanism will divide all water extracted between the parties on a 60% (the Botha trust) 40% (the Goudyn trust) ratio of division, except for water to be conveyed to the homestead farm of the Botha trust, and the farm of Piet Le Roux during the exercise of their existing water turns.

(ii) It is recorded that the understanding is that the existing water turns of the Botha trust in its capacity as owners of the homestead farm and Piet Le Roux ('Water Turn Holder(s)') are as follows:

- (a) Homestead farm: 16 hours every 14 days;
- (b) Piet Le Roux's farm: 52 hours every 14 days.

(iii) In practice, this will mean that when the above water turns commence, extraction of water by the Goudyn trust and the Botha trust will cease for the duration of those water turns, as was the case in the past. When each water turn terminates, the extraction

pipe or sleuth utilised during the water turns, will be closed off to enable the Goudyn trust and the Botha trust to share in all the water available at the extraction point on a 60/40 percentage (60% the Botha trust and 40% the Goudyn trust) until the following water turn commences.

- c) That the Owner of Portion 3 (currently the Botha trust) is entitled to make use of the servitude works (in its old, current or future form) for purposes of abstraction of water as a riparian land owner, limited to a use strictly in accordance with the terms and conditions of this settlement agreement.
- d) That if any agreed amendments to the servitudes as registered are to be undertaken, such registered servitudes will also be amended to state the entitlements of the owner of Portion 3, as set out in c) above, clearly.
- e) That the Goudyn trust is entitled to install a pipe from the 'New Abstraction Point 4 (existing abstraction point)'

to Point s. The installation of this pipe takes place after the mechanism mentioned in b) above is in place and is for the Goudyn trust's cost.

- f) That the Botha trust will not oppose any application by the Goudyn trust to increase the volume of Dam 1. That, equally, the Goudyn trust will not at any time in future oppose any application by the owner of Portion 3 to enlarge the capacity of Dam 3.

- g) That the Botha trust undertakes not to plant anything over the new pipes installed by the Goudyn trust, and to allow reasonable access by the Goudyn trust to the pipes for inspection and maintenance.
 - h) That the Botha trust's new camp site will extract its water from the Botha trust's portion of water, and not directly from the river.
 - i) That the Botha trust will apply for the necessary authorisation to proceed with the work agreed upon and regularisation of the 'new abstraction point' at its own cost and with the support of the Goudyn trust, where necessary for purposes of motivation of such regularisation application. If any penalties should be levied or imposed for any work done at the new abstraction point or in the river or if the Botha trust should appeal against any decision of the relevant authorities, it will carry the costs for such penalty and/or appeal.
- (i) A period of 24 months will be afforded for regularisation.
 - (ii) The two trusts may agree to the extension of this period if necessary, which consent will not be unreasonably withheld by either of them.
- j) That, should directives be issued as a condition for authorisation that are in conflict with the agreed system, the system will be amended only to the extent necessary for compliance with such directives, still ensuring the same nett result of the sharing of water agreed upon. If this net result cannot be achieved on the agreed system, the two trusts will agree to a different system that complies with the conditions for authorisation, with a nett result of a 60/40 division of all water extracted at the shared point after Piet Le Roux and the homestead farm are provided for in accordance with what is legally due to them as set out in b(ii) above. Except as set forth herein, neither trust may extract any water from the Wolvenkloofstream upstream from the new extraction point, or any other alternative shared point of abstraction to be erected in terms of this agreement.
 - k) That registration of any new servitudes and the cancellation of any existing servitudes necessary to reflect all changes to the previous regime, agreed herein, will be for the Goudyn trust's account, and the Botha trust consents thereto where necessary. Piet Le Roux's consent will also be obtained to do this.
 - l) That, should the water works agreed to in this settlement agreement not be authorised within the period of 24 months (or a further extension of time granted by the Goudyn trust to the Botha trust) for any reason, or if Piet Le Roux should not consent to the agreements regarding the water distribution system or the amendment of existing servitudes, the original system at the servitude point it will be restored according to the letter of the servitudes currently in existence, or as closely thereto as possible. The agreement to share water on a 60/40 basis after provision is made for the entitlements of Piet Le Roux's farm and the homestead farm, however, will still stand. The two trusts will then share the costs of restoration of the system to its original state equally.

- m) That the two trusts shall, immediately upon the settlement agreement being made an order of Court, proceed to implement the agreed settlement arrangements regarding regularisation, servitudes and water abstraction and the distribution thereof, but on condition that the mechanism referred to in b)(i) above will not be constructed before due authorisation by the relevant authorities to implement the agreed settlement arrangement.

2 There shall be no order as to costs in either the application or the appeal.

Gorven AJA (Navsa, Mocumie and Makgoka JJA and Ledwaba AJA concurring)

- [1] This appeal relates to water servitudes over agricultural land. A river runs through a farm in the Worcester area. The river is the Wolvenkloofstroom (the river). A dispute arose as to the drawing and leading of water from the river. The background to the matter is of some moment. The farm was owned by the father of Andries Abraham Le Roux (Andries) and his brother Schalk Johannes Le Roux (Schalk). In 1983, Andries and Schalk bought it from their father and thereafter owned it in equal undivided shares. Andries and Schalk agreed in 1987 to divide the farm into four properties. This gave rise to a Deed of Division by which transfer of the subdivided farms was registered in
1990. At the same time as the farm was subdivided, servitudes were registered. Andries became the owner of the three farms described as Portions 1 and 2 of the Farm Goudyn and the Remainder of the Farm Goudyn (the dominant farms). Schalk became the owner of the farm described as Portion 3 of the Farm Goudyn (the servient farm).
- [2] The river runs over the servient farm[1] and is a tributary of the Holsloot river. The dominant farms each hold registered servitudes[2] over the servient farm. The servitudes allow the dominant farms to draw water[3] from the river and lead it[4] over the servient farm along specified routes by way of either pipelines or furrows. There are dams on Portions 1 and 2 (dam 1 and dam 2) and on the servient farm (dam 3). Dams 1 and 2 have a total capacity of about 28 000 cubic metres and dam 3 about 86 000.
- [3] At the time of sub-division, the water from the river was drawn immediately upstream of a weir (the original weir). The original weir is situated on the servient farm. A pipe drew water from just above the weir into a furrow (the extraction pipe). The water was led to dam 1 and dam 1 fed dam 3 along a furrow running between them. Dam 2 was fed separately. The servitudes gave effect to the situation which obtained at the time of subdivision except that no provision was made in them for dam 3 to obtain water from dam 1. Two other owners of farms (the lower farms) hold servitudes over the servient farm to use water during specific times (waterbeurte). They lead the water along the same routes as Portion 2 up to a certain point.
- [4] Andries, the father of the first appellant, sold the dominant farm to the trustees of the Goudyn Plase Trust (the Goudyn trust) in 2007. On 12 October 2012, Schalk sold and transferred the servient farm to the trustees of the TC Botha Trust (the Botha trust). The Botha trust also owns one of the lower farms enjoying water use at specified times. When

the Botha trust took transfer of the servient farm, the Goudyn trust blocked the furrow between dam 1 and dam 3, thus cutting off the previous supply of water to dam 3. The Goudyn trust avers that it had allowed Schalk to use water from the original weir while he was owner as a personal favour. It says that the servient farm was not entitled to that water and it was within its rights to terminate this supply.

- [5] After the furrow between dams 1 and 3 was closed, the servient farm had to obtain water directly from the river. It did so by utilising water drawn into the furrow from the extraction pipe above the original weir and leading some of that water into a pipeline over the servient farm directly to dam 3. The Goudyn trust took the view that the Botha trust was not entitled to any water from the original weir and the extraction pipe. This led to the Goudyn trust initiating spoliation proceedings.
- [6] Events overtook that application when, on 15 November 2013, a severe flood washed away the original weir. It also washed away the extraction pipe. Thereafter, the Botha trust erected a new weir (the new weir) and 400mm extraction pipe. The new weir was completed on 25 November 2013. It is situated some 65 metres above the site of the original weir. The Botha trust also excavated a new furrow. The new furrow is fed from the new weir by the extraction pipe. Across the furrow, an earth wall was constructed with two below wall pipes feeding the farms and above wall pipes for any overflow. The short below wall pipe is 125mm in diameter and discharges water into the new feeder furrow which was joined to the servitude furrow feeding the dominant farms. The long below wall pipe is 200mm in diameter and carries water to dam 3. This means that the servitude furrow to the dominant farms is supplied through only the 125mm pipe, while the servient farm is supplied through a 200mm pipe to a certain point, after which dam 3 is supplied through a 125mm pipe. The servitude furrow was previously fed from the original extraction pipe which was 400mm in diameter.
- [7] The original weir has not been reconstructed. It is common cause that, since the flood, all three dams and the lower farms have been fed from the new weir. It is also common cause that the Botha trust did not obtain environmental authorisation for the construction of the new weir and waterworks. A process seeking authorisation after the fact is currently pending. The new weir was constructed to meet immediate needs. The Goudyn trust, which took no part in the works constructed after the flood, complains that the pipe leading into its servitude furrow is now 125mm in diameter whereas it was previously 400mm. The pipe leading to the servient farm is 200mm in diameter. The complaint is that the Goudyn trust receives only a portion, and an even smaller one than hitherto, of the water extracted from the river at the new weir, whereas it should be entitled to all the water. In addition, it complains that the new weir and waterworks are unlawful, having been constructed without the requisite permissions.
- [8] The new weir is justified by the Botha trust on the basis that it is less extensive than the original one, runs parallel to the river and not across it, allows for gravity feeds and prejudices no-one. It is claimed to be less likely to wash away or require repairs. The original

weir required repairs caused by river pressure about twice a year. The new weir required no repairs during the two years preceding the application. In any event, says the Botha trust, the flood altered the area around the original weir, making the cost of any replacement prohibitive and requiring a large amount of material to be utilised. This would require consent from the authorities and an environmental impact study. The Botha trust resists the reconstruction of the original weir.

[9] The Goudyn trust applied to the Western Cape Division of the High Court for a declaration of rights concerning the servitudal rights and two interdicts. The substantive relief sought can be summarised as follows:[5]

1 Declaring that the Goudyn trust is entitled, in the exercise of its servitudal rights, to abstract water by means of a weir erected, or to be erected, as indicated on the map referred to in the servitudes alternatively at the place where the original weir had been erected prior to the flood of 15 November 2013.

2 Interdicting the Botha trust and Mr Botha in his private capacity from interfering with, or preventing the exercise of, the Goudyn trust's servitudal rights.

3 Directing the Botha trust and Mr Botha to forthwith:

3.1 Permit the full flow of all water abstracted by the original weir to pass undisturbed and unobstructed through the Goudyn trust's servitude furrows and pipelines, inclusive of the operation of the diversion sluices of the Goudyn trust at points s and h.

3.2[6] Permit the Goudyn trust to replace, fix and set iron or steel sluice plates, which were previously removed from the diversion boxes at points s and h, the latter in order to give effect to the water use by the lower farms.

3.3 Demolish the weir or structures that have been constructed upstream from the servitude weir; alternatively, put them out of operation in a manner which would prevent any water being thereby abstracted, or led away, from the river.

3.4 Remove and demolish the weir or structures erected in the river upstream from the original weir to dam up water in the river, alternatively to put them out of operation in a manner that will result in the water in the riverbed flowing freely and unhindered to the original weir.

[10] The demolition order was premised on the averment that the new weir and structures fell foul of the National Water Act 36 of 1998 (NWA) and the National Environmental Management Act 107 of 1998 (NEMA). It was alleged that these interfered with the bed, banks and course of the river 'in order to impede and divert the flow of water in the river.' As such it was contended that they contravened s 21(c) and (i) of the NWA.

- [11] The Minister of Water and Sanitation and the MEC for Environmental Affairs and Development Planning for the Western Cape were joined as respondents but, apart from an employee of the former having delivered an affidavit indicating that he would consider the answering affidavit before deciding what course to take, neither took part in the matter, even after the answering affidavit was delivered. This is also true of the appeal.
- [12] The application was referred for the hearing of oral evidence. It was thereafter dismissed with costs by Binns-Ward J who refused leave to appeal to this court. Leave to appeal was granted by this court.
- [13] Both the trusts claim to have been open to a sensible, negotiated solution. The Goudyn trust contends that, in closing off the furrow between dams 1 and 3, thus depriving the latter of water from the river along the traditional route, it was simply giving effect to the servitude. The Botha trust claims that this was done out of spite because the Goudyn trust had wanted to purchase the servient farm when Schalk sold it to the Botha trust. The Goudyn trust was thereby attempting to force the Botha trust to sell to it since it would have no water with which to farm. On the other hand, the Botha trust claims that it has no obligation to supply water to the dominant farms from the new weir since it is not the servitudinal weir and had done so out of generosity.
- [14] The Goudyn trust sought an order that the new weir be demolished and contended that the Botha trust was not entitled at all to water extracted from the river above the original weir once it has been restored. For its part, the Botha trust disputed the servitudes, saying that they should be set aside as lacking consensus or were at least subject to rectification so as to allow dam 3 to be fed from dam 1. When Schalk did not make himself available for cross-examination, the Botha trust perforce abandoned this line of argument. It also disputed the declaration of rights sought by the Goudyn trust that it had a right to erect a weir at the point where the original weir stood prior to the flood, saying that this would be illegal.
- [15] During the hearing before us, it was put to the parties that, as neighbouring farmers, the matter cried out for a sensible, practical, negotiated solution. They were each entitled to whatever water use is allowed by the prevailing legislation and would be better placed than the court to work out how to allocate water between them if there was any shortage. The parties had attempted to settle the matter prior to the appeal hearing but took the opportunity to make further such attempts. During the hearing, the parties indicated that they had arrived at an in-principle solution but would require time to arrive at a detailed, agreed order. They requested that the matter be adjourned for that purpose but indicated that it might be necessary for this court to determine the question of costs. They produced an agreed order as to the merits by 26 May 2020. However, they indicated that the issue of costs had not been resolved and would need to be decided. They were afforded an opportunity to address written argument on that issue and each of them made further written submissions. This, then, is the only aspect of the matter on which a decision is required.

- [16] The Goudyn trust submitted in its further written submissions on costs that, although it had good grounds for being awarded the costs of both the application and the appeal, it would be appropriate in all the circumstances of the matter for each party to bear its own costs.
- [17] The Botha trust argued strenuously that it should be awarded costs in both fora. It argued that the relief sought by the Goudyn trust was all premised on the Botha trust not being entitled to draw any water from the servitude weir, once reconstructed and that the new weir and waterworks are illegal and must be demolished. These submissions are only partly accurate. The declaration of rights sought is not premised on exclusive use. It claimed no more than is prescribed in the servitudes. While some of the relief arguably went too far in attempting to claim the sole right to draw water from that point, since water use rights are determined by legislation, this was not the only aspect of the relief which was opposed by the Botha trust.
- [18] As for the contention, mentioned in argument during the hearing and repeatedly by the Botha trust in the further written submissions on costs, that it had been 'dragged to court', the Botha trust initially claimed that the servitudes should either be set aside due to lack of consensus or should be rectified. I also do not agree with the submission that the Goudyn trust abandoned the relief sought during the hearing. It certainly did not abandon the need for the declaration of rights concerning the servitude since this had been contested terrain and had been disallowed by the court of first instance. The agreed order recognises this right and makes provision for the amendment of the servitudes if the new weir is approved by the authorities. Had the Goudyn trust not persisted in the appeal, I think it is fair to say that no settlement would have occurred and the parties would have continued at loggerheads with each other.
- [19] In the totality of the circumstances it cannot therefore be said that either party would have achieved clear and substantial success. There were bases which, on the face of it, could justify some of the relief sought by the Goudyn trust and bases on which other aspects of the relief sought could, on the face of it, have been successfully resisted. It would be inappropriate to say more than that in the light of the settlement of the merits. As was submitted by the Goudyn trust, this court does not lightly adjudicate matters where the only remaining issue relates to costs.
- [20] The parties have now embarked on a new chapter of neighbour relations. It is sincerely hoped that this heralds in an era of

co-operation in place of the past combative contestation. The extent of the co-operation to which they have committed themselves can be gleaned from the terms of the agreed order sought. In my view, it would not be helpful in fostering these neighbour relations for a costs order to be made in either the application or the appeal. This may serve to declare a winner and a loser and threaten to sour their future relationship. In all the circumstances, it seems to me equitable to let the costs lie where they fall, without making any order.

[21] In the result, the following order issues:

1 The order of the court below is set aside and the following order by consent is made in substitution:

(iv) It is recorded that the understanding is that the existing water turns of the Botha trust in its capacity as owners of the homestead farm and Piet Le Roux ('Water Turn Holder(s)') are as follows:

(c) Homestead farm: 16 hours every 14 days;

(d) Piet Le Roux's farm: 52 hours every 14 days.

(v) In practice, this will mean that when the above water turns commence, extraction of water by the Goudyn trust and the Botha trust will cease for the duration of those water turns, as was the case in the past. When each water turn terminates, the extraction

pipe or sleuth utilised during the water turns, will be closed off to enable the Goudyn trust and the Botha trust to share in all the water available at the extraction point on a 60/40 percentage (60% the Botha trust and 40% the Goudyn trust) until the following water turn commences.

(j) A period of 24 months will be afforded for regularisation.

GORVEN AJA

ACTING JUDGE OF APPEAL

Appearances

For appellant: A La Grange SC

Instructed by: Du Bois Attorneys, Robertson

Symington & De Kok, Bloemfontein

For respondent: T J Nel

Instructed by: Krouwkams Attorneys, Worcester

Phatshoane Henney, Bloemfontein.

[1] It also runs over the Remainder but, for present purposes, that is of no moment.

[2] It is the owners of a property who hold servitudes in their capacity as owners but, for the sake of conciseness, I shall refer to the properties as holding the servitudes.

[3] Known as a servitude of aquaehaustus.

[4] Known as a servitude of aquaeductus.

- [5] I am using the language used in this judgment to describe the various parties and aspects of the servitudes for the sake of clarity.
- [6] This was numbered 3.3 without a paragraph 3.2 so this and the subsequent paragraphs have been renumbered to follow sequentially.
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