

SOUTH AFRICA / JUDGMENT

Le Roux NO and Others v Botha NO and Others (5788/2016) [2018] ZAWCHC 86 (3 July 2018)

[2018] ZAWCHC 86

COURT

Western Cape High Court, Cape Town

BEFORE

A.G. Binns-Ward

CASE / FILE NUMBER

5788/2016

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Source record**Edited grammatically after delivery****Republic of South Africa****IN THE HIGH COURT OF SOUTH AFRICA****(WESTERN****CAPE DIVISION, CAPE TOWN)****Case****No: 5788/2016****Before: The Hon. Mr Justice Binns-Ward****Hearing: 6-7, 27-28 March 2018**

Judgment: 3 July 2018
In

the matter between: CAREL
WYNAND LE ROUX
N.O. First
Applicant
NIEL
FICK
N.O. Second
Applicant
ANDRONIKUS
GRIESSEL
N.O. Third
Applicant
(In
their capacity as the trustees of the
GOUDYN

PLASE TRUST (IT221/97))
and
THEUNIS
CHRISTOFFEL BOTHA
N.O. First
Respondent
THEUNIS
CHRISTOFFEL BOTHA (Jnr)
N.O. Second
Respondent
HILDE
BOTHA
N.O. Third
Respondent
T
C 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

JUDGMENT

BINNS-WARD J:

- [1] The Le Roux brothers (to whom, for convenience, I shall hereinafter refer by their respective forenames, Andries and Schalk) purchased the farm Goudyn 619 from their father in 1983 and acquired ownership of the property in equal undivided shares. The property so acquired was subsequently subdivided into four parcels of land, namely Portions 1, 2, and 3, and the Remainder of the farm Goudyn
619. In 1987 the brothers concluded an agreement in terms of which the jointly owned land was partitioned. The agreement provided that Andries would obtain sole ownership of Portions 1 and 2 and the Remainder, and Schalk would get exclusive ownership of Portion 3. The relevant transfers giving effect to the partition agreement were registered during 1990 in terms of deed of division transfer T33043/90. Notwithstanding the division, the brothers for 14 years thereafter continued to farm the entire farm effectively as a single unit. In 2007, as will be described below, Andries transferred title to his portions of the land to the Goudyn

Plase Trust. At all times until 2012 the water use arrangements between the divided parts of the land continued in practice as before the division.

- [2] There are three dams on the land. They were referred to in the evidence as ‘dam 1’, ‘dam 2’ and ‘dam 3’, respectively. The dams were built by the brothers’ father in or about 1969-1970. They were constructed for the purpose of storing water for irrigation purposes. The dams were (and still are) filled with water abstracted from the Wolwenkloof River (also called the Waterkloof River). The river runs across part of what became Portion 3 and thereafter flows over the Remainder to its junction with the Holsloot River, which is on the Remainder. The relative positions of the

respective portions of the farm, the dams and the rivers are depicted on the plan inserted at paragraph [17] below. It will be noted that the dams were not constructed in a streambed, and that it is accordingly necessary to lead the

abstracted water to them by artificial means.

- [3] The current litigation is between the successors in title to Andries and Schalk as owners of the land. It is about the rights of the parties to abstract water from the Wolwenkloof River and lead it overland to fill the storage dams on Portions 1, 2 and 3 of the farm.
- [4] Andries’ son, Mr Carel Le Roux, currently farms those portions of the land now registered in the name of the Goudyn Plase Trust. He is one of the three trustees of the trust. The trustees are the applicants in the case in nomine officii.
- [5] Schalk sold Portion 3 to the TC Botha Trust in 2012. It is currently farmed by Mr Theunis Botha, who is the fourth respondent. He and his two co-trustees of the TC Botha Trust have been cited in nomine officii as the first to third respondents.
- [6] The Minister of Water and Sanitation and the MEC, Environmental Affairs and Development Planning (Western Cape) were cited as the fifth and sixth respondents, respectively. Apart from the filing by the fifth respondent of a preliminary affidavit reserving her rights to deliver an answer after consideration of the answering papers of the first to fourth respondents, the fifth and sixth respondents have not, however, been active participants in the litigation.
- [7] The applicants have sought the following relief in terms of their notice of motion (as amended):

... ’n bevel:

1. Wat verklaar dat die Applikante, in hul hoedanigheid as trustees indertyd van die GOUYDYN PLASE TRUST (Trust Nr IT221/97), geregtig is om ter uitoefening van die serwituutregte oor Gedeelte 3 van die Plaas Goudyn Nr 619, Administratiewe distrik Worcester, Wes-Kaap Provinsie (hierna “Gedeelte 3”) wat geregistreer is ten gunste van die Applikante se eiendomme, synde Gedeeltes 1 en 2 en die Restant van die bogenoemde plaas (hierna “die Applikante se geregistreerde serwituutregte”), water uit die Wolvenkloofrivier te onttrek

deur middel van 'n keerwal wat aangebring is of aangebring staan te word op Gedeelte 3,

- (a) soos aangedui op Inlassing 1 op Kaart 9314/87 (Plan 12078), soos aangeheg by Akte van Verdelingstransport T33042/1990 en Akte van Transport T97275/2007, alternatiewelik
 - (b) op die plek waar die keerwal aangebring was alvorens dit deur die vloed van 15 November 2013 beskadig is (hierna "Applikante se serwituutkeerwal");[1]
2. Wat die Eerste tot die Derde Respondente as trustees indertyd van die T C BOTHA TRUST (Trust Nr 318/97) en die Vierde Respondent (hierna die "Eerste tot Vierde Respondente") verbied om in te meng met of afbreuk te doen aan die uitoefening deur die Applikante van die Applikante se serwituutregte;[2]
3. Wat die Eerste tot Vierde Respondente gelas om onverwyld:

3.1 die volle vloei van alle water afgekeer deur die Applikante se serwituutkeerwal in die Wolvenkloofrivier op Gedeelte 3 ongestoord en onbelemmerd te laat afvloeï in die Applikante se serwituutslote en pyplyne op en oor Gedeelte 3 met inbegrip van die bedryf deur die Applikante van die uitkeersluise in die verdeelkas by punt s op serwituutslot tsv en by punt h op serwituutslot aa bb,

soos aangedui op voormelde Kaart 9314/87;

3.3 die Applikante toe te laat om yster of staal sluisplate wat voorheen verwyder is vanaf die verdeelkas by punt s op die serwituutslot tsv en by die serwituut uitkeersluis by punt h op die serwituutslot aa bb, soos aangedui op gesegde Kaart 9314/87 te vervang, te plaas en te stel ten einde uitvoering te gee aan die waterbeurte soos uiteengesit

en verduidelik in paragrawe 37, 38 en 39 van die funderende eedsverklaring van CAREL WYNAND LE ROUX;[3]

3.4 Die uitkeerwal of -struktuur wat in die Wolvenkloofrivier stroomop van die Applikante se serwituutwal aangebring is af te breek, alternatiewelik, uit bedryf te stel op 'n wyse wat sal verhoed dat enige water daardeur uit die gemelde rivier geneem of weggelei kan word;

3.5 Die keerwalle of -strukture wat in die Wolvenkloofrivier stroomop van die Applikante se serwituutwal aangebring en geskep is ten einde water in die rivier op te dam of te gelei na die uitkeerwal waarna in paragraaf 3.3 hierbo verwys is te verwyder en af te breek, alternatiewelik, uit bedryf te stel op 'n wyse wat sal meebring water wat in die rivierbedding vloei vrylik en ongestoord na die Applikante se serwituutkeerwal sal vloei;[4]

- [8] Dam 1 is on Portion 1 of the original farm. Portion 1 (the applicants' property) is a small sliver of land, only 11 hectares in extent. It is rather inconveniently sequestered from the Remainder and from Portion 2 (also the applicants' property) by Portion 3 (the respondents' property). Portion 1 is not farmed. Its only practical purpose is to house dam 1. It is strikingly apparent from the charts that were put in evidence that the reason for the allocation of Portion 1 to Andries under the partition agreement must have been to give him

the benefit of the water stored in dam 1 to irrigate the land on the other two portions owned by the applicants. That much is confirmed by the nature of the servitural rights registered against Portion 3 in favour of the Remainder and Portion 2 in terms of the partition agreement. I shall describe them in detail presently, but, amongst other matters, they give the owner of the Remainder the right to pipe water from dam 1 across Portion 3 to the Remainder and also afford the right to the owner of Portion 2 to lead water by means of a furrow over Portion 3 to the dam on Portion 2. There is, however, no notarial tie between Portion 1 and either of the other two portions of the farm currently owned by the applicants. The registered servitudes gave formal effect to some of the practical water-related

arrangements that were already in place on farm Goudyn 619 at the time that the division agreement was entered into.

- [9] Dam 1 is fed with water that is diverted at a weir constructed on the Wolwenkloof River where it runs over Portion 3. The diverted water is thus led over Portion 3 to dam 1 and, as mentioned, it can be piped from there across another part of Portion 3 to the Remainder or to Portion 2. The means by which water is procured to fill dams 1 and 2 are secured by servitural rights of aquaehaustus (drawing water) and aquaeductus (leading water) registered in favour of Portions 1 and 2 and the Remainder against the title deeds of Portion 3.
- [10] Dam 3 is on Portion 3. It is by far the largest of the three storage dams. It is situated on part of the boundary of the respondents' property with Portion 1, and in very close proximity to dam 1. Historically, dam 3 was filled with excess water after dam 1 had filled. The excess water was led to dam 3 by means of a furrow or slood from dam 1.

This practice was maintained after the partition of the land between the two brothers, and continued until Andries decided unilaterally to fill in the connecting slood. That happened in 2012, shortly before the transfer by Schalk of Portion 3 to the first to third respondents in their capacity as the trustees of the TC Botha Trust.

- [11] It is alleged by the respondents, and having regard to the surrounding circumstances, supported by the probabilities, that the connecting slood was filled in as an act of pique because of Andries' unhappiness with Schalk's sale of Portion 3 to an outsider, rather than to Andries or the Goudyn Plase Trust. The respondents' purchased the property for R12 million, as opposed to the mere R5 million that Andries was willing to give for it.
- [12] It is clear from the evidence that neighbourly relations between the new owners of Portion 3 and Andries and his son, Carel, have been antagonistic, to say the least, since the sale of Portion 3 to the respondents. There has been previous unresolved litigation between them or their respective family trusts concerning the use of the weir on the Wolwenkloof River and also disputes about rights of road access. It is evident that the atmosphere has been such that emotion would tend to prevail over pragmatism and reason.

- [13] Dam 2 is on Portion 2. As mentioned, it is also fed by water diverted from the Wolwenkloof River at the aforementioned weir and led over Portion 3.
- [14] Two neighbouring farms, one of which is owned by the TC Botha Trust (Portion 32 of the Farm Goudyn No. 418) and the other by Mr Piet Le Roux (Farm Goudyn No. 697), also draw water from the Wolwenkloof River at the place from which the dams on Goudyn 619 are filled. These lower lying properties obtain the water in the exercise of servitural rights obtained long before Andries and Schalk became owners of the land. The division of water between these two farms and Goudyn was effected by way of a simple diversion work at a point in the furrow between the weir and dam 1 (at point s on the plan) and a sluice (at point h on the plan). The diversion works are used to divert the water into a channel leading to the two farms at certain times, in other words by way of a 'leibeurt' or 'waterbeurt' arrangement.
- [5] The path by which water diverted by the weir on the river is taken to the two farms is congruent for the greater part of its length with that by which water is taken to dam 2 in terms of the servitudes to be described in paragraph [16], below.
- [15] The Wolwenkloof River is fed from the catchment area of the surrounding Wolwenkloof Mountains, which, respondents aver, provides a bountiful supply of water. They and Schalk testified that the water flowing in the river has historically been more than sufficient to supply the needs of the all the adjoining landowners, even in times of drought.
- [16] Various praedial servitudes[6] were freshly registered against Portion 3 in favour of Portions 1 and 2 and the Remainder, respectively, when Portion 3 was transferred to Schalk pursuant to the partition agreement. They fall to be identified with reference to Map No. 9314/87 (Plan 12078) that was attached to the deed of partition transfer (T 33042/90, dated 12 June 1990). They record that Portion 3 was transferred to Schalk –

Onderhewig verder aan die volgende nuut opgelegde voorwaardes opgelê by die onderverdeling van die eiendom hierdeur getranspoteer:

- (1) Die eienaar van GEDEELTE 1 van die Plaas GOUDYN Nr. 619 Groot 11.0137 Hektaar gehou deur Akte van Verdelingstransport Nr. T

33043/90 sal geregtig wees op:

- (a) [’n Padserwituut oor die eiendom hierdeur getranspoteer].
- (b) Pyplyn serwitute 3 meter wyd oor die eiendom hierdeur getranspoteer die middellyne waarvan voorgestel is deur die lyne de ff gg hh en ut op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.
- (c) Watersloot serwitute oor die eiendom hierdeur getranspoteer die middellyne waarvan voorgestel is deur die lyne tsv en sr op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.
- (d) Die reg om ’n serwituut keerwal aan te bring op die eiendom hierdeur getranspoteer soos aangedui in die inlassing 1 op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.

(e) Die reg om met sy werknemers of kontrakteurs die eiendom hierdeur getranspoteer binne te gaan vir die doeleindes van inspeksie, instandhouding, en reparasie van die paaie, pyplyne, vore en keerwal soos hierbo uiteengesit.[7]

(2) Die eienaar van GEDEELTE 2 van die Plaas GOUDYN Nr. 619 Groot 54.7594 Hektaar gehou deur Akte van Verdelingstransport Nr. T

33043/90 sal geregtig wees op:

(a) [’n padserwituut oor die eiendom heirdeur getranspoteer]. (The road servitude in favour of Portion 2 was registered in exactly the same terms as that in registered in favour of Portion 1.)

(b) Pyplyn serwitude 3 meter wyd oor die eiendom hierdeur getranspoteer, middellyne waarvan voorgestel is deur die lyne de ff gg hh hgjf en ut op gesegde Kaart Nr, 9314/87 (Plan 12078) Hieraan (sic) geheg.

(c) Watersloot serwitude oor die eiendom hierdeur getranspoteer die middellyne waarvan voorgestel is deur die lyne tsv sr en aa bb op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.

(d) Die reg om ’n serwituut keerwal aan te bring op die eiendom hierdeur getranspoteer soos aangedui in die inlassing 1 op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg. (The servitude giving the owner of Portion 2 the right to draw water at a weir to be erected on Portion 3 was identical to that conferred in favour of the owner of Portion 1.)

(e) Die reg om ’n serwituut uitkeersluis aan te bou op die eiendom hierdeur getranspoteer soos aangedui word in inlassing 3 op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.

(f) [As per clause (e) of the above quoted servitude registered in favour of Portion 1.][8]

(3) Die eienaar van die Restant van die Plaas GOUDYN Nr. 619 groot as sulks 117,7940 Hektaar gehou deur Akte van Verdelingstransport Nr. T 33043/90 sal geregtig wees op:

(a) ’n padserwituut oor die eiendom heirdeur getranspoteer]. (The road servitude in favour of Portion 3 was registered in exactly the same terms as that in registered in favour of Portions 1 and 2.)

(b) Pyplyn serwitude 3 meter wyd oor die eiendom hierdeur getranspoteer, die middellyne waarvan voorgestel is deur die lyne ff gg hh en ut op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg.

(d) Die reg om ’n serwituut keerwal aan te bring op die eiendom hierdeur getranspoteer soos aangedui in die inlassing 1 op gesegde Kaart Nr, 9314/87 (Plan 12078) hieraan geheg. (The servitude giving the owner of Portion 2 the right to draw water at a weir to be erected on Portion 3 was identical to that conferred in favour of the owners of Portions 1 and 2.)

(e) [As per clause (e) of the above quoted servitude registered in favour of Portion 1.][9]

[17] The servitudes are better understood with reference to a diagram charting them on a plan that shows the layout of the respective parcels of land:

[See PDF for image]

Diagram by land surveyors Earth2Sky Geomatics, Worcester, attached as part of annexure B to the respondents' principal answering affidavit.

[18] The respondents, supported in this respect by the testimony on affidavit of Schalk, contended that it had been agreed between the Le Roux brothers as part of the division agreement that the respective portions of land to be divided between them should continue after the division to enjoy the respective rights to water that had been afforded inter se when they had been under joint ownership. In this regard it was alleged that a framework of mutual servitudes had been contemplated,

including provision for a servitude in favour of Portion 3 over Portion 1 to permit the owner of the former to draw water from the dam on Portion 1 to be led from there to dam 3.

[19] One would have expected the creation of mutually operating servitutorial rights to have been set out in the parties' division of ownership agreement if that had been their intention. Neither side was able, despite enquiry, to locate a copy of the agreement. It was concluded in 1987, nearly three years before the division between Andries and Schalk was effected.[10] The respondents did produce a land surveyor's diagram, dated 22 February 1988, which purports to reflect a servitude of sloop in favour of Portion 3 over Portion 1 on Plan 9312-87, and is labelled as an attachment to T33043 (which it will recalled was the applicable deed of division transfer). The deed of transfer contains no reference to the diagram, however. (It appears that there may be other anomalies in respect of the formulation and registration of the servitudes, for, as pointed out by a land surveyor whose firm was engaged for the purpose of drawing up the plan of division (No. 12078) that was registered by the Surveyor-General as Map No. 9314/87, no provision appears to have been made for a servitude in favour of Portion 2 over Portion 1 to permit the former to utilise the existing routes of leading water between sr and aa on the plan of division.)

[20] Schalk testified that he had left the supervision of the registration of the servitudes agreed upon for the purposes of the division to Andries. The suggestion was that the omission of a servitude in favour of Portion 3 allowing its owner to take water via dam 1 had been in error or by deception. It was contended by the respondents that the deed of division transfer was susceptible to rectification. The applicants applied for and were granted leave to cross-examine Schalk on the issue. Schalk was not disposed to make himself available, however, and the respondents' counsel advised the court that in the circumstances, while the respondents reserved their right to pursue a claim for rectification in other proceedings if so advised, they would not persist in a defence predicated on the rectification of the deed in the current matter.

- [21] It seems to me that in fact the formulation of a praedial servitude in favour of Portion 3 over Portion 1 along the lines conceived by Schalk may actually have been problematic. What is certain, however, is that the registered title deeds could not be rectified to provide the owner of Portion 3 with the right to draw water at the weir and lead it over its own property either to dam 3 or to Portion 1; one cannot register a servitude over one's own property. This is so because praedial servitutorial rights derogate, according to their tenor, from the ordinary rights of ownership of the servient tenement, and a tenement cannot be servient to itself.
- [22] As matters stand therefore the current application falls to be determined upon a proper construction of the servitudes as they are reflected in the registered title deeds. The central question is the extent to which, if at all, the registered servitudes in favour of Portions 1 and 2 and the Remainder derogate from the right of the owner of Portion 3 to abstract water from the Wolwenkloof River and lead it to dam 3.
- [23] It will be noted that the separately registered Portions 1, 2 and the Remainder each have identical servitutorial rights to provide a weir and draw water from precisely the same point on Portion 3, which, as mentioned, is at a point on the Wolwenkloof River where it runs through Portion 3. There is nothing in the registered servitudes to determine, as between themselves, the extent to which the owners of Portions 1, 2 and the Remainder may draw water at the weir point, nor is there any such determination as between them and the owner of Portion 3 as to the extent to which water may be drawn at the weir from the river at a point where it runs through the latter property. As mentioned, the owners of the lower lying properties also have the right to water drawn at the weir and led over Portion 3. Shared use of the designated abstraction facility and some parts of the routes of leading the abstracted water was plainly contemplated.
- [24] The deponent to the applicants' founding affidavit describes that dam 2 is filled with water diverted from the path of the water that would otherwise be led via the servitude to dam 1. According to his evidence this happens when dam 1 is filled, or 'has sufficient water' as he put it.[11] This might be all very well when Portion 1 and Portion 2 are under common ownership, as they are presently, but it begs the question of how the servitutorial rights individually registered in favour of each of them are to operate if, as is quite conceivable, the respective properties, including the Remainder, become separately owned. The same question arises in respect of the operation of the right to draw water at the weir point if any of the portions of the land currently owned by the applicants are at any time separately alienated.
- [25] It is trite that praedial servitudes attach to the affected land, and not - other than incidentally to their ownership - its respective owners. What is clear is that by reason of the several separately registered servitudes, which give the owners of a number of individually registered portions of property overlapping rights of aquaehaustus and aquaeductus, none of the servitude holders enjoys the exclusive right to abstract water at the weir and lead it to their respective properties.

What might appear to be exclusive rights if the servitutorial provisions in the title deeds of each of the dominant tenements are examined individually, are clearly shown not be exclusive when the incidence of the equivalent servitutorial rights of all the other properties involved are taken into account.

- [26] The amount of water to which the owners of the lower lying properties are entitled is apparently determined by their respective leibeurte, but there is no express provision as to the individual entitlements of Portions 1, 2 and the Remainder. It seems to me in the circumstances that if the servitudes registered in favour of Portions 1 and 2 and the Remainder are to be practicably workable, the provisions determining the extent of the respective rights to water drawn from the Wolwenkloof River falls to be tacitly imputed.
- [27] The imputation of tacit terms, if indicated, would occur with regard to the business efficacy of the contracts seen through the eyes of the contracting parties when they concluded the agreement. The imputation of tacit terms is permissible, not to lend reasonableness to the contract that is evident from the express terms, but only to the extent that it is necessary to make the contracts effective. The exercise necessarily involves regard being had to the evident object of the contract and the circumstances prevailing when the agreement was entered into.
- [28] Regard to the circumstances that prevailed when the relevant contract was made is in any event a recognised consideration when construing the ambit of servitutorial provisions, especially when they are susceptible to more than one construction; cf. e.g. *Richter v Bloemfontein Town Council* 1922 AD 57 at 69-72 and *Cliffside Flats Pty Ltd v Bantry Rocks Pty Ltd* 1944 AD 106 at 117- 118. This is reflective of the contextually informed approach that applies to the proper construction of all deeds of contract; cf. *Natal Joint Municipal Pension Fund v Endumeni Municipality*

[2012] ZASCA 13, 2012 (4) SA 593 (SCA), [2012] 2 All SA 262, at para.

18. Whilst courts are astute not to make contracts for the parties when it is apparent that the contracts that the parties have concluded are one-sided or ill-considered, they are careful not to construe contracts, where there is a dispute as their import, in a manner that would give an unbusinesslike result; cf. the reference with approval in *Bothma-Batho Transport (Edms) Bpk v S Botha & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA), at para 12, to *Rainy Sky S.A. and others v Kookmin Bank*

[2012] 1 All ER 1137 (SC), at para 21, where Lord Clarke held

The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties

to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible

constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

- [29] A consideration of the circumstances prevailing when the division agreement was concluded shows that all three dams were filled with water abstracted at the weir point in place at the time of the division agreement. The entire farm would have enjoyed riparian rights under the statutory provisions applicable in terms of the Water Act 54 of 1956 that was then in force. Such rights would have accrued to each of the portions upon the division of the farm. (There is no evidence that the currently delineated portions of Farm Goudyn 619 derived from different original grants.) There is nothing in the registered servitudes that subordinated the riparian right of the owner of Portion 3 in terms of s 10(1) of the Water Act[12] to abstract surplus water[13] from the river for storage in a dam to the equivalent rights of the owners of the other portions. The registered servitudes merely defined the means whereby (the weir) and the routes over Portion 3 applicable to the exercise by the owners of Portions 1 and 2 and the Remainder of their rights of abstraction for storage. That was the object of the servitudes; cf *Cliffside Flats (Pty) Ltd supra*, at 111, referring to *Rolls v Miller* 27 Ch 71 at 88. They did not give the owners of the latter properties preferent rights of abstraction, in the sense of a right to draw water from the public stream before the owner of Portion 3 could access the resource. The prevailing law granted riparian owners the use of only so much of water in a public stream as they could reasonably use.
- [30] With the inception in 1998 of the National Water Act 36 of 1998, the respective properties' water use entitlements fell, in terms of s 4(2), to be determined with reference to their owners' respective existing lawful water uses during the two-year statutory window period referred to in s 32(1) of the Act.[14] The types of water uses identified for the purposes of the National Water Act are listed in s 21. Those that are relevant for present purposes are 'taking water from a water resource' (s 21(a)) and 'storing water' (s 21(b)).
- [31] The applicants contend that Portion 3 did not exercise any lawful water use during the statutory window period. The basis for that contention is an assertion by the applicants that the only water received by dam 3 during that period was led via dam 1 and was received in dam 3, not by way of the exercise of a use right attached to Portion 3, but merely in consequence of an indulgence granted by the owner of Portion 1.
- [32] In my judgment that contention is unfounded. The means of leading the water abstracted from the river for the purpose of storage in the dam is not determinant of the property owner's abstraction use. The fact that, for convenience, he leads the abstracted water by way of someone else's property by virtue of an indulgence granted by the latter, rather than by a route over his own property, does not detract from the factual nature and extent of the water uses in question. The fact that the water abstracted for storage on Portion 3 was led there by way of the owner of Portion 1's property does not make the relevant water uses that person's,

rather than those of the owner of Portion 3.

- [33] The capacity of the dam and the extent of the owner's use of the water stored in it for irrigation during the statutory window period determine its abstraction and storage uses for the purposes of s 32 read with s 21 (a) and (b) of the National Water Act. Dams 1 and 2 each have a capacity of approximately 14 000 m³, whereas the capacity of dam 3 is more than 85 000 m³. The evidence does not establish the extent of the areas that were irrigated from the respective dams at the time. There is evidence, however, that the existing lawful water use on Portion 3 during the window period in terms of the National Water Act included the abstraction of 514 091m³ of surface water for irrigation purposes. This much was reflected in a letter to the respondents from the Breede-Gouritz Catchment

Agency (a 'responsible authority' within the meaning of the Act) informing them of a determination made in terms of s 35(4) of the Act.[15] In the absence of any indication of any change of land or water use on the respective properties during the period after the partitioning of the farm when Portion 3 was in Schalk's ownership, that seems to me to afford a reasonable basis to infer that the extent of water use would have been no different at the time of the division of the land between the two brothers.

- [34] Portion 3's surface water abstraction use right determined in terms of s 35(4) is related in the letter of notification from the Catchment Management Agency to s 21(a) of the Act, which pertains to 'taking water from a water resource'. 'Water resource' is defined in s 1 of the Act to include 'a watercourse, surface water, estuary or aquifer'. A 'watercourse' by definition includes, amongst other things, a river or spring or a dam into which water flows. It is clear, if regard is had to the topography described earlier, and depicted on the diagram in paragraph [17] above, that water taken by Portion 3 was abstracted from the Wolwenkloof River, which is a 'watercourse' as defined. It was not abstracted from dam 1. (The notion that the water with which dam 3 was filled had been abstracted from dam 1 could be sustained only if the water in dam 1 had been 'private water' within the meaning of the Water Act, 1956 – which was not the case. Dam 1 is in any event a dam into which water is led, not one into which water flows. It thus does not qualify as a 'watercourse', as defined.)

- [35] It is also evident that the only means of filling dam 3 was with water drawn from the river. When the division agreement was concluded, Portion 3 abstracted the water at the existing weir point designated in the servitude conditions. It would therefore have been a starkly unbusinesslike act for Schalk to have agreed that the farm should be partitioned on the basis that dam 3, which was the only place that irrigation water was stored on Portion 3, should be deprived of its existing means of supply (i.e. water abstracted at the weir point). The contextual indications are that the parties to the division agreement accepted when settling

the terms of the servitutorial conditions that the owner of Portion 3 would, along with the other riparian users in that vicinity, be able to continue to draw water from the river at the then existing weir point.

[36] It has repeatedly been emphasised in the jurisprudence on servitudes that they must be interpreted to have the least onerous effect, so as to limit or impinge on the rights of the owners of the servient tenements as little as the language in which they are expressed will allow.[16] A strict construction of the express provisions of the servitutorial conditions does not render a prohibition against the owner of Portion 3 from also abstracting water for that property's reasonable use at the common weir point. The factual context also indicates that a continuation by the owner of Portion 3 of the practice to abstract water at the weir point and lead it to dam 3, would not, if reasonably carried out, derogate from the servitude rights given to the owners of Portions 1 and 2 and the

Remainder.[17] In the peculiar circumstances of this case, I am not therefore not persuaded by the applicants' counsel's contention that doing so would breach the principle that the grantor of a servitude may not do anything that derogates from the exercise of the servitutorial rights conferred ('concessa servitude simul concessa censetur omnia sine quibus servitus exerceri nequit').

[37] The servitudes registered against Portion 3 are positive servitudes; they afford the owners of the dominant tenements the right to do various things on Portion 3. Negative servitudes, by contrast, forbid the owner of the servient property from exercising rights that it would ordinarily be able to exercise on its own property. A building height restriction servitude (servitus altius non tollendi) is a commonly encountered example of a so-called negative servitude.

[38] The servitudes registered against Portion 3 do not prohibit its owners from drawing water from the Wolwenkloof River to fill dam

3. Indeed, the applicants make no contention to the contrary. They do contend, however, that any such taking of water from the river must occur downstream of the weir point from which they have been given the right to divert water to fill dam 1.

The applicants' position comes down to an assertion that the registered servitudes give them a preferential right to the water in the river, and, as the correspondence addressed by their attorney to the respondents prior to the latter taking transfer of Portion 3 indicates, an exclusive right to water drawn at the weir point, with a prohibition on the owner of Portion 3 from abstracting water upstream from that point.

[39] A similar contention, in circumstances where the dominant tenement's servitutorial right to draw water had been acquired by prescription, rather than contract, was rejected in *De Klerk v Niehaus* (1897) 14 SC 302. The significance of that case in my view is that it illustrates that the existence of a servitude of aquaehaustus does not, of itself, necessarily operate to deprive the owner of the servient tenement of its riparian rights (if such exist) to the use of water drawn from a place upstream of the point where the dominant tenement owner is entitled to exercise its servitutorial right to draw water.

[40] The extent to which the owners of Portion 3 are entitled in the circumstances to exercise any right they might have to draw water from the river is determined by well-established principles. These were succinctly rehearsed by Harms JA in *Cillie v Geldenhuys*

[2008] ZASCA 54; [2008] 3 All SA 507 (SCA), 2009

(2) SA 325, at para 15, as follows:

Dit is 'n algemene reël dat 'n serwituuthouer in beginsel voorkeur geniet bo die dienende eienaar ten opsigte van die omskrewe genots- en gebruiksbevoegdhede wat die betrokke serwituut verleen (Van der Merwe 464). [[18]] Die eienaar van die dienende eiendom is daarenteen slegs bevoeg om sy saak te gebruik "insoverre hy nie daardeur die belange van die serwituuthouer aantas nie" (Van der Merwe op 465). Dit beteken dat wat die dienende eienaar mag of nie mag doen nie van die strekwydte van die serwituut afhang. Gaan dit om bv 'n konsensuele serwituut, is dit 'n kwessie van uitleg; gaan dit om 'n serwituut wat deur verjaring geskep is, hang dit van die presiese aard en omvang van die reg wat aldus verwerf is, af.[19]

(Emphasis by italicisation in the original.)

[41] The effect of the foregoing principles in my judgment is that there is nothing in the registered servitudes that would prohibit the owners of Portion 3 from drawing from the river at the weir point, and leading it to the dam on their property, so much water that does not adversely affect the entitlements of the owners of the dominant tenements, and as they are entitled to in terms of the National Water Act. The fact that the registered servitudes and established practices reflect that the owners of a number of different properties each has the right, individually, to erect a weir and divert water at the same spot on Portion 3 inexorably enjoins the conclusion that none of them has been given an exclusive right to do so. Any weir built at the place designated in the registered servitude would consequently necessarily be 'a joint waterwork' in the language of the National Water Act.[20] It was not surprising in the circumstances to read Schalk's evidence that, in practice, as the owner of Portion 3, he in the main attended to the repair and maintenance of the weir, and Andries and the owners of the lower lying farms contributed to the costs of his doing so. One would expect the position to have been otherwise, however, were Portion 3 not entitled to share in the use of the waterworks, for in that case the responsibility for their maintenance would have been entirely that of the servitude holders.

[42] In the circumstances I fail to see why the respondents should not be entitled, subject, of course, to regularisation in terms of the applicable statutory requirements, to erect and use the weir that is necessary for them and all the servitude holders to exercise their rights to abstract and lead water from the point - provided that they do so in a manner that does not adversely affect the servitude holders' rights. The requirement that servitude holders must exercise their rights *civilter modo*[21] serves as a common law enjoiner in the circumstances for all the affected parties to treat with one another reasonably to that end. There is nothing in the applicants' complaint to show as a matter of fact that the respondents' conduct has adversely affected the realisation of the applicants' entitlement

(whatever it might be) to water from the river. (I shall come presently to the effect of the applicants' right to abstract the water at the expressly designated place (point u).

- [43] There is also nothing in the servitural rights conferred on the dominant tenements that prohibits the owner of Portion 3 from withdrawing water upstream from the registered weir point, provided that by doing so it does not deprive the dominant tenements from access to the amount of river water to which they are in any event entitled.
- [44] It is time now to examine the factual background to the current litigation in a little more detail.
- [45] The fourth respondent reacted to the filling in by Andries of the interconnecting sloop between dams 1 and 3 by digging an alternative route for water abstracted for the purpose of filling dam 3 to be led entirely over his own land, thereby bypassing the hitherto used route via Portion 1. He also laid a pipe in part of the existing sloop over which the applicants enjoy servitural rights of aquaeductus. The pipe is used to lead water abstracted by the fourth respondent from the river by way of a new path directly to dam 3.
- [46] That gave rise to the institution by the applicants of the spoliation litigation referred to earlier. After argument in the spoliation application had been heard (before Gamble J), but before judgment could be delivered, the weir that existed at that time was washed away in a flood that occurred on 15 November 2013. The applicants were advised that the destruction of the weir rendered their spoliation application nugatory. They therefore instituted the current proceedings in May 2016. In the interim, and indeed, right up to the present, all of the property owners that enjoyed the right to draw water at the designated weir point (point u) have been abstracting their water using a replacement weir erected by the fourth respondent some 60-80 metres upstream from the

pre-existing structure. The fourth respondent provided a channel parallel to the river bank from the abstraction points at the new weir to point t on the plan, by means of which the abstracted water is led to the beginning of the routes for leading it to the servitude holders in terms of the various registered servitudes of aquaduct. In other words, he acted to ensure a continued supply of abstracted

water to all the users who had hitherto used the weir that had been swept away.

- [47] The replacement was constructed hastily, and without environmental authorisation, to address the exigencies of the situation caused by the flood damage. Without it, the property-owners who had been using the pre-existing weir (i.e. the applicants, the respondents and Mr Piet Le Roux) would be left without the means to draw water to fill their dams for use in irrigating their lands during the summer dry season that was just beginning. Irrigation was reportedly essential for the well being of the vineyards and orchards on the land of the applicants and the respondents. The evidence suggests that in the three years that intervened before the institution of the current proceedings the joint users of the weir waterworks have used the replacement weir without any of them suffering a shortfall in

their respective annual entitlements to abstracted water.

- [48] The applicants have complained that the size of the pipe whereby the water is abstracted to be led to dam 1 is smaller than that which the respondents have provided for the abstraction of water for their own purposes. In my view there is nothing in the point in the absence of any evidence showing that the smaller pipe diameter has resulted in the applicants being deprived of their lawful entitlement to water. The alternative to a system of pipes of varying sizes allowing a simultaneous abstraction of water by the joint users in volumes directly proportionate to the extent of their lawful water uses would be a system of 'waterbeurte'. As already discussed, the servitudes do not expressly provide how the co-existing water abstraction rights are to be exercised inter se at the abstraction point. If they are unable to resolve the question between themselves, the appropriate course would be obtain an order in proceedings in terms of Chapter 13 of the National Water Act.
- [50] Applying the Plascon-Evans rule, as it is bound to do when final relief is sought on paper, the court must accept this evidence unless it is palpably far-fetched.

The test for departing from the ordinary incidence of the rule is a stringent one that is not easily satisfied; see *National Scrap Metal (Cape Town) Pty Ltd and another v Murray & Roberts Ltd and others* [2012] ZASCA 47, 2012

- (5) SA 300 (SCA), at para. 22. In my view the evidence in this case does not justify a departure from the rule. The evidence in any event did not establish that the flow management methods employed by the fourth respondent resulted in the applicants receiving less water in their dams than they were entitled to take from the river.
- [51] The weir point in issue (point u) was not the only place adversely affected by the exceptional flood in November 2013. Many other farmers in the area were constrained to effect emergency reconstruction without being able to obtain prior environmental approval. A special dispensation (allowing like to be replaced with like) was put in place by the regulatory authorities to deal with these exigencies. The special dispensation did not include the weir replacement effected by the respondents, but a process of regularisation is currently underway. The evidence suggests that obtaining environmental approval is usually a somewhat drawn-out process. The respondents adduced the evidence of an environmental expert and a civil engineer with relevant experience who have opined that the respondents' application for the statutory regularisation of the weir upstream of the designated weir point enjoys good prospects of success, and that it may be a less environmentally invasive solution than the re-construction of a weir at the spot where the previous structure washed away. The fourth respondent has explained his decision to relocate the weir, pointing out that changes to the character of the river wrought by the flood rendered it impractical to rebuild it at the original place. He is supported in that view by the aforementioned civil engineer.
- [52] These considerations, of course, do not detract from the applicants' servitutorial right to erect a replacement weir at the place designated in their title deeds, but if they were to seek to do so they would require environmental authorisation. It is trite that the environmental legislation

– primarily the National Environmental Management Act 107 of 1998 – enjoins an integrated approach to environmental management.[22] It seems obvious therefore that any consideration of an application by the applicants for environmental authorisation to erect a weir at the place designated in the servitutorial conditions would fall to be considered by the relevant authorities in the context of the replacement that already exists and any as yet undetermined application for the regularisation of the latter structure. It is uncertain in the circumstances whether the applicants would be granted the required authorisation.

- [53] The respondents pointed out, in respect of the order sought in paragraph 3.3 of the notice of motion,[23] that the applicants do not have a registered servitude giving them sluice rights at point s. That is indeed so, but the respondents would be well advised not to make too much of the point. It is only by means of some form of diversion works at point s that the registered servitudes are workable. It is well-established that such ancillary rights as are necessary to lend effectiveness to a registered servitude are tacitly imputed in favour of the servitude holder. The imputed right of reasonable access to the servient tenement by the owner of the dominant tenement to inspect and maintain the servitude works is a ready example.[24] Any suggestion therefore that the diversion box at point s must not be operated in such a manner as to allow each of the servitude holders to obtain its water entitlement in terms of the

registered servitudes would not bear scrutiny. It would also fly in the face of the respondents' own evidence that the registration of the servitudes over Portion 3 in favour of Portions 1 and 2 and the Remainder was intended by Andries and Schalk to entrench for posterity the practical basis upon which the abstracted water had been shared between the three dams and the lower lying farms before the division agreement.

- [54] However, the evidence does not establish that the on-going management of the diversion system, primarily by the fourth respondent, is not assuring the applicants of the water to which they are entitled. It also does not provide the detail that would be required to properly frame any positive interdict of the nature prayed for in terms of paragraph 3.3 of the notice of motion. In the context of the applicants' unilateral decision to cut off the previously established route for leading water to fill dam 3 by way of Portion 1, it is evident that the diversion works at point s must also provide, insofar as necessary, for the diversion of water by another route for the owner of Portion 3's purposes.
- [55] This is a convenient point to deal with the applicants' contention that the conduct of the respondents in leading abstracted water over their own land by a different route to that which had applied during the statutory window period in terms of the National Water Act necessarily implied that the filling of dam 3 by such means could not be a continued lawful water use in terms of the Act. In that connection much reliance was placed on the observation by Van Heerden J in *Starke NO and another v Schreiber and others* [2001] 1 All SA 167 (C) at 184 that the ambit of an 'existing lawful water use' in terms of Act depends on the manner in which, and the purposes for which the water was actually used during the period of two years prior to the date of commencement of the Act. It was suggested that the

current method of leading the abstracted water by a different route to Portion 3 implied a changed use. I do not consider that this argument can be sustained in the face of the verification in 2015 of the respondents' water use in terms of s 35(4) of the Act. It seems to me in any event that the relevant water uses in issue are the taking of the water from the river (a use in terms of s 21(a) of the Act) and the storage of such water in dam 3 (a use in terms of s 21(b) of the Act). Those uses are unaffected by the different means of leading the abstracted water between the river and the dam. The amounts of water involved in the said uses have, as mentioned, been statutorily verified in terms of the Act.[25]

[56] Turning now, in the light of the foregoing, to consider the relief sought by the applicants.

[57] There is no dispute about the applicants' servitugal right to construct a weir for the abstraction of water on Portion 3 as indicated on insert 1 on Map 9314/87 annexed to the deed of division transfer. There is accordingly no reason for the court to invoke its discretionary power to make a declaratory order to such effect, as prayed in paragraph 1 of the amended notice of

motion. As discussed above, it is also in any event by no means certain that the applicants would be able in the prevailing

circumstances to obtain the statutory authorisation required to exercise the right.

[58] There is no proof that the respondents have interfered with or derogated from the exercise by the applicants of their registered servitugal rights. A case has therefore not been made out for the relief sought in terms of paragraph 2 of the notice of motion.

[59] The servitugal rights conferred on the applicants by the newly registered servitudes in favour of their properties do not afford them the right to the undisturbed and unrestricted flow of water abstracted at the weir point. A number of properties enjoy corresponding rights to abstract water at the same point using the same weir facility. The effect of the registered servitudes in favour of Portions 1 and 2 and the Remainder currently owned by the applicants is that those properties are entitled to abstract their entitlement to water taken from the Wolwenkloof River at the designated point of abstraction and to lead it from there to their respective properties. The servitudes do not give the applicants the exclusive right to all the water that is capable of abstraction at the weir point and, as discussed, they do not prohibit the respondents from abstracting their share of the water flowing in the river from that point and leading it over the same route onto Portion 3, provided that that is done in a manner that does not adversely impinge on the applicants' exercise of their rights. A case for the prohibitory interdict sought in terms of paragraph 3.1 of the notice of motion has not been made out. The applicants have not shown that they have been

adversely affected in the exercise of their servitugal rights by the fourth respondents' conduct.

[60] An interference with the rights of the owners of the lower lying farms has not been established. Nor have the applicants established that they have the exclusive right to regulate the diversion of water at points s and h. A proper basis for the interdictory relief sought in paragraph 3.3 of the notice of motion has not been made out.

[61] A case for the relief sought in terms of paragraphs 3.4 and 3.5 of the notice of motion has also not been made out. The applicants would be entitled to an interdict requiring the demolition of the weir constructed by the respondents only if they were able to show that its existence was prejudicing their right to abstract the water to which they are entitled at the weir point provided for in the registered servitudes. I would in any event not be inclined to exercise the court's discretion in favour of the applicants in regard to the interdictory relief sought in these paragraphs in circumstances when the weir that the applicants are entitled to erect is a joint waterwork that has not yet been built, and when there is no certainty that in the prevailing circumstances

the statutory permission that they would require to build it would be forthcoming.

[62] The applicants' exercise of their entitlement to abstract water from the river is not inextricably linked to the weir point indicated on the registered servitude. It would be feasible, were the relevant statutory authority to be persuaded that it would be impractical to require or permit the re-erection of a weir at the original spot, for the servitudes to be amended to provide for the abstraction to take place where the respondents have erected the replacement weir, or at any alternative place that might reasonably be considered more practical; see Part 2 of Chapter 13 of the National Water Act, and consider the development of the common law in respect of servitudes in *Linvestment CC v Hammersley and Another* [2008] ZASCA 1; [2008] 2 All SA 493 (SCA); 2008 (3) SA 283 and the related observations by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and others (Dark Fibre Africa (RF))* [2015] ZACC 29 (CC), 2015 (6) SA 440 (CC), 2015 (11) BCLR 1265, at para.

150. When the respondents, admittedly in response to what they consider to be provocative conduct by the applicants' in the current matter, assert that the applicants are being permitted to use the most recently erected weir only as an indulgence (Afr. 'n vergunning), they should bear in mind that on their own case the character of the current weir is in fact that of a replacement

joint waterwork that has been erected where it is in response to the emergency created by the damage wrought by the flood in 2013, when the pre-existing weir was washed away and the underlying riverbed scoured out in such a way as to make reconstruction at the same spot impractical. The siting of the joint waterwork is a matter that all the parties who have a legal and practical interest in it would be well advised to address in a co-ordinated and mutually co-operative manner under both the environmental and water regulatory statutes in terms of the currently on-going process for the regularisation of the weir structure constructed by the respondents.

[63] In the result, the application falls to be dismissed with costs, save that the costs wasted on 27 March 2018, when the hearing was stood down to enable the respondents to consider their position with regard to the cross-examination of Mr Schalk Le Roux, shall be borne by the first to third respondents.

[64] The following order is made:

1. The application is dismissed.
2. Save as provided in terms of paragraph 3 of this order, the applicants shall be liable for the respondents' costs of suit.
3. The first, second and third respondents shall be liable to pay the wasted costs incurred by the applicants as a result of the matter standing down at the respondents' request on 27 March 2018.

A.G. BINNS-WARD

Judge of the High Court

APPEARANCES

Applicants' counsel: A. de V. La Grange SC

Applicants' attorneys: Du Bois Attorneys

Robertson

Van der Spuy Attorneys

Cape Town

First to Fourth Respondents' counsel: T.J. Nel

First to Fourth Respondents' attorneys: Krouwkam Attorneys

Worcester

Hayes Inc

[1] 'An order: 1 Declaring that the applicants in their capacity as the trustees for the time being of the Giudyn Plase Trust ... are entitled in the exercise of the servitunal rights over Portion 3 of the Farm Goudyn 619, Worcester Administrative district, Western Cape Province (hereinafter "Portion 3") which are registered in favour of the applicants' properties , namely Portions 1 and 2 and the Remainder of the aforementioned farm (hereinafter "the applicants' registered servitunal rights) to abstract water from the Wolwenkloof River by means of a weir erected, or liable to be erected on Portion 3, (a) as indicated on insert 1 on Map 9314/87 (Plan 12078) as attached to Deed of Division Transfer T33042/1990 and Deed of Transfer T97275/2007, alternatively

(b) at the place where the weir had previously been erected before it was damaged in the flood of 15 November 2013 (hereinafter

referred to as “Applicants’ servitude weir”).’ (My translation.)

[1] ‘An order:

1 Declaring that the applicants in their capacity as the trustees for the time being of the Giudyn Plase Trust ... are entitled in the exercise of the servitural rights over Portion 3 of the Farm Goudyn 619, Worcester Administrative district, Western Cape Province (hereinafter “Portion 3”) which are registered in favour of the applicants’ properties, namely Portions 1 and 2 and the Remainder of the aforementioned farm (hereinafter “the applicants’ registered servitural rights) to abstract water from the Wolwenkloof River by means of a weir erected, or liable to be erected on Portion 3, (a) as indicated on insert 1 on Map 9314/87 (Plan 12078) as attached to Deed of Division Transfer T33042/1990 and Deed of Transfer T97275/2007, alternatively

(b) at the place where the weir had previously been erected before it was damaged in the flood of 15 November 2013 (hereinafter

referred to as “Applicants’ servitude weir”).’ (My translation.)

[2] ‘Prohibiting the First to Third Respondents as trustees for the time being of the TC Botha Trust ... and the Fourth Respondent (hereinafter the “First to Fourth Respondents”) from interfering with or impinging upon the exercise by the Applicants of the Applicants’ servitural rights.’ (My translation.)

[3] There was no para. 3.2 in the notice of motion.

[4] ‘3. Directing the First to Fourth Respondents to forthwith: 3.1 Permit the full flow of all water abstracted by the Applicants’ servitude weir in the Wolwenkloof River on Portion 3 to pass undisturbed and unobstructed through the Applicants servitude sloots and pipelines on and over Portion 3, inclusive of

the operation by the Applicants of the diversion sluices in the diversion box at point s on servitude sloot tsv and point h on

servitude sloot aa bb, as reflected on the aforementioned Map 9314/87; 3.3 Permit the Applicants to replace, fix and set iron or steel sluice plates, which were previously removed from the diversion box at point s on the servitude sloot tsv and at the diversion sluice servitude at point h on the servitude sloot aa bb, as reflected on the said Map 9314/87, in order to give effect to the waterbeurte as set forth and explained in paragraphs 37, 38 and 39 of the founding affidavit of CAREL WYNAND LE ROUX; 3.4 Demolish the weir or – structure that has been constructed upstream from the Applicants’ servitude weir; alternatively, put it out of operation in such manner as shall prevent any water being thereby abstracted from or led away from the said river; 3.5 Remove and demolish the weirs or –structures erected in the Wolwenkloof River upstream from the Applicants’ servitude weir to dam up water in the river, alternatively, to put them out of operation in a manner that will result in the water that flows in the riverbed flowing freely and

unhindered to the applicants' servitude weir.' (My translation.)

[4] '3. Directing the First to Fourth Respondents to forthwith:

3.1 Permit the full flow of all water abstracted by the Applicants' servitude weir in the Wolwenkloof River on Portion 3 to pass undisturbed and unobstructed through the Applicants servitude sloots and pipelines on and over Portion 3, inclusive of

the operation by the Applicants of the diversion sluices in the diversion box at point s on servitude sloot tsv and point h on

servitude sloot aa bb, as reflected on the aforementioned Map 9314/87;

3.3 Permit the Applicants to replace, fix and set iron or steel sluice plates, which were previously removed from the diversion box at point s on the servitude sloot tsv and at the diversion sluice servitude at point h on the servitude sloot aa bb, as reflected on the said Map 9314/87, in order to give effect to the waterbeurte as set forth and explained in paragraphs 37, 38 and 39 of the founding affidavit of CAREL WYNAND LE ROUX;

3.4 Demolish the weir or – structure that has been constructed upstream from the Applicants' servitude weir; alternatively, put it out of operation in such manner as shall prevent any water being thereby abstracted from or led away from the said river;

3.5 Remove and demolish the weirs or –structures erected in the Wolwenkloof River upstream from the Applicants' servitude weir to dam up water in the river, alternatively, to put them out of operation in a manner that will result in the water that flows in the riverbed flowing freely and unhindered to the applicants' servitude weir.'

(My translation.)

[5] I have been unable to find an English equivalent to these words. 'Leibeurt' is defined in the HAT Handwoordeboek Afrikaanse Taal 6th ed. as 'tyd om water uit 'n gemeenskaplike bron te lei' (Eng. 'time slot for diverting water (for own use) from a common source'. My translation.) '

[6] A contention by the respondents' counsel in his heads of arguments that the servitudes were personal, rather than praedial, in character was abandoned at the hearing; advisedly so.

[7] Subject further to the following newly imposed conditions imposed upon the partitioning of the property hereby transferred: The owner of PORTION 1 of the Farm GOUDYN No. 619, 11.0137 ha. in extent held by Deed of Division Transfer No. T 33043/90 shall be entitled to:

(a) [a road servitude over the property conveyed hereby].

(b) Pipeline servitudes 3 m wide over the property hereby conveyed the midlines of which are represented by the lines de ff gg hh and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.

- (c) Water slood servitudes over the property hereby conveyed the midlines of which are represented by the lines tsv and sr on the said Map No. 9314/87 (Plan 12078) attached hereto.
 - (d) The right to construct a servitotal weir on the property hereby conveyed as indicated on insert 1 on the said Map No. 9314/87 (Plan 12078) attached hereto.
 - (e) The right to enter the property hereby conveyed together with his employees or contractors for the purposes of inspection, maintenance and repair of the roads, pipelines, furrows and weir described hereinabove. (My translation.)
- [7] Subject further to the following newly imposed conditions imposed upon the partitioning of the property hereby transferred:

The owner of PORTION 1 of the Farm GOUDYN No. 619, 11.0137 ha. in extent held by Deed of Division Transfer No. T 33043/90 shall be entitled to:

- (a) [a road servitude over the property conveyed hereby].
- (b) Pipeline servitudes 3 m wide over the property hereby conveyed the midlines of which are represented by the lines de ff gg hh and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (c) Water slood servitudes over the property hereby conveyed the midlines of which are represented by the lines tsv and sr on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (d) The right to construct a servitotal weir on the property hereby conveyed as indicated on insert 1 on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (e) The right to enter the property hereby conveyed together with his employees or contractors for the purposes of inspection, maintenance and repair of the roads, pipelines, furrows and weir described hereinabove.

[8] The owner of PORTION 2 of the Farm GOUDYN No. 619, 54.7594 ha. in extent, held by deed of division Transfer No. T 33043/90 shall be entitled to:

- (a) ...
- (b) Pipeline servitudes 3 metres wide over the property hereby conveyed, the midlines of which are represented by the lines de ff gg hh hgjf and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (c) Water slood servitudes over the property hereby conveyed, the midlines of which are represented by the lines tsv sr and aa bb on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (d) The right to construct a servitotal weir on the property hereby conveyed as indicated on insert 1 on the said Map No. 9314/87 (Plan 12078) attached hereto.

- (e) The right to build a servitude diversion sluice on the property hereby transferred as indicated in insert 3 on on the said Map No. 9314/87 (Plan 12078) attached hereto. (My translation.)
- [8] The owner of PORTION 2 of the Farm GOUDYN No. 619, 54.7594 ha. in extent, held by deed of division Transfer No. T 33043/90 shall be entitled to:
- (a) ...
- (b) Pipeline servitudes 3 metres wide over the property hereby conveyed, the midlines of which are represented by the lines de ff gg hh hg fj and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (c) Water sloot servitudes over the property hereby conveyed, the midlines of which are represented by the lines tsv sr and aa bb on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (e) The right to build a servitude diversion sluice on the property hereby transferred as indicated in insert 3 on on the said Map No. 9314/87 (Plan 12078) attached hereto.
- [9] The owner of the remainder of the Farm GOUDYN No. 619, 117,7940 ha. in extent, held by deed of division Transfer No. T 33043/90 shall be entitled to:
- (a) ...
- (b) Pipeline servitudes 3 metres wide over the property hereby conveyed, the midlines of which are represented by the lines ff gg hh and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (c) Water sloot servitudes over the property hereby conveyed, the midlines of which are represented by the lines tsv and sr on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (d) The right to construct a servitural weir on the property hereby conveyed as indicated on insert 1 on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (e) ... (My translation.)
- [9] The owner of the remainder of the Farm GOUDYN No. 619, 117,7940 ha. in extent, held by deed of division Transfer No. T 33043/90 shall be entitled to:
- (b) Pipeline servitudes 3 metres wide over the property hereby conveyed, the midlines of which are represented by the lines ff gg hh and ut on the said Map No. 9314/87 (Plan 12078) attached hereto.
- (c) Water sloot servitudes over the property hereby conveyed, the midlines of which are represented by the lines tsv and sr on the said Map No. 9314/87 (Plan 12078) attached hereto.

12078) attached hereto.

(e) ...

[10] The applicants attached a copy of a 'Prokurasie en Verklaring vir Verdelings Transport', executed on 16 March 1990 to their replying affidavit, and in their heads of argument appear to have equated that with the agreement. The Power of Attorney and Declaration are, however, quite distinguishable from the underlying agreement referred to therein, which was reportedly dated 10 December 1987 (which happens to have been the same date on which the Minister of Agriculture signed the deed of consent to the subdivision of the land in terms of the farm into the four sections that now comprise Portions 1, 2 and 3 and the Remainder).

[11] 'As die dam op Gedeelte 1 ... genoeg water sou hê'.

[12] Section 10(1) provided: 'Subject to the provisions of this Act, and to any existing right, every riparian owner is entitled to the use of so much of the surplus water of a public stream to which his land is riparian as he can beneficially use for domestic purposes, for the watering of his stock, and for agricultural and urban purposes, and to impound and store such surplus water for those purposes.'

[13] 'Surplus water' was defined in s 1 of the Water Act, 1956, as 'in relation to a public stream, means public water flowing or found in that stream, other than the normal flow, if any'. 'Normal flow' was, in turn, defined as 'in relation to a public stream, ... the quantity of public water actually and visibly flowing in that public stream which, under a system of direct irrigation from that stream, whether by furrows or otherwise, but without the aid of storage, can be beneficially used for the irrigation of land riparian to such stream'.

[14] Section 32(1) provides insofar as relevant for present purposes: 'Definition of existing lawful water use.—

(1) An existing lawful water use means a water use—

(a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which—

(i) was authorised by or under any law which was in force immediately before the date of commencement of this Act' (A useful thumbnail review of the material changes in the applicable legal regime is given in *S v Mostert and others* [2009] ZASCA 171, 2010 (2) SA 586 (SCA), [2010] 2 All SA 482 at paras. 8-11; see also *Joubert en Andere v Die Benede-Blyderivier Watergebruikersvereniging en 'n Ander* [2006] ZASCA 53, 2007 (4) SA 80 (SCA). [2006] 4 All SA 549 at paras. 7-8.)

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[15] Section 35 provides insofar as relevant for present purposes:

35. Verification of existing water uses.

- (1) The responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use.
- (2) ...
- (3) A responsible authority—
 - (a) may require the applicant, at the applicant's expense, to obtain and provide it with other information, in addition to the information contained in the application;
 - (b) may conduct its own investigation into the veracity and the lawfulness of the water use in question;
 - (c) may invite written comments from any person who has an interest in the matter; and
 - (d) must afford the applicant an opportunity to make representations on any aspect of the application.
- (4) A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful water use contemplated in section 32 (1).

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 - (c) may invite written comments from any person who has an interest in the matter; and
 - (d) must afford the applicant an opportunity to make representations on any aspect of the application.
- (4) A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful water use contemplated in section 32 (1).
- [16] See, for example, the dictum of Harms JA in *Cillie v Geldenhuys* [2008] ZASCA 54; [2008] 3 All SA 507 (SCA), 2009
- (2) SA 325, at para. 20: 'Servitude moet mins beswarend uitgelê word en die regte van dienende eienaars so min as moontlik ingekort word'. (Eng. 'Servitudes must be construed least onerously and the rights of servient owners must be restricted as little as possible.' My translation.)
- [17] Cf. *Roeloffze v Bothma* 2007 2 SA 257 (C) at para. 33-34 and the other authority referred to in note 10 to that judgment. That judgment dealt with a servitude of right of way, but that does not give rise to a valid point of distinction in respect of the applicable principle.
- [18] The reference is to CG Van der Merwe, *Sakereg* 2de uitg.
- [19] 'There is a general rule that the holder of a servitude in principle enjoys precedence over the servient owner in respect of the defined rights of use and enjoyment conferred by the relevant servitude (Van der Merwe 464). The owner of the servient property is accordingly only entitled to use his property "to the extent that he does not thereby impinge on the rights of the servitude holder" (Van der Merwe at 465). This implies that what the servient owner may do or not do is dependent on the ambit of the servitude. If, for example, a consensual servitude is involved, it is a question of construction; if a servitude obtained by prescription is involved, it depends on the precise nature and extent of the right thus accrued.' (My translation.)
- [20] See s 134.
- [21] 'In a civil manner'; or as the Constitutional Court expresses the principle 'respectfully and with due caution', see *Motswagae and others v Rustenburg Local Municipality and another* (Lawyers for Human Rights as amicus curiae)
- [2013] ZACC 1; 2013 (2) SA 613 (CC); 2013 (3) BCLR 271 (CC) fn 57 at para. 14 and *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and others* (Dark Fibre Africa (RF)

[2015] ZACC 29 (CC), 2015 (6) SA 440 (CC), 2015 (11) BCLR 1265, at para. 143. In *Low NO and others v South African National Parks and another* [2008] ZAWCHC 333 (12 December 2008)) at para 47, Bozalek J gave expression to the principle in the following words ‘...the owner of a dominant tenement must exercise his rights with due regard to the rights of the other owner and must exercise the

servitude in a proper and careful manner so as to cause least inconvenience to the servient owner.’

[22] See, in particular, the principles set out in s 2 of Act 107 of 1998.

[23] See paragraph [7] above.

[24] Cf. *Zeeman v De Wet en andere* NNO

[2012] ZASCA 22, 2012 (6) SA 1 (SCA), at para. 13

[25] The position is factually distinguishable from that discussed in *Du Preez and Others v Viljoen NO and Others* [2017] ZAWCHC 113 (11 October 2017), at para 69. In that matter the indications were that a different amount of water was being taken from the water resource in question at the time relevant in the proceedings than that which had been taken during the window period. The actual import of the relevant dicta in *Starke*, and the reliance thereon in *Du Preez*, in any event invites consideration in the context of the remarks thereanent in *Schutte v Five Lakes Farms CC and others* WCC case no. 18104/14 (unreported judgment of Van Staden AJ, dated 15 February 2018) at paras. 50-52.

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