

SOUTH AFRICA / JUDGMENT

Low NO and Others v South African National Parks and Another (16144/2007) [2008] ZAWCHC 333 (12 December 2008)

[2008] ZAWCHC 333

COURT

Western Cape High Court, Cape Town

BEFORE

Bozalek

CASE / FILE NUMBER

16144/2007

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Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 16144 / 2007

In the matter between:

WILLIAM WALLACE LOW N.O. First Applicant

JONATHAN WILLIAM TREVOR MORT N.O. Second Applicant

LANCELOT PETER LIDDELL N.O. Third Applicant

PONTIUS TRADING 22 (PTY) LIMITED Fourth Applicant

and

SOUTH AFRICAN NATIONAL PARKS First Respondent

MINISTER OF WATER AFFAIRS AND FORESTRY Second Respondent

JUDGMENT DELIVERED ON 12 DECEMBER 2008

BOZALEK, J:

- [1] First to third applicants herein are the executors of the estate of the late Geoffrey Vincent Hare (also referred to as “the

deceased”) who, in his lifetime, owned the property “Klein Welgemeend” in Lakeside, Cape Town (“the property”).

At the time this application was launched the executors had agreed to sell the property to fourth applicant and by the time of hearing, ownership had been transferred to it.

- [2] The underlying source of the dispute in this matter relates to a praedial water servitude in favour of the property, a residential erf in the suburb of Lakeside in the South Peninsula, situated on the slopes of the Muizenberge, directly below Boyes Drive.
- [3] The relief sought by the applicants consists of four declaratory orders relating to the rights of the applicants, (and their

predecessor-in-title, the late Mr. Hare), in their respective capacities as owners or putative owner of the property, to use the

water from two servitude springs situated on a neighbouring property. That property forms part of the Table Mountain National Park and is under the control of first respondent, the South African National Parks. Second respondent, the Minister of Water Affairs and Forestry, is cited by reason of his responsibility, inter alia, for the administration of the National Water Act, 36 of 1998. The application was opposed by first respondent but second respondent abides the result.

- [4] Prayer 1 of the declaratory relief reads as follow:

“Declaring that the use by the late Geoffrey Vincent Hare, in his capacity as the owner of the property referred to as remainder of erf [...], Cape Town (“the dominant tenement”), of the water supply from two servitude springs situated on erf [...], Cape Town... (the servient tenement”) as referred to in the servitude registered against the title deed of the dominant tenement... and the servient tenement... constituted an “existing lawful water use” as defined in s 32(1) of the National Water Act 36 of 1998 (“the Water Act”) as at the commencement date of the Water Act.”

- [5] The second prayer seeks a declaration that the late Mr Hare was entitled, from the commencement date of the National Water Act, to use the water supply without a licence and to continue with the said existing lawful water use. The third prayer seeks a declaration in similar terms in relation to first to third applicants in their capacities as executors of the deceased estate and, in the case of fourth applicant, upon it becoming owner of the property. The fourth prayer seeks a declaration that the applicants are not precluded by virtue of the Regulations to the National Environmental Management: Protected Areas Act, 57 of 1993, from repairing and restoring the infrastructure of the servitude and from making use thereof and that they might do so without requiring the written permission of first respondent or conducting an environmental impact assessment. Finally, the fifth prayer seeks mandatory relief directing first respondent to afford the applicants access to the servient tenement for the purpose of...

“cleaning the servitude springs, streams and intakes referred to in the said title deed, keeping the same in good order and condition, and/or repairing and maintaining the pipelines referred to therein in good order and condition and replacing any of the aforesaid pipelines when and where necessary, and permitting the applicants to carry out any of the foregoing activities on the said property”.

- [6] This matter was fully argued on 8 and 9 September 2008 when judgment was reserved. However, besides its substantive defences, first respondent also raised a non-joinder point, contending, for the first time in its heads of argument, that the City of Cape Town (“the City”), as the owner of the servient tenement, should have been joined as a respondent. I handed down a judgment ordering the applicants to deliver a full set of the papers to the City and to ascertain from it whether it was prepared to file a consent to be bound by the judgment of this Court notwithstanding that it had not been cited as a party in the matter. I ordered, further, that judgment would stand over pending the taking of such steps and that, should such consent be filed within a six week period, judgment would be delivered without hearing any further argument.
- [7] By agreement between the parties the six week period was extended to 21 November 2008. Shortly before that date, the City served and filed a notice of intention to abide wherein it stated that it abided the decision of the Court provided that no costs order was sought against it. An affidavit by the manager of the City’s Property Services department was filed confirming background information furnished by the applicants and giving the correct description of the servient tenement, namely, erf [...], Cape Town, Division Cape, Province of the Western Cape. Also attached was an authority on behalf of the City to abide the Court’s decision signed by its Director of Legal Services. In the circumstances, the way has been cleared for the Court to deliver its judgment herein without any further ado.

BACKGROUND

- [8] The great majority of the facts relevant to this matter are common cause. The dominant tenement and the servient tenement were once part of a single erf which was consolidated in 1948. By that year there was a system of pipelines on the consolidated erf which conveyed the water from the springs on the mountainside to a reservoir situated behind the house on the lower slopes of what became the dominant tenement, a residential property better known as “Klein Welgemeend”. The springs are situated just below a rocky outcrop on the mountainside which is the site of a disused quarry.
- [9] In 1961 the consolidated erf was split into the two current portions when a public road, Boyes Drive, was extended through the middle of the property. The upper section was transferred to the Cape Town municipality. A servitude was registered over this section, the servient tenement, in favour of the owner of the property i.e. the lower section, and its successors in title entitling the owner to “the free and undisturbed use in perpetuity of the water from two servitude springs”.
- [10] The relevant portions of the servitude reads in full as follow:

“1. ALRA ESTATE (PROPRIETARY) LIMITED and its successors in title as owner of the remaining extent of the consolidated Lot No. 184 of the farm Weltevreden, situate as aforesaid, measuring as such remaining extent Two decimal Nought Six Six Five (2.0665) Morgen, shall be entitled to the free and undisturbed use and enjoyment in perpetuity of the water from two servitude springs situated on the aforesaid Portion 1 of the said consolidated Lot No. 184, hereby transferred, and which said two springs are marked Spring A and Spring B on the aforesaid diagram No. 5786/60 of the said Portion 1, hereto annexed, and which aforesaid water flows and/or is conveyed from the said springs to the said remaining extent and the tanks thereon in the following manner: -

The water from Spring A flows by means of a servitude stream along the line a b c d shown in blue on the aforesaid diagram to Intake A so marked on the said diagram and from Intake A the water is conveyed by means of a servitude pipe line to point j, which pipeline is marked e f g j on the said diagram.

The water from Spring B is conveyed by means of a servitude pipe line to point j, which pipe line is marked in blue h j on the said diagram. From point j, where the said two pipe lines meet, the water is conveyed along a servitude pipe line marked j k in blue on the said diagram to Intake B, so marked on the said diagram, and from Intake B aforesaid the water is conveyed by means of a servitude pipe line to the said remaining extent and to the aforesaid tanks on the said remaining extent and which pipe line is marked l m in blue on the said diagram.

2. The said Company and its successors in title as owner of the remaining extent aforesaid, in order to exercise effective and proper use and enjoyment of the water as aforesaid, shall at all times have the right of access to the said Portion 1 hereby transferred for the purpose of cleaning the said springs and the said streams and Intakes and keeping them in good order and condition and/or for the purpose of repairing and maintaining the aforesaid pipe lines in good order and condition and replacing any of the aforesaid pipe lines when and where necessary.
3. The owner of the said Portion 1 or its successors in title shall not permit and/or allow any person to interfere with the use and

enjoyment of the water as aforesaid by the said ALRA ESTATE (PROPRIETARY) LIMITED or its successors in title as owner of the said remaining extent.

- [11] From the wording of the servitude it appears that by 1961 the run-off water was being stored in tanks on the property. Up to January 2005 the servitude infrastructure as described in the title deeds was in place on the servient tenement and was maintained in working order.
- [12] Although the servient tenement belongs to the City of Cape Town it now falls within the area of the Table Mountain National Park and is administered as part of that National Park by first respondent in its capacity as the long term lessee of that land. This has been the position since approximately 1995.

[13] In January 2005 a fire advanced through the National Park, including the servient tenement, and destroyed the pipes forming part of the servitude infrastructure. The pipes were made of a PVC material incapable of withstanding the intense heat of a veld fire. By this time, however, the deceased was extremely ill and was continually being hospitalised. His illness rendered him unable to manage his affairs properly, one aspect of which was attending to replace the damaged water pipes. The deceased passed away in July 2005. Shortly thereafter, third applicant, in the performance of his duties as one of the executors of the deceased's estate, turned his attention to instituting an insurance claim in respect of the destroyed piping and, in September 2005, to reconstructing the infrastructure of the servitude on the servient tenement. Before the new pipes could be installed, a ranger from the National Park arrived and stopped the work. Despite sending copies of the servitude and title deeds to first respondent, the third applicant was told that his work team would be arrested if it continued with the work.

[14] Notwithstanding an extensive engagement between the applicants and first respondent since then, in the form of meetings and

correspondence, the impasse reached in September 2005 has continued up until present. In effect the dominant tenement has not enjoyed its claimed servitudinal rights for more than four years.

THE ISSUES IN DISPUTE

[15] All of the above is common cause. What then are the issues between the parties? In its opposing affidavit first respondent raised four defences. Firstly, it contends that the extent of the applicants' existing lawful water use depends upon the manner in which, and purpose for which, the applicants' predecessor in title in fact used the water from the two springs during the two years prior to the commencement of the National Water Act on 1 October 1998. In this regard, first respondent states that despite requesting the applicants to make information at their disposal available to assist it in establishing the extent of the applicants' purported water use, the latter had failed to do so. First respondent's reliance on this defence can be traced back to correspondence between first respondent's erstwhile legal advisor and third applicant and/or his legal representative. I shall revert to this correspondence in due course.

[16] The second defence raised is that the applicants' existing lawful water use is limited to the extent which was authorised by the servitude under consideration and, more specifically, to the capacity of the infrastructure which was in place in 1961. More specifically, first respondent contends that the applicants are limited to the utilisation of three storage tanks on the property with a capacity of ±5000 litres each and piping on the servient tenement measuring 30 and not 50 millimetres in diameter, the latter being the size of the piping sought to be installed by the applicants.

[17] The third defence raised is that the applicants must exercise any servitude which they have, reasonably, this necessarily entailing

that first respondent's "expert advice and assistance should be obtained before these rights may be exercised".

[18] The fourth defence put up by first respondent was that before the applicants could replace or upgrade the pipeline it was necessary, in terms of applicable legislation, to prepare an environmental assessment report. This defence was abandoned in first respondent's

heads of argument and need be considered no further.

THE VARIOUS DEFENCES CONSIDERED

[19] When the merits of the first and second defences were argued, first respondent's main contention was that in order to obtain the declaratory relief sought in the first to third prayers, it was incumbent upon the applicants to prove the exact physical extent of the late Mr Hare's use of water from the springs for the period 10 October 1996 to 30 September 1998 i.e. the two years period prior to the commencement of the new Water Act.

[20] First respondent submitted that not only would the applicants have to prove the physical extent of the use during the two year period, but would also have to show, if not the amount of water taken through the servitudal infrastructure in 1961, then at the least the capacity of the infrastructure to take off water at that time. This, counsel argued, was a consequence of the fact that whatever volume of water the applicants were able to prove was enjoyed during the two-year period prior to the relevant date in 1998 could not exceed what was, or could have been, received in 1961 when the servitude was first registered. To use a hydrological metaphor, first respondent's case is that the amount of water which could have been taken by the dominant property in 1961 was the high watermark of what the applicants were entitled to at present, notwithstanding their present claim for a right to enjoy all the water emanating from the two springs.

[21] Needless to say, given the nature of the servitude, to require the applicants to prove water consumption or capacity figures going back nearly 50 years and some 10 years respectively, creates an onus which they would find very difficult, if not impossible, to discharge. In my view, the submission by first respondent that the

applicants attracted such an onus rests on misconceptions both as to the nature of the dispute between the parties, as it evolved, and of the relevant provisions of the National Water Act.

[23] First respondent thus sought to limit the extent of the applicants' right to lead off water to what was reasonably necessary for gardening and domestic purposes. The applicants, however, saw no reason why any such limitation should be imposed. The contention by the applicants that the servitudal infrastructure took "all the water" must thus be read in this context. It means no more than that there was no inherent limitation on the applicants' rights other than the capacity of the servitude infrastructure itself. On the applicants'

approach there is, for example, no justification for a flow control or any similar device to be installed at or below the springs.

[24] In my view, having regard to the true nature of the dispute between the parties, and the terms of the National Water Act, there was no need on the part of the applicants to establish exactly how much water was taken from the springs in 1961 or between 1996 and 1998. Both prevailing hydrological conditions and the actual amount of water taken at or over the relevant times would be irrelevant to the relief sought by the applicants. This appears to be borne out both by the wording of the servitude and by the terms of the relevant provisions of the National Water Act and informed commentary on how an existing lawful water use must be proved.

[25] It is common cause that the applicants' rights to use water are now regulated by and in accordance with the National Water Act. Section 22(1) of the Act, entitled "Permissible water use", provides as follow:

1. A person may only use water -
 - (a) without a license –
 - (i) if that water use is permissible under Schedule 1;
 - (ii) if that water use is permissible as a continuation of an existing lawful use; or
 - (iii) ...".

The applicants contend the water use in issue is permissible under subsection 1(a)(ii) as a continuation of an existing lawful use.

[26] "Water use", for the purposes of the Act, includes taking water from a water resource, storing water and impeding or diverting the flow of water in a water course (s 21). A water resource is defined as including a watercourse, which is in turn defined as including a river or spring.

[27] S 32 of the Act goes on to define the concept of "existing lawful water use" as follows:

"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
- (II) ...".

[28] S 34, entitled "Authority to continue with existing lawful water use", provides as follows:

“(1): A person, or that person’s successor in title, may continue with an existing lawful water use, subject to –

- (a) any existing conditions or obligations attaching to that use;
- (b) its replacement by a license in terms of this Act; or
- (c) any other limitation or prohibition by or under this Act.”

[29] According to the applicants, and as is confirmed by a diagrammatic representation of the servitude which forms part of the title deed, the water course and servitudal infrastructure consists of two springs, springs, A and B, flowing by stream and/or pipeline to their respective intakes, A and B, converging at intake B and flowing, in a single pipeline, down the mountain side and under Boyes Drive into an unspecified number of tanks on the dominant tenement.

[30] It is not in dispute that, assuming the presence and consistent operation of the lawful servitude infrastructure as described above on the servient tenement during the two years prior to 1 October 1998, this constituted a “water use” as envisaged by the Act.

[31] The presence and consistent operation of the infrastructure during the two-year period is established, inter alia, through the evidence of the third applicant, a lifelong friend of the late Mr Hare, who visited the property regularly from 1978 to 2005, the period when it was owned by the deceased. Third applicant was also a co-director of a construction company through which the maintenance work required on the property, including maintenance and repair of the servitudal infrastructure, was done. Further evidence relied on was that of the late Mr. Hare’s gardener and housekeeper as well as certain correspondence the former had written during his lifetime concerning the servitude and its infrastructure. Collectively, this evidence clearly established that, throughout the late Mr Hare’s ownership of the property, including the relevant two year period over 1996 to 1998, the servitudal infrastructure and water source was in operation, diverting the water from the springs into the pipelines and onto the property. There were a few occasions when the infrastructure was damaged or clogged as a result of a veld fires but it was repaired soon afterwards. The system provided a constant supply of spring water to the tanks on the property, albeit that there was less water when the weather was dry, and the garden was watered from the tanks throughout the year. On the face of it then,

the late Mr. Hare used the water from the servitude springs and, furthermore, this constituted an “existing lawful water use” as defined in s 32(1) of the Act as at its commencement date.

[32] The first significant point of difference between the parties, as alluded to earlier, was the suggestion by first respondent that the applicants were required to prove the exact extent of their use of the water over the two year period. This argument in my view rests upon two misconceptions, the first of which was the parties’ differing perceptions of what the applicants meant when they contended, prior to the institution of the application, that they were entitled to “all the water” emanating from the springs. I am satisfied that the applicants

intended to convey no more than that, apart from the inherent limitation on the amount of water which they could take by reason of the nature and capacity of the servitudal infrastructure, they were entitled in law to whatever water such infrastructure could and did carry to the dominant property. Put differently, it was not open to first respondent or, for that matter, the City of Cape Town, to place any restriction on the servitudal infrastructure, such as a flow limiting device, for any reason whatsoever. My reasons for this conclusion are that in the first place the terms of the servitude express no limitation, explicit or implicit, on the dominant property's right to the flow of water. The phrase "of the water from two servitude springs" in clause 1 of the servitude can, in my view, in the circumstances, only bear the meaning of all the water that could be accepted by the infrastructure.

- [33] The further misconception on the part of first respondent is that, in terms of the Act, it was incumbent upon the applicants to prove how many kiloliters of water were received by the property over the relevant two year period. In the circumstances of this matter no such meaning, or equivalent meaning, is possible. S 32(1) refers, in general terms to a water use "which has taken place at any time during a period of two years immediately before" the commencement of the Act. In, *Water Law – A Practical Approach to Resource Management and the Provision of Services*, by Thompson, published by Juta, at page 502, the author comments as follows on proof of the extent of an actual water use:

"If an actual water use that took place during the qualifying period exceeded the extent of the use that was authorised by or under the law which was in force immediately before the date of commencement of the NWA, the existing lawful use would only be that portion that was authorised or allowed by law."

In the present matter, however, on a proper interpretation of the servitude, the only limitation on the amount of water which could be taken from spring was the nature or capacity of the servitudal infrastructure. Subject to disputes about those aspects, the late Mr. Hare, during his lifetime, and now the applicants, are entitled to take all the water which such infrastructure can carry. To illustrate this proposition one may have regard to the possibility that in 1961 very dry conditions prevailed in Cape Town with the result that the servitude springs only delivered a very limited amount of water to the dominant property. It could hardly be said that such volume of water then established the limit of what the owners of the dominant property could thereafter draw from the springs.

- [34] Thompson, at page 505 et sequor, in discussing the extent of an existing lawful water use, is not always entirely clear in this regard. He states at one point (page 505):

"The extent of an existing lawful water use is not the use that could have taken place lawfully in terms of the water laws which were in force when the NWA commenced. The extent is only that part that actually took place lawfully during the qualifying period. The part that did not take place, or if it did take place, if it did not take place lawfully, could not be an existing lawful water use."

To the extent that this statement suggests an approach whereby the applicants, post-1998, would be limited to the volume of water which was actually (lawfully) enjoyed by the late Mr. Hare during the relevant two year period, notwithstanding, for example, that drought conditions may have reduced the supply to negligible proportions, I disagree.

[35] However, the author clarifies this aspect somewhat immediately thereafter and on the following page when discussing the effect of hydrological conditions prevailing during the qualifying period. Where these were such as to have provided a limitation on the water which could lawfully have been taken during the qualifying period, this would not limit the right-holder's right to take greater amounts at a later stage provided that the intention of the person using the water during the qualifying period was not to limit him/herself to the lesser amount. In this regard the author writes:

"The extent is not the actual, maximum, minimum or average rate of water abstracted, volume of water stored, rate of flow diverted or quantity or quality of waste discharged during the period. The extent is also not nil if no water or waste was abstracted, diverted or discharged during the period..... The extent of an existing lawful water use should be determined by asking whether and how the water use would have been undertaken during the qualifying period, if certain hydrological conditions prevailed during the qualifying period. If the person would have undertaken the water use, the manner in which the water use would have been undertaken should be part of the existing lawful water use. If the water use would not have been undertaken, it should not be part of the existing water use."

[36] In the present matter both parties sought to rely on the approach adopted by Van Heerden J (as she then was) in the matter of *Starke N.O. v Schreiber* 2001 (1) All SA 167 (C), a case which dealt inter alia with the question of whether the provisions of the Act affected the right of an owner of a registered servitude to prohibit unauthorised use of water from a public river. Discussing whether the applicants had established a "clear right" for the purposes of interdictory relief sought, the Court considered the parties' respective rights to use certain river water following the enactment of the new Act. The learned judge held that the parties' respective rights to use the water had to be determined by reference to the concept of "existing lawful water use, as contained in the Act and is defined in s 32(1)". At page 184B the Court stated:

"The extent of this existing lawful water use depends on the manner in which, and the purposes for which, the applicants in fact used the water in the Bushmans River during the period of two years prior to the date of commencement of the Act. It is not in dispute that the applicants use of the water in the river during the said period was indeed 'authorised by or under any law which was in force immediately before the date of commencement of the Act.' It is, however, neither necessary nor possible, for purposes of the present proceedings, to determine the exact nature or extent of the applicants' existing lawful water use. Suffice it to say that, at present, the applicants remain entitled, notwithstanding the provisions of the Act, to continue using the water flowing in the Bushmans River above the S-Drift to the same extent, in the same manner, and subject to the same seasonal variations, as they actually used such water during the two year period preceding 1 October 1998..."

- [37] The Court's remarks about the applicants' present entitlement to water were obiter dicta, in that it eventually granted the relief sought, not by reference to the extent of the applicants' rights to use water, but on the basis of their right to enforce the restrictive conditions imposed upon the respondents in the title deeds. Apart from the non-binding nature of these remarks, I find myself unable, from the passage cited above, to determine with any certainty whether or not the learned judge was indicating that historical levels of water use over the relevant two year period would establish the ceiling of later lawful water use by the applicants. I would have difficulty with such a proposition given that prevailing climatic conditions might have rendered that ceiling arbitrary or unrealistic. What is clear from the learned judge's approach, however, is that users of water in terms of an "existing lawful water use" are entitled to no less water than that which they enjoyed over the two year period prior to the introduction of the National Water Act.
- [39] The related defence raised by first respondent was that the applicants' existing lawful water use is limited to only that quantity authorised by the servitude in question and, more specifically, that the applicants' rights are limited to the utilisation of the infrastructure that was in place in 1961 which amounted to three storage tanks on the property with a capacity of ± 5000 litres each. The suggestion on behalf of first respondent appears to be that the applicants are therefore limited to tanks of this capacity and are not entitled to utilise a new tank or tanks situated on the property to store the water received from the pipes. The second leg of this defence is based on evidence in the first respondents' opposing affidavits suggesting that the pipeline in 1961 and 1998 measured no more than 30 mm in diameter. On this basis, it is suggested, the applicants were not entitled to install 50 millimetre piping in place of the destroyed pipe, as was their intention.
- [40] It should be noted that, in the period leading up to the bringing of the application, first respondent's representatives did not suggest that the proposed infrastructure replacement would not be in accordance with the position as it was in 1961. Third applicant stated in his affidavit that he pointed out the exact nature of the proposed remedial work to first respondent's representative at an on-site inspection. This is not denied. One would expect that had there been a concern on first respondent's part that the applicants were overreaching the servitude, this would have been raised in correspondence and clear evidence to this effect put up. But in any event these challenges are, in my view, without substance. As regards the water storage tanks there is no clear evidence at all of what water storage tanks stood on the dominant property in 1961. It could very well have been the tanks which remain there to this day. The applicants put before court an original photograph, apparently taken in the 1940's or the 1950's, indicating that there were at least four tanks, notwithstanding first respondent's representative's reference to three tanks containing approximately ± 5000 litres each. There is also evidence from the applicants of another wooden tank lower down on the property.

- [41] Furthermore, although “tanks” are referred to in the servitude they do not strictly form part of the infrastructure in the sense of defining or limiting the extent of the servitude. The terms of the servitude are clear and express no physical limitation to the amount of water, or even the purpose for which, water can be taken from the servient tenement. The essence of a servitude is that it confers “a real right to an advantage out of the property of another” *Dreyer v Letterstedt’s Executors* (1965) 5 Searle 88 at 99. The essence of the present servitude is the right to take and convey water off the servient tenement. It does so by permitting the continued presence of pipes and other infrastructure on the servient tenement, and by permitting the dominant owner to enter onto that tenement for the purpose of maintenance and repair of the system. Whether the water so led off is stored on the dominant owner’s property, how it is stored, or whether it is simply allowed to run away, are matters that do not impact in any way on the rights or obligations of the owner of the servient tenement and are therefore matters of no consequence to it in law. As was contended by Mr. Janisch for the applicants, the exercise of trying to determine whether the current storage capacity of the tanks on the property exceeds that which existed in 1961 is futile, quite apart from the fact that it is irrelevant.
- [42] With regard to the diameter of the pipes, first respondent’s Mr. Bell contends that in former years the infrastructure appears to have comprised a 30mm diameter pipe and not the 50mm diameter pipe which the applicants propose to install. This conclusion appears to be based upon Mr. Bell’s finding of a 30mm internal diameter pipe outside the fire-affected area on the servient tenement which he duly photographed. In reply, however, third applicant, supported by numerous photographs, demonstrates that all of the damaged pipes which are still to be found on the servient tenement are of 50 millimetre diameter. They comprise not only the original steel pipe which comprised the original servitudinal infrastructure but also the plastic pipes which replaced the steel pipes. Some remnant pipes in the vicinity of the springs and the inlets are even larger than 50 mm in diameter. Third applicant was able to find no evidence from the springs down to Boyes Drive of piping, of whatever substance, smaller than 50mm in diameter. He explains that the 30mm internal diameter pipe found by Mr. Bell runs under Boyes Drive and was installed some 10 years ago. That pipe, a 30mm internal diameter pressure pipe running through a concrete sleeve of 150mm diameter installed under Boyes Drive, was not damaged in the fire and the applicants do not seek to replace it.
- [43] In the circumstances I consider that the applicants have established, to the Court’s satisfaction, that at all material times the piping component of the servitudinal infrastructure on the servient property was not less than 50mm in diameter and may thus be replaced by piping of equivalent diameter.
- [44] This does not completely dispose of first respondent’s second defence, however. Mr. Van Staden, on behalf of third respondent,

referred to a 1948 surveyor's diagram indicating a third spring and raised the question of where this fitted into the servitudal

infrastructure. In similar vein he submitted that there was confusion as to whether the infrastructure comprised two intakes, as described in the servitude and the servitude diagram, or whether this infrastructure had been extended by the applicants without

appropriate authorisation. This alleged uncertainty was largely based on a letter sent by the applicants' legal representative prior to the institution of the application, dated 18 January 2006, referring to "two weirs" which would have to be repaired and "one collector sump which receives water from the two weirs".

[45] As far as the third spring is concerned, the only reference thereto was an imprecise representation on the surveyor's diagram dating back to 1948 and a reference, in a letter by the late Mr. Hare to the City in 1983, to the existence of three springs. As was contended by applicants' counsel, Mr. Janisch, there was certainly no evidence, nor for that matter any allegation in the papers, of any current, unlawful use of water by the applicants from a third spring. Nor did the deceased in the letter in question state that he used the water from the third spring. Mr. Janisch pointed out, moreover, that first respondent's representatives did in fact conduct on-site inspections of the servitudal infrastructure but put up no evidence that it differed from that described in the servitude. Furthermore, in first respondent's own expert report, drawn up by a Mr. Du Plessis, who also conducted a site inspection, there is a reference to two inlet structures having been identified, the location of which corresponds with the description of the servitude. Photographs of these inlet structures appear in the report. In the circumstances I am satisfied that nothing can be made of this issue and that the evidence clearly establishes that there is in effect no real dispute about the servitudal infrastructure.

[46] The final defence raised by first respondent is that the applicants were required to exercise whatever servitudal rights they possessed, reasonably, the implication being that the applicants had not done so or did not intend to do so. In this regard first respondent emphasises that the spring are situated in a sensitive area of a National Park and that the repair and replacing of pipes and other infrastructure cannot take place without the involvement of first respondent.

[47] It is trite that the owner of a dominant tenement must exercise his rights with due regard to the rights of the other owner and thus must exercise the servitude in a proper and careful manner so as to cause least inconvenience to the servient owner. See *Rubidge v Mc Cabe and Sons* 1913 AD 433 at 431. However, the servitude in question contains a precise description of how the right is to be exercised and stipulates that the applicants are entitled to maintain, repair and replace the infrastructure. Furthermore, there is no real dispute between the parties with regard to the restoration of the infrastructure. The applicants initially sought to bury the new pipes underground, presumably to avoid the consequences of a further veld fire. It would appear that first respondent objected to this proposal but in

the light thereof the applicants demurred. In third applicant's affidavit he states that there is no objection to performing the repair work in the presence of representatives of first respondent nor indeed to first respondent itself carrying out this work, if it so prefers, provided that it does so in a manner which fully restores the utility of the servitude.

[48] There is, therefore, in my view, no justifiable apprehension that the applicants may proceed to exercise their rights "unreasonably"

in restoring the servitude infrastructure.

RELIEF SOUGHT

[49] Prayer 5 entails an order directing first respondent to permit the applicants access to the servient tenement for the purpose of cleaning the servitude springs, streams and intakes, keeping them in good order and condition and for the purpose of repairing and maintaining the pipe lines and replacing any of it where necessary. This relief echoes the terms of clause 2 of the registered servitude. By agreement, through these particular provisions, to use the language of Van Heerden J in *Starke v Schreiber* (supra):

"(t)he respondent's predecessors in title lawfully divested themselves of an incidence of their ownership in favour of the applicant's

predecessors in title."

Since none of first respondent's defences have been upheld, and in the light of the first respondent's refusal over three years to permit the work in question, it must follow that the applicants are entitled to the relief in question.

[50] The balance of the relief sought comprises declaratory orders. On behalf of first respondent it was contended that the Court should, in the exercise of its discretion, refuse to grant such orders. It was argued that, regard being had to the demands of justice or convenience, this was not an appropriate case for declaratory orders. The reasons advanced for this submission include the alleged lack of evidence proving the extent of the applicants' rights. I have found, however, that there was no such shortfall in the evidence.

[51] In *Adbro Investment Company Limited v Minister of the Interior and Others* 1961 (3) SA 283 (T) at 285D it was held that:

"Some tangible and justifiable advantage in relation to the applicant's position with reference to an existing future or contingent legal right or obligation must appear to flow from the grant of the declaratory order sought."

Williamson JA stated further (at page 285A – B), in regard to the court's power to grant a declaratory order, that:

"In each case the court must carefully determine whether or not the particular case in question is a proper case for the exercise of its discretion. For a case to be a proper case, in my view, generally speaking it would require to be shown that despite the fact that no consequential relief is being claimed

or perhaps could be claimed in the proceedings, yet nevertheless justice or convenience demands that a declaration be made, for instance as to the existence of or as to the nature of a legal right claimed by the applicant or of a legal obligation said to be due by a respondent. I think that a proper case for a purely declaratory order is not made out if the result is merely a decision on a matter which is really of mere academic interest to the applicant.”

[52] In my view, it can hardly be said that the applicants have merely an academic interest in the declaratory orders sought. The orders relate to and clarify the rights of the late Mr Hare and his successors-in-title in relation to a servitude sought to be exercised which has considerable practical value and implications for the applicants. The order seek to clarify the applicants’ rights in relation to the servitude following the new water dispensation introduced by the National Water Act and are, furthermore, a response to first respondent disputing, on various grounds, the extent of such rights and first respondent’s refusal to allow the applicants to exercise their rights in terms of the servitude. Apart from any other consideration, the declaratory orders will make it clear that first respondent, or any other party for that matter, can no longer insist on some other limitation of the flow of the water by means of a flow control device.

[53] In the circumstances I consider that it would be a proper exercise of this Court’s discretion to grant the declaratory orders sought.

COSTS

[54] On behalf of first respondent, Mr. Van Staden contended that, whatever the outcome of the case, first respondent should not be ordered to pay costs. He relied on the case of *Coetzeestroom Estate and Gold Mining Company v Registrar of Deeds 1902 (TS) 216 at 223-4* as authority for the general rule that costs will not be awarded against a public official where his action or stance, though mistaken, was bona fide. He contended, furthermore, that the applicants could have approached the Department of Water Affairs to determine their rights in which event first respondent would have abided that decision. However, the applicants were under no obligation to follow such a procedure, assuming this was feasible, nor did they stand to gain anything therefrom to which they were not already entitled. Nor is it obvious to me that first respondent would have abided by any decision arising out of such a process. Mr van Staden argued, further, that first respondent was justified in denying the applicants’ access to the servient tenement because their rights were uncertain at the time. Finally, he contended that first respondent’s refusal to allow such access was justified in the light of the applicants’ admission that they may only utilise a 30mm pipe under Boyes Drive and that they are not allowed to bury the piping on the servient tenement.

- [55] The Coetzeestroom Estate case established a rule offering some protection against costs orders to public officials who act bona fide, but the rule has been judicially qualified in certain respects. It has been held that the views of the Court in that case were not to be elevated into a rigid rule of universal application for this would restrict too narrowly the exercise of a judicial discretion in the matter of costs. See Attorney-General, Eastern Cape v Blom 1988 (4) SA 645 (A) at 670F – G.
- [56] I do not consider that first respondent should be a beneficiary of the general rule in the present matter. It was sued principally in its capacity as a neighbour and not as the repository of a particular statutory or public duty as was the case in Coetzeestroom. Whilst first respondent may indeed have been bona fide in its opposition, it acted nonetheless in a somewhat high-handed if not obstructive fashion. The defences which it raised were of a somewhat technical nature, in some instances founded upon a speculative rather than a factual basis. Furthermore, the factual basis involved in some of the defences raised by first respondent were not foreshadowed in the meetings and inspections which preceded the launching of the application and which would have allowed the applicants' to clear up any misconceptions.
- [57] The applicants have been forced to litigate to obtain relief and have been kept out of their rights since September 2005 as a result of the approach adopted by first respondent. None of the further considerations advanced on behalf of first respondent, either singly or collectively, justify withholding a costs order from the successful litigants. In the circumstances I consider that the applicants are fully entitled to their costs.

ORDER

[58] In the result the following order is made:

1. Declaring that the use by the late Geoffrey Vincent Hare, in his capacity as the owner of the property referred to as Remainder of Erf [...], Cape Town ("the dominant tenement"), of the water supply from two servitude springs situated on Erf [...], Cape Town, Division Cape, Province of the Western Cape, (previously known as Portion 1 of Consolidated Lot No. 184 of the farm Weltevreden) ("the servient tenement"), as referred to in the servitude registered against the title deed of the dominant tenement (namely Deed of Transfer No. T28356/1978) and the servient tenement (namely Deed of Transfer No. T930/1961), constituted an "existing lawful water use" as defined in section 32(1) of the National Water Act 36 of 1998 ("the Water Act") as at the commencement date of the Water Act.
2. Declaring, accordingly, that the said Geoffrey Vincent Hare was entitled, as from the said commencement date:
 - 2.1 in terms of section 22(1)(a)(ii) of the Water Act, to use the said water supply without a licence; and

2.2 in terms of section 34(1) of the Water Act, to continue with the said existing lawful water use, subject to the further provisions of section 34(1).

3. Declaring further that the First to Third Applicants (in their capacity as executors of the deceased estate of the late Geoffrey Vincent Hare) and the Fourth Applicant (in its capacity as successor-in-title to the First to Third Applicants as owner of the property) have, and (in the case of the Fourth Applicant) will, upon becoming owner of the property, have the same entitlements as set out in paragraph 2 above.
4. Declaring further that the Applicants are not precluded, by virtue of either regulation 39(2) or regulation 42(c) of the Regulations to the National Environmental Management: Protected Areas Act 57 of 1993, promulgated on 28 October 2005 by way of GN R1061 in Government Gazette No. 28181, from repairing and restoring the infrastructure (as referred to in the said title deeds), from making use of and enjoying the water supply in terms of the said servitude, nor from continuing to make use of the said water supply in terms thereof, and in particular that the Applicants are not required to obtain the written permission of the First Respondent and/or to conduct an environmental impact assessment in regard to any such repair and/or restoration and/or use.
5. Directing First Respondent to permit the Applicants access to Erf [...], Cape Town, Division Cape, Province of the Western Cape (previously known as Portion 1 of Consolidated Lot No. 184 of the Farm Weltevreden) for the purpose of cleaning the servitude springs, streams and intakes referred to in the said title deed, keeping the same in good order and condition, and/or repairing and maintaining the pipe lines referred to therein in good order and condition and replacing any of the aforesaid pipe lines when and where necessary, and permitting the Applicants to carry out any of the foregoing activities on the said property.
6. First respondent is directed to pay the costs of this application.

LJ BOZALEK, J

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