

SOUTH AFRICA / JUDGMENT

## Schutte v Five Lakes Farm CC and Others (18104/2014) [2018] ZAWCHC 132 (15 February 2018) [2018] ZAWCHC 132

COURT

Western Cape High Court, Cape Town

BEFORE

Van Staden

CASE / FILE NUMBER

18104/2014

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IN

THE HIGH COURT OF SOUTH AFRICA  
(EASTERN  
CIRCUIT COURT, GEORGE)

Case No: 18104/2014

In

the matter between:

EGHARDT  
RUPERT SCHUTTE  
Applicant  
and  
FIVE  
LAKES FARM CC  
First  
Respondent  
ABSA  
BANK LIMITED  
Second  
Respondent  
THE  
REGISTRAR OF DEEDS, CAPE TOWN  
Third  
Respondent

Court: Van  
Staden, AJ  
Date  
of Hearing: 30,  
31 May  
and 17 October 2017

Judgment: 15  
February 2018

## JUDGMENT

### INTRODUCTION

1. The crucial question in this matter is the nature and extent of the evidence required for the acquisition of praedial servitudes as provided for in Section 127 of the National Water Act No 36 of 1998 ('the Act') in an instance where an applicant for such servitudes bases his claim on an existing lawful water use, defined in Section 32(1)(a) of the the Act as a use which took place during the period of two years prior to the commencement of the Act.
2. Applicant, Mr. E.R. Schutte ('Schutte or applicant'), applied for such praedial servitudes over Portion 211 of the farm Klein Krantz ('Portion 211'), the property of first respondent, Five Lakes Farms CC ('Five Lakes or first respondent'), in favour of his property, Portion 210 of the farm Klein Krantz ('Portion 210') in the district of George.

### THE HISTORY OF THE LITIGATION

3. Schutte's attorney addressed a letter dated 10 June 2014 to Five Lakes advising of his intention to claim a servitude, as required in Schedule 2 of the Act. A servitude diagram 865/2014 indicating the point of extraction in the Duiwe River and the route of the pipeline crossing Portion 211 was annexed to this notice.
4. Applicant issued the ensuing notice of motion on 22 August 2014 and inter alia applied for the following:
  - 4.1. A servitude of abutment to take water from the Duiwe River, a watercourse on Portion 211;
  - 4.2. A servitude of aqueduct to direct the flow of this water via Portion 211 to Portion 210; and
  - 4.3. An order that no compensation is payable to Five Lakes in respect of these servitudes.
5. In the founding affidavit Schutte explained that he purchased Portion 210 at a public auction held on 26 June 2002 and that this property was advertised as land under irrigation with an existing pipeline. At the commencement of the auction it was announced that Portion 210 acquired its water from the Duiwe River and a pipeline crossing Portion 211. Schutte, furthermore, stated that he, as owner of Portion 210, derived his right to this water from the provisions of the previous Water Act 54 of 1956, more specifically Sections 8 and 9, read with

the definitions of 'riparian land' and 'riparian owners' in Section 1 of that Act.

6. Schutte indicated that there had been compliance with the requirements of Schedule 2 to the Act, which deals with notice of a claim for a servitude under Section 127 of the Act.
7. Schutte furthermore relied on certain information obtained from an engineer, Mr. Retief Kleynhans ('Kleynhans'), who previously assisted him to lodge an application with the Department of Water Affairs and Sanitation in order to register

certain water uses, including the water uses under considerations in this matter. Schutte intimated that Kleynhans, who allegedly utilised aerial photographs of the two portions to reach his conclusions, was prepared to state that the most probable inference was that, during the qualifying period of two years prior to the commencement of the Act referred to in Section 32(1) (a) of the Act, water was taken at the existing point of extraction in the Duiwe River on Portion 211 and pumped to Portion 210 by utilising the existing pipeline. In the founding affidavit reference was made to a confirmatory statement of Kleynhans annexed as an annexure. The annexed statement signed by Kleynhans, dealing with the historic water uses in terms of Section 32 in respect of Portion 210, was signed by Kleynhans but is not a sworn statement.

8. In first respondent's opposing affidavit deposed to on 29 September 2014, Ms. Vicky Ann Benjamin ('Benjamin') an erstwhile member of Five Lakes explained that the members of Five Lakes were in the process of transferring their membership interest in Five Lakes to a third party. The submission was therefore made that this third party should have been cited as a respondent in the application.
  9. In respect of the allegation that the water use on Portion 210 was authorised under the previous Water Act 54 of 1956 Benjamin responded that she as a layperson was in no position to present argument of a legal nature and that her legal representatives would do so at the time of the hearing of the application.
  10. She furthermore stated that Five Lakes purchased Portion 211 during 1997 and that she lived on this property from July 1997 until the year
2000. She intimated that the then owner of Portion 210, Mr. Bill Troskie ('Bill Troskie'), visited Portion 210 once in a while as a holiday home, that he undertook no farming activities, kept no animals and that he did not have a farm manager on Portion 210. His brother, Mr. Boet Troskie ('Boet Troskie'), the owner of Portion 211, farmed actively on his property and had a permanent farm manager, a Mr. Danie Oosthuizen ('Oosthuizen'), to manage Portion 211.

11. She claimed that no water whatsoever was supplied from the Duiwe River to Portion 210 during the five years from mid-1997 to 2002, nor for the first approximately two years of Schutte's occupancy. Thereafter Schutte approached one of the members of Five Lakes, Mr. Trevor Blamire ('Blamire'), and he agreed that Schutte could draw water from the Duiwe River in return for helping to maintain the water supply. After Blamire passed away in 2011, she was informed that Schutte continued to draw water for his own use.
12. Benjamin indicated that she intended tracing Oosthuizen since she believed that he would have 'valuable factual information which will surely assist the court in determining the application'. She also indicated that, if necessary, she would ask the court's permission to file a supplementary affidavit by Oosthuizen.
13. She furthermore relied on certain information furnished by Mr. C. J. van Huyssteen ('Van Huyssteen'), an estate agent. A confirmatory affidavit of Van Huyssteen was filed and, in this affidavit, he claimed that water from the Duiwe River was not utilised for domestic purposes on Portion 210 by Bill Troskie, but that rain water tanks were utilised.
14. Benjamin did not dispute Schutte's statement that he was not prevented from using the water-pump and the pipeline in question and that he was not denied access to Portion 211 for the purpose of maintaining the water-pump and pipeline.
15. In the replying affidavit deposed to on 16 October 2014, Schutte -
  - 15.1. Denied many of the allegations in the opposing affidavit
  - 15.2. Intimated that Oosthuizen also managed the farming activities on Portion 210;
  - 15.3. Conveyed that the agreement with Blamire that he may utilise the pump in the Duiwe River on Portion 211 to irrigate grasslands and for domestic use on Portion 210 was entered into shortly after he purchased Portion 211.
16. On 3 February 2015, Schutte launched an application to file further affidavits deposed to by a certain Mr. Nel and by Oosthuizen. This application was initially opposed but on 6 March 2015 an order was made by this Court allowing these further affidavits.
17. In Oosthuizen's affidavit, deposed to on 28 January 2015, he explained that he was the farm manager of both Portions 210 and 211 purchased by the two brothers, Bill and Boet Troskie, from 1984 for an uninterrupted period of 15 years until 1999. Shortly after 1984 he personally installed the existing pump in the Duiwe River as well as the pipeline to Portion 211. He explained that the pipeline was directly linked to the residence on Portion 210 and that the water was used for domestic purposes, consumption by animals and for agricultural irrigation. After Portion 211 was sold during 1997, he continued to manage the farming activities on Portion 210 until 1999.
18. In her supplementary answering affidavit deposed to on 31 March 2015 Benjamin stated that she had been advised that Schutte bears the onus to prove the existence of a right to use water, as well as the extent thereof. She therefore concluded that Schutte was not in a

position to satisfy this onus. The non-joinder of the Minister of Water Affairs and Sanitation was also raised as a defence. It was furthermore contended that there are factual disputes between the parties and that these disputes should have been envisaged by applicant when the application was launched. In respect of Oosthuizen's affidavit, Benjamin claimed that his failure to deal with the reservoir on Portion 211 and the fact that this reservoir was the source of the water used on Portion 210 on an intermittent basis, is fatal to the application.

19. A letter dated 22 April 2015 was forwarded by Schutte's attorney to the attorneys of Five Lakes intimating that there are factual disputes that should be referred for oral evidence. It was also stated that the notice of motion would be amended to show a specific volume of water utilised.
20. On 10 September 2015 applicant amended the notice of motion by limiting the volume of water that may be extracted to 63 814 m<sup>3</sup> per annum.
21. On 1 April 2016, first respondent filed a supplementary answering affidavit deposed to by Ms. Grit Heyroth ('Heyroth'). Heyroth is the purchaser of the interest in Five Lakes referred to by Benjamin in her opposing affidavit and now the only member of Five Lakes. In this affidavit Heyroth pointed out that on 10 June 2014, when applicant gave notice to Five Lakes of his intention to acquire a servitude, he had not yet applied to the Department of Water Affairs and Sanitation for the registration of the alleged water use. This application was only lodged on 8 August 2014. The legal submission was therefore made that applicant had no lawful right to the use of water when the application in terms of Section 127 of the Act was launched and that, in the absence of proof of registration of water rights, applicant cannot claim to have an authorised lawful water right.
22. The matter was thereafter removed from the roll on 9 September 2016 and on 20 January 2017 a notice was served on first respondent and the Minister of Water Affairs and Sanitation. In the notice it was stated that all the papers in this application had been delivered to the Minister. The Minister was advised that he could comment on the application within ten days of receipt of the notice, or alternatively, elect to be joined as a party. The Minister did not respond to this notice.
23. On 28 March 2017 the matter was postponed for a hearing of oral evidence on 29, 30 and 31 May 2017. In terms of this order the following disputes were, in terms of Rule 6(5)(g) of the Uniform Rules of Court,

referred to oral evidence:

23.1. the dispute whether the owner of Portion 210 of the Farm Klein Krantz, No 192, Magisterial District of George, Western Cape Province, extracted water from the Duiwe River during the two-year period prior

to the coming into operation of the National Water Act of 1998 (Act No 36 of 1998);

23.2. the dispute whether the owner of the aforementioned farm led water from the Duiwe River across Portion 211 of the Farm Klein Krantz, No 192, Magisterial District of George, Western Cape Province, to Portion 210 of the Farm Klein Krantz, Magisterial District of George, Western Cape Province during the aforementioned two-year period;

23.3. if both the aforementioned two issues are decided in the applicant's favour, the dispute as to the volume of water extracted and led. It is recorded that the applicant contends that he need not prove the volume of water extracted or led while the first respondent contends that the applicant does bear such an onus;

23.4. if it were to be found that the applicant is entitled to a servitude/s as prayed for in prayers 1 and 2 of the notice of motion, the dispute as to whether the applicant's servitude of aquaduct should follow a route over the first respondent's property at all; and

23.5. if it were to be found that the applicant's servitude is to follow a route across the first respondent's property, the following two disputes:

23.5.1. the route such servitude should follow; and

23.5.2. the compensation payable by the applicant to the first respondent, if any.

24. In response to a letter of the attorneys for Five Lakes, Schutte's attorney placed the following on record in a letter of 22 May 2017:

24.1. There is no such thing as a water registration does not exist. If the owner of land had certain water entitlements during the qualifying period and he had laid claim thereto by advising the Department of Water Affairs and Sanitation, such owner has a right to the water involved for as long as the verification of that entitlement has not shown differently.

24.2. Schutte had filed the necessary documentation with the Breede / Gourits Water Association.

24.3. Schutte has a further entitlement to household water in respect of Portion 210 in terms of Schedule 1 of the Act.

24.4. To move the pipeline on Portion 211 will serve no purpose and will disturb the ecology on Portion 211 without adding any benefit for Five Lakes.

24.5. The extraction point cannot be moved since such a move would require a water licence. Problems with the pump at the extraction point had been remedied since Schutte replaced the engine and pump.

24.6. Mr John Roberts ('Roberts') of the Department of Water Affairs and Sanitation supports Schutte's views and confirms the quantity of water extracted during the qualifying period.

24.7. The opinions of Kleynhans support the submissions on behalf of Schutte.

25. Before the hearing of 29 May 2017, Kleynhans deposed to an affidavit on 11 May

2017. In this affidavit he explained that Bill Troskie approached him for advice in respect of the hydraulic properties of the pipe and pipeline in question in December 1998. At that time he visited Portion 210 and 211 and inspected the pump and pipeline. He noticed that farming activities, including the irrigation of established pasture with a sprinkler system was taking place on Portion 210. He obtained an aerial photograph of the relevant properties that had been taken on 27 August 1998. In August 2014 he again visited Portion
210. He thereafter prepared the application to register applicant's water rights. He annexed correspondence of Roberts to his affidavit in which the latter in essence agrees with Kleynhans that the water uses as claim by applicant was exercised by the owner of Portion 210 during the qualifying period.
26. The evidence of Kleynhans and Schutte, on behalf of applicant, and Benjamin, on behalf of first respondent, was heard on 30 and 31 May 2017 and argument on 17 October 2017. Counsel for both parties were allowed further time to file heads of argument and such heads were respectively received on 15 November and 7 December 2017.

#### RELEVANT PROVISIONS OF THE NATIONAL ACT 36 OF 1998

27. For the sake of convenience certain provisions of the Act and the schedules to the Act are quoted or summarised hereunder.
- 27.1. The definition of 'entitlement' in Section 1 as 'a right to use water in terms of any provision of this Act or in terms of an instrument issued under this Act.
- 27.2. The definition of 'responsible authority' which means, in relation to a specific power or duty in respect of water uses that 'if that power or duty has been assigned by the Minister to a catchment management agency, that catchment management agency'.
- 27.3. The definition of 'watercourse' in Section 1 which includes 'a river' and the definition of 'water resource' which includes a 'watercourse'.
- 27.4. The definition of 'waterwork' in Section 1 as 'any ... structure, earthwork or equipment installed or used for or in connection with water use'.
- 27.5. Section 4:
- 'Entitlement to water use
- (1) A person may use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1.
- (2) A person may continue with an existing lawful water use in accordance with section 34.
- (3) A person may use water in terms of a general authorisation or licence under this Act.

- (4) Any entitlement granted to a person by or under this Act replaces any right to use water which that person might otherwise have been able to enjoy or enforce under any other law-
- (a) to take or use water;
  - (b) to obstruct or divert a flow of water;
  - (c) to affect the quality of any water;
  - (d) to receive any particular flow of water;
  - (e) to receive a flow of water of any particular quality; or
  - (f) to construct, operate or maintain any waterwork.'

27.6. Section 22(1)(a) in terms of which a person may also use water without a licence:

27.6.1. if that water use is permissible under Schedule 1 (to the Act) (sub-section 1); and

27.6.2. if that water use is permissible as a continuation of an existing lawful use (subsection 2).

27.7. Section 26(1)(c) in terms of which the Minister may make regulations requiring that any water use be registered with the responsible

authority.

27.8. The Water Use Registration Regulations (published under GNR1352 in GG20606 on 12 November 1999) more specifically the following provisions:

27.8.1. The explanatory note where it is stated that: 'Section 26(1)(c) of the Act allows for registration of all water uses including existing water use in terms of Section 34(2).'

27.8.2. Paragraph 3 which deals with applications for registration of water use and where it is stipulated that any person who uses water in terms of Section 21 of the Act must register such use on a form obtained from the Department of Water Affairs and Sanitation and submit the completed form to the responsible authority when requested to do so by the responsible authority.

27.8.3. Paragraph 6 which deals with the extent and lawfulness of water use and reads as follows:

'(1) the extent or lawfulness of the relevant water use will be determined on the basis of the information supplied in the application forms. The responsibility is with the water user to ensure the correctness of all information.

(2) the extent or lawfulness of the water use is subject to verification by the responsible authority in terms of Section 3(5) of the Act.'

27.9. Section 32(1)(a)(i):

'32 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; ...'

27.10. Section 34:

'34 Authority to continue with existing lawful water use

- (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 licence in terms of this Act; or
  - (c) any other limitation or prohibition by or under this Act.
- (2) A responsible authority may, subject to any regulation made under section 26 (1) (c), require the registration of an existing

lawful water use.'

27.11 Section 35:

'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.'

27.12 In the headnote to Part 7 under the heading 'Individual applications for licences (SS40-42)' it is stipulated that water users who are not required to licence their use, but wish to convert the use to licenced use may also use the procedure set out in this part, but the responsible authority may apply to grant a licence when the applicant is entitled to the use of water under an existing lawful use.

27.13 Section 127:

'127 Acquisition of servitudes

- (1) A person who is authorised under this Act to use water may-
  - (a) claim a servitude of-
    - (i) abutment (defined in Section 126 (a) as the right to occupy, by means of a waterwork, the bed or banks of a stream or adjacent land belonging to another);
    - (ii) aqueduct (defined in Section 126(b) as the right to occupy land belonging to another by means of a waterwork for abstracting or leading water); or

(iii)...

(b) obtain an amendment to any existing servitude of abutment, aqueduct or submersion, to the extent that this is necessary to give effect to that authorisation.

(2) The servitude claimed under subsection (1) (a) may be-

(a) a personal servitude in favour of the claimant; or

(b) a praedial servitude in favour of the claimant in the claimant's capacity as owner of property on which the claimant may use the water.

(3) A servitude under this Chapter may also be claimed in respect of an existing waterwork.

(4) A person who intends to claim a servitude under this section must follow the procedure set out in Schedule 2.'

27.14 Section 128 deals with the rights and duties of servitude holders and landowners. In terms of Section 128(1) the holder of a servitude has the right of access to the land which is subject to the servitude for the purpose necessary for the effective enjoyment of the servitude and deals with the rights and obligations of the servitude holder.

27.15 Section 130 addresses the powers of the high court in respect of a claim for a servitude and determines that the claim may be awarded without modifications on such terms as the court considers just (Section 130(a)) and award compensation or refuse to award compensation (Section 130(b)).

27.16 Section 131 provides that, in determining just and equitable compensation, a high court must take into account all relevant factors, including a number of factors enumerated in subparagraphs (a) to (i).

27.17 Section 133 in terms of which an owner of land subject to a servitude may apply to the high court for the cancellation of that servitude if the relevant authorisation associated with the servitude is terminated; if the rights and obligations in respect of the servitude have not been exercised for three years, or for any other lawful reason.

27.18 Section 146 provides for the establishment of an independent body, the Water Tribunal, and Section 148 provides for appeals to the Water Tribunal including an appeal against a decision of a responsible authority, such as a catchment management agency on the verification of a water use under Section 35 by a person affected thereby.

27.19 Schedule 1 deals with permissible use of water and reference is made in this schedule to Sections 4(1), 22(1)(a)(i) and Item 2 of Schedule 3 to the Act. Item 1(a) of Schedule 1 provides that a person may, subject to the provisions of the Act, take water for reasonable domestic use in his/her household directly from any water resource to which that person has lawful access. Item 1(b) stipulates that any person may take water for use on land owned or occupied by that person for reasonable domestic use, small gardening not for commercial purposes and the watering of

animals from any water resource which is situated on or forms a boundary of that land.

27.20 Schedule 2 addresses servitudes under Section 127 of the Act and the notice in respect thereof.

27.21 In terms of Schedule 7, the whole of the previous Water Act 54 of 1956, except certain sections including Section 1 and Section 9 were repealed with effect from 1 October 1998. The other sections, including Sections 1 and 9, were repealed with effect from 1 October 1999.

#### EVALUATION OF THE EVIDENCE

28. In *Lekup Prop Co No 4 (Pty) Ltd v Wright*[1] it was explained that ‘a referral to trial is different to a referral to oral evidence. In the latter case the affidavits stand as evidence, save to the extent that they deal with disputes of fact. Once the disputes have been resolved by oral evidence, the case is decided on the basis of that finding together with the affidavit evidence that is not in dispute.’

29. Before dealing with the oral evidence presented, the admissibility of Oosthuizen’s affidavit deposed to on 28 January 2015 and referred to in paragraph 17 above, should be dealt with. It was conveyed to the court that Oosthuizen passed away prior to the hearing of oral evidence on 30 and 31 May 2017. During argument Mr. Joubert, counsel for Schutte, applied in terms of Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 for the hearsay evidence contained in Oosthuizen’s affidavit to be admitted.

30. First Respondent’s counsel, Mr. Coetsee, submitted that this application should be refused for the following reasons:

30.1. Schutte’s legal representatives, for tactical reasons did not disclose Oosthuizen’s death to first respondent until after the closure of applicant’s case.

30.2. Schutte did not request the court to rule on the admissibility of Oosthuizen’s affidavit timeously. [2]

30.3. Five Lakes was prejudiced in that it could not timeously determine the full evidentiary ambit that it faced.

31. I agree that the non-disclosure of Oosthuizen’s death under the circumstances referred to above was a mistake. There is, however,

little merit in first respondent’s claim of prejudice in my view. The fact of the matter is that Oosthuizen’s affidavit

formed part of the papers since it was filed on 3 February 2015. Since that date first respondent was aware of its contents and it could have been dealt with in cross-examination in the expectation that Oosthuizen would be called as a witness. If necessary, first respondent could also have insisted on the re-call of Kleynhans for further cross-examination. Ndlovu’s case is a criminal matter and is no authority for the proposition that a court cannot condone the delay in bringing an application such as the one under consideration timeously. It is also relevant to note

that Benjamin specifically indicated in her opposing

affidavit that Oosthuizen would have valuable factual information which will assist the court in determining the application. On a consideration of all the factors referred to in Section 3(1)(c)(i)-(vii) the affidavit of Oosthuizen is therefore admitted.[3]

32. For the determination of the disputes identified in the court order of 28 March 2017, the contents of the affidavit of Oosthuizen as well as the evidence of the three witnesses who testified on 30 and 31 May 2017, Schutte and Kleynhans on behalf of applicant and Benjamin on behalf of first respondent, must therefore be taken into consideration.
33. The proper approach for the evaluation of the evidence delivered by these witnesses is to make factual findings about their credibility, their reliability as well as the probabilities, taking the subsidiary factors referred to in the SFW v Martell case into consideration. [4] One of the factors mentioned in respect of reliability is the opportunity to experience or observe the event in question.
34. Schutte's evidence of the purchase of Portion 210, the state of the waterworks on Portion 210 and 211, the fact that the existing infrastructure allowed for water from the Duiwe River to be delivered to the residence on Portion 210 for domestic purposes, the fact that he found grasslands and orchard which had been previously irrigated on Portion 210 as well as the terms of his agreement with Blamire, referred to above, must be accepted.
35. First respondent's counsel criticised the evidence of Kleynhans and submitted that his sudden recollection of his visit to Portion 210 and 211 during 1998 was not properly explained. He pointed out that he was informed by applicant's counsel that 'Kleynhans only recently remembered that he visited Portion 210 and 211 during 1998'. The evidence of Kleynhans, however, disclosed that he did not forget that he had visited Portion 210 and 211. He testified that he did not think that there was a reason to mention this visit to Schutte or his legal representatives when he was approached to deal with Schutte's application for the registration of his water uses in 2014. Counsel for Five Lakes posed the question why Kleynhans only remembered this visit after the unfortunate demise of Oosthuizen.
36. It should also be noted that Kleynhans during cross-examination found it difficult to explain why he referred to registration of Schutte's existing lawful water uses, whereas these rights were not registered but only an application for such registration had been submitted. Section 26(1)(c) of the Act and the Water Use Registration Regulations promulgated thereunder[5], however, refer to a registration. It is not at all clear to me what the connection and differences between licences and registrations

are. Verification in terms of Section 35 does appear to me as being the same as an application for a licence or a registration. The fact of the matter is that a person or his successor in title may continue with an existing lawful water use without a licence or registration, but subject to the right of the responsible authority to require a registration in terms of Section 34 of the Act or a verification of the existing lawful water use in terms of Section 35 of the Act. I am not surprised

by the difficulty experienced by Kleynhans to deal with the concepts of registration and verification. I also find it difficult to appreciate the connection and the difference between these concepts and the concept of licencing referred to in Part 7 (Sections 40 to 44)[6]. For the purposes of this judgment, however, it is not necessary to further deal with these concepts.

37. This criticism of Kleynhans's evidence is justified, but in my view, there is no basis upon which his evidence can be rejected as false. He made a good impression and his evidence is corroborated by that of both Schutte and Oosthuizen and the probabilities.
38. First respondent's counsel submitted that Benjamin was the only one of the witnesses who testified who was in a position to give factual evidence as to what actually occurred during the window period of two years. In my view, however, her evidence did not really take the matter any further. It must furthermore be noted that she was asked to confirm the contents of her two opposing affidavits. In the Lekup- case[7] which dealt with a referral to trial, it was stated that it was the incorrect procedure to allow a respondent at such a trial to read from affidavits. A witness who gives evidence in trial proceedings must do so in the ordinary way. In Lekup the court a quo was also criticised for accepting affidavits as proper evidence before that court. It was intimated that affidavits

filed may be used for cross-examination and also as proof of admissions therein but otherwise have no probative value. In my view,

the same considerations apply to disputes referred to oral evidence.

39. In respect of these disputes referred to oral evidence it bears noting that Benjamin, in her opposing affidavit conceded that she has no knowledge of many of the factual allegations contained in the founding affidavit and that she also relied on what she was told by Van Huyssteen. He was, however, not called to testify. The disputes raised can at best be regarded as the disputes referred to under (c) and (d) at page 1163 in the Room Hire-case[8].
40. The highwater-mark of Benjamin's evidence was that she would walk on Portion 211 for an hour early at dawn on the days when she was there, except for the first year of her stay on the farm when she was working in Sedgfield. The possibility can obviously not be excluded that activities undertaken by Oosthuizen in respect of the waterworks on Portion 211 could have taken place at times when Benjamin was not undertaking her daily walk. The reliability of her observation that the waterworks connecting Portion 211 to Portion 210 was not utilised during that period can furthermore be questioned since her cross-examination showed that she was not at all sure of the outlets of the reservoir on Portion 211. She qualified her evidence that there were two outlets by the word 'apparently' and when asked about the outlet, she stated that she was sure that they would have seen the outlet when they cleaned out the reservoir. She also stated that she would imagine that the outlet was at the bottom of the reservoir. Apart from Benjamin's limited opportunity to observe relevant events, her powers of observations and/or recollection can therefore, in my view, also be doubted.

41. In all the circumstances, although I do not question her credibility. I conclude that she is not really in a position to dispute the evidence of Schutte, Kleynhans or Oosthuizen and that her evidence is less reliable than that of the other witnesses.

## FACTUAL

## BACKGROUND

42. Taking the evidence referred to above, including contents of the affidavit of Oosthuizen and the probabilities into consideration the relevant factual background can, in my view, be summarised as follows:
- 42.1. Bill and Boet Troskie purchased Portions 210 and 211 in 1984.
- 42.2. The Troskie brothers farmed in partnership as B & B Boerdery on both Portions 210 and 211 and Oosthuizen was their farm manager from 1984 until 1999.
- 42.3. Oosthuizen installed the engine, water-pump and piping in the Duiwe River shortly after 1984.
- 42.4. Portion 211 was sold to Five Lakes in 1997.
- 42.5. After the sale in 1997 Oosthuizen continued to manage farming activities on Portion 210 until 1999. At all times until 1999 water was extracted from the Duiwe River at the weir for use on Portion 210 and the flow of water was directed via the still existing piping to be utilised on Portion 210 for domestic purposes, consumption by livestock and for irrigation purposes.
- 42.6. In December 1998 Kleynhans visited Portions 210 and 211 inspected the waterworks and ascertained that irrigation was taking place on Portion 210 with water from the Duiwe River directed to Portion 210 via the waterworks in question.
- 42.7. Aerial photographs considered by Kleynhans, including a photograph taken on 26 August 1998 and a photograph taken in 2000, showed that eleven hectares on Portion 210 was probably under irrigation during the period 1996 to 1999.
- 42.8. The water use that took place on Portion 211 for the benefit of Portion 210 during the qualifying period was authorised under the previous Water Act 54 of 1956, whether such period is regarded as 1996 to 1998 or 1997 to 1999.[9]
- 42.9. There is no evidence of the exact volume of water that was utilised on Portion 210 during the period 1996 to 1999.
- 42.10. Benjamin permanently reside on Portion 211 from June 1997 to July 2000, but for the first year she worked in Sedgefield and presumably did not go for daily walks at dawn as she did for the ensuing two years.
- 42.11. From 14 November 1997 Blamire resided on Portion 211.

42.12. After 1999, when Oosthuizen no longer managed farming activities on Portion 210, this property was unoccupied, until it was sold to Schutte in 2002.

42.13. On 2 December 2002 Schutte purchased Portion 210 at a public auction. Advertisements prior to the auction brought Schutte under the impression that water utilised on Portion 210 was lawfully taken from the Duiwe River and directed to Portion 211 via a pipeline. This information was also announced at the commencement of the auction.

42.14. Shortly after Schutte purchased Portion 210, Blamire, representing Five Lakes, agreed that Schutte may continue to utilising the water from the Duiwe River as before and since that time Schutte has used this water for domestic and irrigation purposes on Portion 210.

42.15. As stated in paragraph 3 above, Schutte's attorney addressed a letter as required in Schedule 2 of the Act to Five Lakes dated 10 June 2014.

## DISCUSSION

43. Before dealing with the disputes referred to oral evidence, the question whether the Minister of Water Affairs and Sanitation ('the Minister') and/or the Department of Water Affairs and Sanitation ('the Department') should have been joined as a party to the application should be considered. I believe that the Minister and/or the Department may have a direct and substantial interest which may be prejudiced by a judgment in this matter by reasons of its responsibility for the administration of the Act. In my view it would have been prudent for applicant to join the Minister and/or the Department.
44. A notice was, however, served on the Minister accompanied by a full set of all the papers in the application. In this notice the Minister was requested to indicate within ten days if he/she intended to comment on the application or in the alternative, to join the application as a party. Apparently, no such steps were taken.
45. It is also relevant to note that applicant's existing lawful water use is subject to verification in terms of Section 35 and registration in terms of Section 34(2).
46. I therefore conclude that there is no question of any prejudice and that first respondent's plea of non-joinder should be dismissed.[10]
47. The determination of the first three disputes depends upon the question whether applicant must prove the exact volume of water extracted from the Duiwe River and/or the volume of water directed to flow via the pipeline on Portion 211 to Portion 210.
48. The dates when the qualifying period of two years referred in Section 32(1)(a) of the Act commenced and terminated must obviously be taken into consideration. In his evidence Kleynhans testified that he initially believed that this period is 1 October 1996 to 30 September 1998, 1 October 1998 being the date that the part of the Act dealing with water use, except the parts dealing with the application of individual licences and controlled activities came into operation. Thereafter, he came to the conclusion, apparently having been so advised by officials of the Department, that the qualifying period is 1 October 1997

to 30 September 1999, 1 October 1999 being the date that the part of the National Water Act dealing with the application of individual licences came into operation.[11] I tend to agree with Thompson that the correct period is 1 October 1996 to 30 September 1998 for the reasons advanced by him. It is, however, not necessary to determine this issue, because the evidence discloses that water was in fact utilised on Portion 210 during the full period of 1996 to 1999 covering both periods referred to above. Section 32(1)(a) specifically stipulates that the water use could have taken place at any time during the qualifying period.

49. As far as the volume of water used is concerned, I agree with applicant that it is not necessary for him to show that a specific volume of water was used during the qualifying period.
50. In this respect reference is made to the unreported judgment of William Wallace Louw N.O. and others v South African National Parks and Another[12]. That matter was an application for declaratory orders relating to the rights of the applicants as owners of a property to use water in terms of registered servitudes on a neighbouring property. As in the matter under consideration the respondent in that matter submitted that the applicants had to establish exactly what volume of water was taken from the water resource in that instance. Bozalek J found that it was not incumbent upon the applicants to prove how many kilolitres of water was received by the property over the relevant two-year period. In this respect he referred to Thompson in paragraph 34 and 35 in the following terms:

[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 later 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 and quality of water discharged during the period. The extent is also not nil if no water or waste was abstracted, diverted, stored 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.”*

51. In respect of *Starke N.O. v Schreiber*[13], Bozalek J stated that the remarks of the court in that matter in respect of the applicant’s entitlement to water were obiter

dicta. In paragraph 37 he continued as follows:

‘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 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.’

53. It must also be mentioned that an appeal to the Water Tribunal against the decision of a responsible authority on the verification of water use under Section 35 is allowed in terms of Section 148(1)(e) of the Act. ‘The verification of water use should be based on technical evidence by making use of various tools to identify and determine the extent of a water use, such as satellite imagery, aerial photography, survey data, flow measurements and field surveys’.[16] Any verification of water use can therefore be taken on appeal to a water tribunal who would probably be qualified to consider these technical aspects. I cannot see on what basis it can be expected of a court to determine volumes.
54. Insofar as the applicant amended his notice of motion to indicate a specific volume, I agree that this was an unnecessary plus petitio that can be ignored.
55. In respect of the first three issues referred to above, I therefore find for applicant. In respect of the disputes about the route of the servitude, I am not persuaded that the existing route should be changed.
56. As far as the question of compensation payable by the applicant is concerned, I agree with applicant that no order should be made in this respect. The waterworks was established in about 1984 and since that time, with one relatively short break, the water has been utilised on Portion 210. Portion 211 also utilised water from the waterworks. For these reasons I agree that no order of compensation should be made.

## COSTS

57. I believe that applicant was at fault in the following respects:

57.1. By not annexing an affidavit of Kleynhans in support of the original application.

57.2. By not joining the Department of Water Affairs and Sanitation.

57.3. By not advising first respondent of Oosthuizen's death at the first opportunity.

57.4. By not launching an application in terms of Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 timeously.

58. First respondent was, in my view, entitled to oppose the application initially. When Oosthuizen's affidavit was filed and taking into consideration that Benjamin specifically stated that Oosthuizen would be in position to assist the court, first respondent should have reconsidered its position at that time.

59. In all the circumstances and in the exercise of the discretion in that respect, I conclude that respondent should pay 75% of applicant's costs.

## CONCLUSION

60. I therefore find for the applicant and the order annexed hereto is made.

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W.H. VAN STADEN

Acting Judge of the High Court

[1] 2012

(5) SA 246 (SCA) para 32 at 258E-I.

[2] Reference was made to S v Ndlovu 2002

(6) SA 305 (SCA) para 18 at 318D-E where it was held that the trial court must be asked clearly and timeously to consider and rule on the admissibility of hearsay evidence.

[3] Schwikkard Van Der Merwe Principles of Evidence (3rd Ed) p278-283.

[4] Stellenbosch Farmers Winery Group Limited v Martell et Kie 2003

(1) SA 11 (SCA) para 5 at 14l-15e.

[5] Paragraph 27.7 and 27.8 above.

[6] Paragraph 27.12 above. [7] Footnote 1 above loc cit.

[6] Paragraph 27.12 above.

[7] Footnote 1 above loc cit.

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- [8] Room Hire Co. (Pty) Ltd v Jeppe Street Mansion (Pty) Ltd 1949
- (3) SA 1155 (TPD).
- [9] See paragraph 48 hereunder.
- [10] Compare Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD).
- [11] Hubert Thompson Water Law (2006 Edition) p500-501.
- [12] (CPD Case No. 17144/2007) Judgment delivered on 12 December 2008 by Bozalek J.
- [13] 2001
- (1) All SA 167 C and specifically the quote at page 184b.
- [14] (A174/2016)[2017] ZAWCHC 113 (11 October 2017).
- [15] 2007
- (4) SA 80 (SCA).
- [16] Thompson op cit page 504.
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