3]NOT REPORTABLE

1]IN THE HIGH COURT OF SOUTH AFRICA

2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)

3] CASE NO 10663/01

4]In the matter between:

5]CITY OF CAPE TOWN
(CMC ADMINISTRATION) **Plaintiff**

6]and

7]W D BOURBON-LEFTLEY N. O. **First Defendant**

8]M M BOURBON-LEFTLEY N. O. **Second Defendant**
(in their capacities as trustees for the time being of the *W D Bourbon-Leftley Family Trust*)

9]_____

10]JUDGMENT: DELIVERED 6 APRIL 2004

11]_____

12]GRIESEL J:

13]In this action the plaintiff claims payment of the amount of R1 715 480,54 from the defendants in respect of water supplied by the plaintiff from a pipeline from the Wemmershoek Dam and utilised by the defendants on their farm *Môrelig* in the district of Paarl. At all relevant times since November 1992 the farm was registered in the name of the W D Bourbon-Leftley Family

Trust *(the trust),* which conducts a commercial fruit-farming operation thereon. The trustees of the trust are the nominal defendants herein, represented throughout by the first defendant, Mr William Bourbon-Leftley *(Bourbon-Leftley Snr)*. For convenience I refer to the defendants simply as *'the trust'*.

14]The plaintiff's main claim is based on a servitude registered against the title deed of the farm in 1964. In terms of the servitude, the farm was entitled to an overall annual allocation of 33,3 million gallons (151 536 kilolitres) potable water from the Wemmershoek pipeline *(the overall allocation)*. The overall allocation is divided into three different categories:

- a free annual allocation of 20 million gallons (90 920 kilolitres) *(the free allocation)*;

- a further maximum allocation of 13,3 million gallons (60 616 kilolitres) *per annum* at a discounted rate –

  - of 1/- (10c) per 1 000 gallons (2,2 cents per kilolitre) for the first 6,666 million gallons (30 308 kilolitres); and

  - 1/6 (15c) per 1 000 gallons (3,3 cents per kilolitre) for the remaining 6,666 million gallons (30 308 kilolitres).

15]This case is largely concerned with liability for a *fourth* category of water – not mentioned in the servitude – namely the excess over and above the overall allocation. It is common cause in this regard that, for a number of years from approximately 1993 to 2001, the trust had exceeded its overall allocation of water. The plaintiff contends that it was a tacit term of the servitude –

> ***16]****'…that, should the trust exceed its maximum annual allocation of water from the pipeline of 151 536 kilolitres, then the trust would pay the plaintiff for the excess water utilised at a rate equivalent to that charged to other parties entitled to similar rights to draw water from the pipeline'.*

17]The plaintiff's main claim has been calculated on the foregoing basis. Its alternative claim is based on delict, alleging that it suffered damages as a result of the negligent, alternatively intentional, misappropriation of the water by the trust. The trust opposes both grounds of the claim, disputing *inter alia* the tacit term relied upon by the plaintiff.

Factual Background

18]The following facts have been agreed between the parties or are common cause on the evidence before the court. During the early 1950's, the Municipality of Cape Town, the predecessor in title to the plaintiff, was in the

process of planning a dam to be built in the Wemmers River near Franschhoek to supply drinking water to the inhabitants of Cape Town. Negotiations between representatives of the municipality and approximately ten farmers riparian to the Wemmers River *(the riparian owners)* took place with regard to the effect of the dam on the existing water rights of the riparian owners. It was proposed on behalf of the municipality that, in future, the farmers would draw their water from a pipeline to be installed and maintained by the municipality. The negotiations culminated in a meeting, held on 7 March 1950, when the following proposal by the municipality was unanimously accepted on behalf of the riparian owners:

> ***19]****'The pipeline will be maintained at no cost to yourselves. We will also supply 240 million gallons per annum free; 80 million gallons per annum at 1/- per 1000 gallons and 80 million gallons per annum at 1/6d. per 1000 gallons.'*

20]On 19 January 1952 this proposal was formalised in a written agreement between the municipality and the riparian owners. Under this agreement, all riparian owners became entitled to a proportionate share of the annual allocation of free water as well as to the additional allocation of water at the prescribed (discounted) rate as envisaged in the earlier negotiations. It was also recorded that the agreement would be binding on the City of Cape Town

and its successors in title and upon the riparian owners and their respective successors in title and that the rights and obligations as defined in the agreement would in due course be registered against the title deeds of the respective owners in terms of notarial deeds of servitude.

21]During 1964 notarial deeds of servitude were duly executed and registered against the properties concerned, including Môrelig. In terms of clause 2 of the servitude in relation to Môrelig, the plaintiff was obliged to supply, and the owner of Môrelig was entitled to receive, the annual allocation as set out above.[1] The servitude thus constituted an agreement between the plaintiff and the trust when the latter took transfer of the farm on 6 November 1992 from its predecessor in title, Le Fayet Operations CC *(Le Fayet)*.

22]After acquiring the farm, the trust proceeded to replace the existing vineyards on the farm with fruit trees to produce plums and citrus for the export market and, to that end, to place approximately 40 000 hectares under irrigation. The trust utilised its allocation of water, as set out in the servitude. It drew its allocation of water from the pipeline at two metered outlets on pipes of 80 mm and 150 mm in diameter respectively.

23]The plaintiff's officials stationed at the Wemmershoek Dam read the

1 Para above.

meters on a regular basis and communicated such meter readings to the plaintiff's accounts department in Cape Town, where monthly accounts were prepared and sent to consumers on the basis of such readings.

24]Towards the end of 1993, Bourbon-Leftley Snr was informed by one of the plaintiff's officials at Wemmershoek Dam, a Mr Young *(Young)*, that according to the plaintiff's readings, the trust was about to exceed its maximum allocation of water for that year. Bourbon-Leftley Snr immediately started making arrangements to obtain additional water from alternative sources. Shortly afterwards, however, the plaintiff's officials discovered that they had been mistaken. On 21 December 1993 Young accordingly notified Bourbon-Leftley Snr, and certified in writing, that only some 60 000 kilolitres of its free allocation had been used by the trust up to that stage, thus leaving some 30 000 kilolitres available for use during the remainder of that year.

25]Following this incident, Bourbon-Leftley Snr regularly telephoned the plaintiff's officials in Cape Town, mostly speaking to a certain Mrs Riecherts, who furnished him with the monthly readings relating to the water usage by the trust on Môrelig. Throughout the period from 1994 to 1998, the monthly readings were recorded by Bourbon-Leftley Snr in his diary and were totalled annually. Such annual totals invariably reflected consumption of significantly less water than the trust's annual allocation of free water. After 1998 Bourbon-Leftley ceased this practice.

26]Unbeknown to Mrs Richerts and the plaintiff's meter readers stationed at Wemmershoek, the readings obtained by those meter readers and communicated to Bourbon-Leftley Snr were incorrect. It appears that the meter readers misread the meter installed on the trust's 150 mm pipeline: the dial of the meter only showed six digits. This required that each reading had to be multiplied by a factor of 10, as indicated on the face of the meter. However, this was not done, such error being perpetuated until about July 1999, when the plaintiff's officials discovered their mistake.

27]With effect from July 1999, the meter was read correctly and reflected a substantial excess by the trust over and above its overall allocation of water. However, these facts were not drawn to the attention of the trust. To compound matters, accounts prepared on the basis of the correct readings were erroneously addressed to the trust's predecessor in title, Le Fayet, instead of to the trust, which did not at any stage receive an account from the plaintiff in respect of water. It was common cause that any accounts that may have been sent to Le Fayet prior to July 1999 would have reflected that no money was owing in respect of water usage on Môrelig.

28]This state of affairs persisted until 7 November 2001, when a final demand was addressed and hand-delivered to the trust on behalf of the plaintiff,

claiming immediate payment of the amount in issue in these proceedings, which represents the total of the previous three years' water consumption by the trust. This was the first intimation that the trust or Bourbon-Leftley Snr received from the plaintiff that the trust had been exceeding its free allocation in terms of the servitude on a regular basis.

29]The record shows that the actual water usage on the farm during the period covered by the present claim was as follows:

30]1 January to 31 December 1999: 309 840 kilolitres;

1 January to 31 December 2000: 348 629 kilolitres;

1 January to 31 December 2001: 265 852 kilolitres.

31]The applicable rate charged to and paid by other riparian owners in respect of excess water is the so-called *'miscellaneous plus 25%'* tariff. Should the trust be found to be liable to pay for excess water at this rate, then it would be liable for payment of the amount claimed in the particulars of plaintiff's claim, based on the above rate.

32]Upon receipt of the demand for payment, the trust denied all liability and maintained that attitude throughout, thus giving rise to the present litigation.

33]To sum up thus far, it appears from the evidence that for a prolonged period the trust had been regularly exceeding its overall allocation of water. The trust was repeatedly, but erroneously, informed by the plaintiff's officials that it was well within the bounds of its permitted allocation. The plaintiff, on the other hand, was aware – at least since July 1999 – of the fact that the trust was exceeding its allocation. After discovering the true facts, the plaintiff's officials continued on a regular basis to read the water meters on the farm in question. Knowing the true facts, the plaintiff for a further period of more than two years failed to communicate such knowledge to the trust or to send it any accounts. Instead, the trust was permitted to continue exceeding its overall allocation.

34]It was submitted on behalf of the plaintiff that the trust – in the person of Bourbon-Leftley Snr and later also his son – was aware of the error made by the plaintiff and of the actual water usage on the farm. This was denied on behalf of the trust. Although Bourbon-Leftley Snr testified that he had a feeling *('n gevoel)* that the readings provided to him by Mrs Riecherts were on the low side and that the trust might have been using more water, her repeated communications of the figures reassured him and he did not deem it necessary to investigate further or to raise this issue with her or with any other person at the municipality. As he put it on more than one occasion in the course of his

evidence: *'Wie was ek om met haar syfers te stry?'*

35]Based on the evidence as a whole, including that of Bourbon-Leftley Snr and Jnr, both of whom made a favourable impression as witnesses, I am unable to find as a fact that they knew of such excess consumption. The matter must therefore be decided on the basis that both parties were unaware of the error in the meter readings until July 1999, when the plaintiff discovered the error. Thereafter, the trust remained ignorant of the true state of affairs until November 2001.

Tacit Term

36]In approaching the question as to whether or not the plaintiff is entitled to rely on the alleged tacit term as pleaded, the following succinct summary of the legal position by NIENABER JA in *Wilkins NO v Voges*[2] serves as the starting point:

> ***37]****'A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such a matter if only they had thought about it – which they did not do because they overlooked a present fact or failed to anticipate a future one. Being unspoken, a*

2 1994 (3) SA 130 (A). See also *Botha v Coopers & Lybrand* 2002 (5) SA 347 (SCA) at 359D – 360F.

tacit term is invariably a matter of inference. It is an inference as to what both parties must or would have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test. Since one may assume that the parties to a commercial contract are intent on concluding a contract which functions efficiently, a term will readily be imported into a contract if it is necessary to ensure its business efficacy; conversely, it is unlikely that the parties would have been unanimous on both the need for and the content of a term, not expressed, when such a term is not necessary to render the contract fully functional.[3]

38]*…A tacit term in a written contract, be it actual or imputed, can be the corollary of the express terms – reading, as it were, between the lines – or it can be the product of the express terms read in conjunction with evidence of admissible surrounding circumstances.'* [4]

39]It is not the plaintiff's case that the tacit term relied upon was an *actual* tacit term in the sense of being one which both parties thought about but did

3 at 136I – 137D.
4 at 144C.

not bother to express. It was conceded that, on the probabilities, the issue of what would occur if the riparian owners' allocation were to be exceeded was not something to which the parties applied their minds. It follows therefore that the plaintiff must rely on an *imputed* tacit term. This entails an enquiry as to whether or not the parties, had they been asked the appropriate question by an officious bystander at the time of the contract, would have answered promptly and with unanimity. As to what *'the appropriate question'* should be, the parties differ widely: the plaintiff contends that, if the parties had been asked by an officious bystander what would happen if a riparian owner exceeded its allocation of free water as well as the maximum allocation of water at a discount, their unanimous reply would have been that the riparian owners should be charged for the excess water at the going rate.

40]The plaintiff's argument in this regard proceeded as follows: The servitude makes specific provision for the allocation of a volume of water, free of charge, to the owner of the property. In addition, a further allocation at two specified (discounted) rates is granted. Nothing is said as to what would happen should the property owner exceed its overall allocation of water in terms of the servitude. According to the plaintiff, one of only three possible results could therefore eventuate in relation to this unspecified (fourth) category of water:

- Either the excess water would be provided at no cost; or

- the excess water would be provided at a cost; or

- the plaintiff would simply cut off the supply of water to the property owner.

41]It was argued that the first option would be utterly unbusinesslike and could not be imported as a tacit term into the servitude on that account alone. It is also incompatible with the express terms of the agreement.

42]As far as the third option is concerned, it was submitted that the plaintiff could not simply have taken the law into its own hands and cut off the water supply, as this would constitute an interference with the servitudinal rights which, in turn, would entitle the party affected to rely on the *mandament van spolie*. It follows therefore, according to the plaintiff, that the second option had to be accepted as the tacit term to be imported into the agreement.

43]I think that the plaintiff is probably correct in arguing that, faced with the limited range of options as set out above, the parties would probably have agreed that, of course, the riparian owner must pay for the excess water used at

the going rate. I am not satisfied, however, that the simple question posed on behalf of the plaintiff is the *appropriate* question for purposes of the present enquiry, having regard to the peculiar circumstances and complexities surrounding the present case, as outlined above. In this regard I agree with counsel for the trust that the question in the form as suggested by the plaintiff amounts to an over-simplification. To my mind, in order to have any relevance to the present situation, the imaginative bystander, foreseeing the scenario herein, should, in addition, have enquired as to what would happen –

- if the owner unwittingly were to exceed his overall allocation of water for more than 8 years;

- if the 's officials, over a prolonged period, repeatedly were to misinform the owner by reassuring him that his actual consumption was comfortably within his permissible free allocation;

- if such owner throughout the relevant period never received a single account from the ;

- if the aforesaid state of affairs were caused by the unilateral error of the 's officials;

- if the were to fail to communicate this fact to the owner or to rectify the error for more than two years after discovering the error in relation to the 's consumption of water, while continuing to supply such owner with water in excess of his maximum allocation.

44]Faced with this scenario at the time of the conclusion of the agreement, I have grave doubts whether the predecessors in title of the present parties would promptly and unanimously have responded to an officious bystander – either in 1950 or in 1952 or in 1964 – that the trust must, of course, pay for the full excess at the going rate. On the probabilities, one or both of the parties may well have responded by saying that, at the very least, they would need to think about it. This result would, of course, be fatal for the tacit term contended for because, as pointed out by BRAND JA in *Botha v Coopers & Lybrand,*[5]

> ***45]****'As een van die partye, byvoorbeeld, sou aandui dat hy eers die saak verder wil oorweeg of dat hy eers sekere onduidelikhede wil opklaar voordat hy sy antwoord gee, slaag die beweerde stilswyende term nie die toets nie.'*

46]A further likely response by a riparian owner to the question as to what

5 Footnote above, para [24] at 360B.

would happen if he were to exceed his overall allocation of water in a given year, could have been to say that the plaintiff's officials would have to contact him immediately and draw his attention to the state of affairs. This is in fact what Bourbon-Leftley Snr testified when asked the same question. His evidence in this regard is entirely in keeping with the probabilities and is moreover borne out by the actual conduct of the parties in this case: as pointed out above,[6] when the plaintiff's officials first thought – erroneously, as it turned out – that the trust was about to exceed its allocation of *free* water (not even its *total* allocation), they immediately notified Bourbon-Leftley Snr of this fact. I find it inconceivable that the parties would have replied to the officious bystander that it would be in order for the plaintiff to continue supplying the owner with excess water, while remaining silent about such excess and then – more than two years later out of the blue – to present the owner with a massive account for his excess consumption, charged at the maximum rate.

47]A further reason why the tacit term contended for by the plaintiff cannot, in my view, be implied, is because it would be contrary to the express terms of the servitude. In clause 2 thereof, it is recorded that the owner is entitled to a certain allocation of water, free of charge, and *''verdere toevoer van water … tot 'n maksimum van'* the stipulated volume (my emphasis). Furthermore,

6 Para .

clause 6 states *'dat behalwe soos hierbo vermeld, erken die Eienaar hiermee formeel dat hy geen reg het om water te neem uit die Wemmersrivier of sy systrome nie en doen formeel afstand van alle Oewerregte daarop'*.

48]If the plaintiff's tacit term were to be implied, it would lead to the unintended and absurd consequence that, contrary to the above-mentioned provisions, all riparian owners would be entitled, as of right, to use *unlimited* quantities of water from the pipeline as long as they were prepared to pay for it at the going rate. I am satisfied that such a proposal, had it been pointed out to the original parties, would promptly have been rejected – at least by the representatives of the municipality – as completely unacceptable. The fact of the matter is that the total volume of water from the pipeline to which the riparian owners would be entitled formed the subject of intense debate and negotiation between the parties prior to conclusion of the agreement. The pipeline was intended, after all, to provide drinking water for the citizens of Cape Town, *not* irrigation water for the riparian owners of Wemmershoek.

49]Bearing in mind that the court does not lightly import a tacit term into an agreement, I am of the view that the plaintiff has failed to discharge the *onus* of proving that the tacit term contended for ought to be imported into the agreement.

Delictual Claim

50]The plaintiff's alternative cause of action based on delict may be briefly disposed of. In arguing this part of the claim, counsel for the plaintiff relied on the judgments in *Minister van Verdediging v Van Wyk en andere*[7] and *Clifford v Farinha.*[8] Both judgments dealt with the *condictio furtiva.* In order to succeed, the plaintiff has to prove that the trust unlawfully and intentionally, alternatively negligently, misappropriated the water, as a result whereof the plaintiff suffered damages.

51]In my view, the plaintiff has failed to prove, *inter alia*, the elements of unlawfulness and damages. With regard to **unlawfulness**, it is difficult to comprehend how there could have been any *'unlawful misappropriation'* (a euphemism for theft) where the *'complainant'* is knowingly and voluntarily supplying the *'thief'* with the *'stolen'* commodity. The plot thickens where the complainant is aware of the true state of affairs, but the thief is not. This is precisely what happened *in casu* after July 1999, when the plaintiff discovered its earlier error.

7 1976 (1) SA 397 (T).
8 1988 (4) SA 315 (W).

52]As for **damages**, the point made on behalf of the trust is simply that water, although a valuable and scarce resource, cannot be sold or marketed like other commodities. While there is water in the dam, it inevitably means that the reasonable requirements of the community are being met. In the absence of proof that the dam was empty at any stage during the relevant period, the plaintiff cannot prove that it could have sold the water in question to any other user and hence that it suffered damages. This conclusion renders it unnecessary to consider the element of intentional or negligent misappropriation.

53]It follows that, for the reasons set out above, the plaintiff is not entitled to succeed on either cause of action insofar as it relates to the *fourth* category of water.

Alternative Basis

54]The foregoing conclusion disposes of the bulk of the plaintiff's claim, based as it is on the fourth category of water. It does not, however, dispose of that portion of the claim – albeit a minuscule portion – based on the trust's consumption of its allocation under the second and third categories, namely the 60 616 kilolitres at a discounted rate.

55]It is plain from the evidence that the trust, in each of the years in question, did as a fact utilise its full allocation of water at a discounted rate. In terms of the express terms of the servitude, the trust is accordingly *prima facie* liable to pay for such water at the rates set out above.9

56]The plea on behalf of the trust does not specifically address this portion of the claim. The general defence raised was a denial of the plaintiff's tacit term. In the alternative, and if the plaintiff's tacit term were found to form part of the agreement, certain further alleged tacit terms were raised on behalf of the trust to the effect that the plaintiff would only be entitled to demand payment if it had given the trust prior reasonable notice of the fact that they were exceeding their maximum annual allocation.

57]I find it unnecessary to burden this judgment with a detailed analysis of those alleged terms. Suffice it for present purposes to say, first, that the condition on which the trust's tacit term is premised – namely a finding that the plaintiff's tacit term has been proved – is lacking, no such term having been found. Secondly, the defence raised does not appear to relate specifically to the second and third categories of water at a discounted rate. Finally, bearing in mind that the *onus* to prove a tacit term rests on the party seeking to

9 Para above.

rely on such term,[10] the trust has not, in my view, discharged such *onus*.

58]It follows from the foregoing that in respect of the years 1999, 2000 and 2001 the plaintiff is entitled to payment of the following amounts:

30 308 kilolitres @ 2,19974c per kilolitre	R666,70
30 308 kilolitres @ 3,2995c per kilolitre	R1 000,01
giving an annual total of –	R1 666,71
with a total for the three years of –	**R5 000,13**

It follows that judgment must be granted in favour of the plaintiff for payment of R5 000,13, together with interest from the time of *mora*.

Costs

59]In view of the limited degree of success resulting from the above conclusion, the question arises as to the effect on the question of costs. It is quite apparent that the bulk of case was concerned with the alleged tacit term in relation to the fourth category of water. My conclusion in relation to that issue means that the trust was successful in resisting the bulk of the plaintiff's claim. I would estimate that the question about the said category occupied

10 *Wilkins NO v Voges,* n above, at 137A.

approximately 80% of the time during the trial. In my view, it would be fair if the plaintiff were ordered to pay 80% of the trust's costs. However, as the parties have not had an opportunity of addressing the question of costs in the light of these conclusions, I shall permit either party, on written notice to the other side, to set the matter down for argument regarding the issue of costs. Failing such notice within 10 days from the date of this judgment, the provisional order will become final.

Order

60]For the reasons set out above, it is ordered as follows:

a) **The defendants are ordered to pay the plaintiff an amount of R5 000,13, together with interest on such amount *a tempore morae*.**

b) **Save as aforesaid, the plaintiff's claim is dismissed.**

c) **The plaintiff is directed to pay 80% of the defendants' costs herein.**

d) **The order set out in para (c) above is provisional. Leave is granted to either party, on written notice to the other side, to set the matter down for argument regarding the issue of costs. Failing such notice within 10 days from the date of this judgment, the provisional order as set out above will become final.**

61]

62]_____

63]B M GRIESEL