Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: A 174/2016

Before: The Hon. Mr Justice Dlodlo
The Hon. Mr Justice Binns-Ward
The Hon. Ms Justice Fortuin

Appeal heard: 20-21 September 2017
Judgment delivered: 11 October 2017

In the matter between:

HENNIE DU PREEZ	First Appellant
ISAK BARTOLOMEUS MOSTERT N.O.	Second Appellant
ELIZABETH EMMA MOSTERT N.O.	Third Appellant
HERCULES CHRISTIAN VAN HEERDEN N.O.	Fourth Appellant
(in their capacity as co-trustees of the Kromspruit Trust)	
WILLEM STEPHANUS CONRADIE	Fifth Appellant

and

PHILIPUS JAKOBUS VILJOEN (Snr) N.O.	First Respondent
PHILIPUS JAKOBUS VILJOEN (Jnr) N.O.	Second Respondent
ARNOLDUS JACOBUS STOFBERG N.O.	Third Respondent
(in their capacity as co-trustees of the PJ Viljoen Boerdery Trust)	
GEORGE JOHAN VILJOEN	Fourth Respondent
MINISTER OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING (WESTERN CAPE)	Fifth Respondent
MINISTER OF WATER AFFAIRS AND SANITATION	Sixth Respondent

JUDGMENT

BINNS-WARD J (DLODLO AND FORTUIN JJ concurring):

[1] Media reports suggest that the Western Cape is currently suffering the most extreme drought conditions in recorded history. Dam storage levels have dropped

incrementally since 2014. No one in the province has been unaffected by the resultant water shortage. Most people, including domestic users of municipal water, have taken special measures to cope with it. This appeal concerns a dispute between neighbouring farmers over the availability of water for agricultural use; more particularly, in consequence of the implementation by the first appellant, in 2015, of a scheme to pipe water emanating from a natural spring on state land on the mountain slopes above Wolseley to a dam on his farm in the Breede River Valley quite some distance below. The appeal lies from the judgment at first instance of a single judge of the court in which an order was made (i) directing the appellants, until the determination of the action that has been instituted by the first to third respondents in case no. 15076/14, to close a manmade water channel ('the furrow') together with all pipes and other relevant works installed by the first appellant in 2015 by which water was being diverted from the Watervalstroom or the sources thereof to the farm Kanonkop and (ii) authorising the respondents to have access to the water sources on the farm Bergplaas[1] for the purposes of inspecting, protecting and maintaining them. It is brought with the leave of the learned judge at first instance.

[2] The first to third respondents, to whom I shall hereafter refer simply as 'the respondents', are the co-trustees of the PJ Viljoen Boerdery Trust, which is the registered owner of the farm De Liefde in the Wolsley-Tulbagh area.[2] They brought the proceedings in the court a quo by way of an urgent application instituted in mid-May 2016. Their complaint was that, in breach of their rights, the first appellant, one Du Preez, who is currently farming on the neighbouring farms Bergplaas and Kanonkop, was diverting, for use on Kanonkop, water abstracted from the Watervalstroom (sometimes also called 'the Kamps River') that would otherwise have been available to fill the dam on De Liefde. The diversion was being effected via a furrow on Bergplaas, which is currently owned by one Conradie, who is the fifth appellant. Du Preez is allegedly in the process of acquiring ownership of both Bergplaas and Kanonkop, as well as another neighbouring farm, Dennelaan. (He describes himself as 'the rightsholder' (*Afr.* 'reghebbende') in respect of those

[1] The deeds registry description of Bergplaas is 'Portion 6 of the farm De Liefde C, No. 334, Witzenberg Municipality, Tulbagh Division'.

[2] The remainder of the farm De Liefde C, No. 334, Witzenberg Municipality, Tulbagh Division'

properties.) The Kromspruit Trust is the registered owner of Kanonkop and Dennelaan. The trustees of the Kromspruit Trust are the second to fourth appellants.

[3] The respondents alleged that since at least 1969, when the present day Bergplaas and De Liefde were parts of a single property owned by Conradie's late father,[3] the dam on De Liefde had been filled with water diverted from the Watervalstroom at the commencement of each winter when the rains began. The water was diverted by means of temporary diversion works constructed of river stones piled-up in the Watervalstroom at its junction with a manmade channel referred to as the 'damsloot'. These crudely constructed diversion works, which were effected annually at a place on Bergplaas referred to in the evidence as 'die eerste verdelingspunt', 'verdelingspunt 1' or 'die eerste verdeelpunt' (*Eng.* 'the first diversion point'), were removed as soon as the dams on De Liefde were full. The 'damsloot' also leads water from the first diversion point via two other diversion points to the dams on Dennelaan and on De Liefde 323,[4] which belongs to one George ('Org') Viljoen.

[4] Relations between the affected landowners concerning water already had a litigious history when the current matter came before the court a quo. An application had been brought by the respondents against Du Preez and Conradie in 2014 under case no. 9883/14 for a *mandement van spolie* arising out of the alleged usurpation of the respondents' aforementioned right to divert water at the first diversion point. Those proceedings were provisionally settled pending the determination of an action to be instituted by the respondents for the enforcement of their alleged water rights and water use rights in respect of water in the Watervalstroom.

[5] The terms of the settlement were incorporated in an order of court that was taken by agreement between the respondents and Du Preez on 25 June 2014. It provided, amongst other matters, for the respondents to continue in the meanwhile with the system of diverting water to fill the dam on De Liefde by means of the aforementioned annually constructed temporary diversion works. It provided further that Du Preez might break those down as soon as the dam on De Liefde was filled.

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[3] Conradie inherited the land upon his father's death in 1994. Conradie had, however, been farming the land together with his late father since the mid-1970's. The land had been owned before that by Conradie's grandfather. Conradie had grown up there.

[4] Remainder of Portion 6 of the Farm De Liefde 323, Tulbagh Division.

[6] The action in case no. 15076/14, referred to above, duly followed. The defendants in the action are the registered owners of Bergplaas (Conradie) and of Kanonkop and Dennelaan (the trustees of the Kromspruit Trust), and the Minister of Water Affairs, who has been cited in her capacity as the functionary ultimately responsible for the administration of the national government's role as 'the public trustee of the nation's water resources'.[5] Du Preez was added as a defendant later. A copy of the pleadings exchanged in the action up to that stage was attached as an annexure to the respondents' founding affidavit in the court a quo. The action is being defended by the appellants in the current matter. The first appellant (Du Preez) averred in his answering affidavit that, insofar as relevant in the proceedings before the court a quo, he stood by the defendants' plea in the action.

[7] To complete the description of the litigious background, I should perhaps also mention that while pleadings in the action were being exchanged the first to third respondents instituted further proceedings in August 2015 arising out of an alleged spoliation by Du Preez related to the abstraction of water at the second diversion point (described below). That application, under case no. 14118/2015, was dismissed; as was the subsequent appeal from that decision to the full court.

[8] The allegations made in the pending action and in the current proceedings fall to be understood in the pertinent statutory context afforded in terms of the Water Act, 1956, and its legislative replacement, the currently applicable National Water Act, 1998. It is therefore appropriate also to describe what appear to be the most pertinent provisions in those statutes, before summarising the currently relevant parts of the pleadings in the pending action as they were described to the court a quo.

[9] The Water Act characterised water dichotomously as either 'private water' or 'public water'.

[10] 'Private water' was defined in s 1 of the Act to mean 'all water which rises or falls naturally on any land or naturally drains or is lead on to one or more pieces of land which are the subject of separate original grants, but is not capable of common use for irrigation purposes'. In terms of s 5(1) of the Act, subject to certain exceptions that it is not necessary to specify, the sole and exclusive use and

[5] See s 3 of the National Water Act 36 of 1998.

enjoyment of private water vested in the owner of the land on which such water was found. Section 5(2) of the Water Act provided (subject to certain exceptions that do not appear to be relevant in the current case) that an owner entitled to the use and enjoyment of private water in terms of s 5(1) could 'not, except under the authority of a permit from the Minister and on such conditions as may be specified in that permit, sell, give or otherwise dispose of such water to any other person for use on any other land, or convey such water for his own use beyond the boundaries of the land on which such water is found'. (The appellants appear to contend in the action proceedings that the water in issue in the current proceedings was 'private water'.)

[11] 'Public water' meant 'any water flowing or found in or derived from the bed of a public stream, whether visible or not'. The term 'public stream' was defined as meaning 'a natural stream of water which flows in a known and defined channel, whether or not such channel is dry during any period of the year and whether or not its conformation has been changed by artificial means, if the water therein is capable of common use for irrigation on two or more pieces of land riparian thereto which are the subject of separate original grants or on one such piece of land and also on Crown land which is riparian to such stream: Provided that a stream which fulfils the foregoing conditions in part only of its course shall be deemed to be a public stream as regards that part only'. In terms of s 9, and subject to certain exceptions that do not need to be described, riparian owners were entitled to the use of a fair share of the water in any public stream running along or through the riparian land.

[12] The National Water Act has replaced the Water Act. It has done away with aforementioned dichotomous characterisation of water and made the state the trustee of all the nation's water resources. Section 4 of the new Act provides that its provisions replace the entitlement of anyone to use water in terms of any other law (which would include the repealed 1956 statute), including any right 'to take or use water', 'to obstruct or divert a flow of water' or 'to construct, operate or maintain any waterwork'.[6] (A 'waterwork' includes any earthwork or structure installed or used for or in connection with water use.) It also provides that any person may 'continue with an existing lawful water use in accordance with section 34',[7] or use water in terms of

[6] Section 4(4).

[7] Section 4(2).

a general authorisation or licence under the Act.[8] Insofar as relevant, s 32, defines an existing lawful water use as 'a water use which has taken place at any time during a period of two years immediately before the date of commencement of [the] Act'. The Act's commencement date (save in respects not currently relevant) was 1 October 1998. The two-year period referred to in s 32 (1 October 1996 – 30 September 1998) was labelled as 'the window period' in the judgment of the court a quo. Section 21 provides that for the purposes of the Act water use includes, amongst other matters, 'taking water from a water resource', 'impeding or diverting the flow of water in a watercourse', and 'altering the bed, banks, course or characteristics of a watercourse'. The definitions, in s 1, of 'watercourse' and 'water resource' denote that the terms comprehend various manifestations of naturally occurring water, or 'any collection of water' declared by the Minister in the Gazette to be a watercourse. Section 22(1) provides, insofar as relevant, that a person may use water only if that water use is permissible as a continuation of an existing lawful use, or is authorised by a licence under the Act.

[13] The plaintiffs' particulars of claim in the pending action went in their original form to the issue with which the proceedings in the aforementioned matter under case no. 9883/14 had been concerned. In their plea the defendants put in issue the legality of the respondents' diversion of the water in the Watervalstroom at the first diversion point. They appear to contend that the respondents were entitled only to so much of the water as would ordinarily flow into the 'damsloot' without the assistance of any form of diversion works. They also placed in issue the legality of the arrangement in terms of which some of the water diverted to De Liefde via the 'damsloot' has, since about 1970, been shared with Org Viljoen's farm, De Liefde 323. The defendants have alleged that the disposal of some of the water to De Liefde 323 had not been a lawful water use because it had not been authorised by a permit in terms of s 5(2) of the Water Act, 1956.[9]

[14] In May 2016, the respondents gave notice of their intention to further amend their particulars of claim. Amongst other matters, the intended amendment introduced issues that are germane to the current proceedings. It sought to introduce

[8] Section 4(3).

[9] The import of s 5(2) of the Water Act, 1956, has been described in para. [10] above.

into the respondents' particulars of claim allegations concerning a channel shown on an attached diagram, which runs between an upper point and a lower point of the Watervalstroom. This is referred to as 'the furrow'. The upper point of the furrow is given in the notice of amendment as being above the first diversion point (at a place identified in the application papers as 'the Donkerkloof', which is one of the sources of the Watervalstroom). In the notice of the proposed amendment it is alleged that the furrow had been in disuse between at least 1995 and 2001. It is further alleged that sometime in or about 2014 and/or 2015 Du Preez had dug the furrow open and laid a pipe from a place near the beginning of the furrow to lead water directly to the dam on Kanonkop. It is alleged that the aforementioned opening up and taking into use of the abandoned furrow was unlawful in 'at least three respects'; viz. (a) the use of the furrow had not been 'an existing legal water use' during the two years immediately preceding the commencement of the National Water Act and had not been licensed; (b) it amounted to a breach of the agreements concerning the division of water abstracted at the first and second diversion points on the Watervalstroom that had been entered into when the plaintiffs sold Dennelaan to the Kromspruit Trust in 2006 and (c) it was in breach of the abovementioned court order of 25 June 2014. The notice of amendment signified the intention of the first to third respondents to pray in their action for an interdict directing Conradie, the Kromspruit Trust and Du Preez to desist from abstracting water via the furrow or any place upstream of the first diversion point or any other upper course (*Afr*. 'bo-loop') of the Watervalstroom. This is in essence the same relief (albeit sought on a final basis) as that granted on an interim basis in the court a quo.

[15] The current proceedings thus bear on the use of the furrow. In their founding papers in the interim interdict application the applicants complained that the alleged opening up by Du Preez of the disused furrow and its use to pipe water directly to Kanonkop resulted in the abstraction of water that would otherwise have run down the Watervalstroom to the first diversion point.[10] As the learned judge a quo identified, one of the questions centrally in dispute in the application was whether the furrow had

[10] Paragraph 55.5 of the respondents' founding affidavit. The respondents also appeared to claim a right to water allegedly diverted back into the Watervalstroom from the furrow system at a point (indicated as point B in a sketch plan drawn by Conradie in or about 1996) above the first diversion point, but, as will be discussed later in this judgment, their case in that respect was tenuous.

been used or operated by Conradie and/or the then owners of Kanonkop during the aforementioned statutory window period, as it has been by Du Preez from 2015. The other, and perhaps equally important, questions are whether the furrow - assuming, against the respondents' primary contention, that it had been in use during the statutory window period - deposited water back into the Watervalstroom above the first diversion point, and whether its current use causes the abstraction of more water for Kanonkop than had been the case during the statutory window period, and prejudicially to the water supply to De Liefde.

[16] It will assist the narrative to describe in outline at this point the route and nature of the furrow. Its route was determined and graphically illustrated in figure 2-1 in a report prepared by Professor JA Du Plessis, the head of the Department of Civil Engineering at the University of Stellenbosch, who was engaged by the respondents as an expert witness in the proceedings in the court a quo. The content of figure 2-1 in Du Plessis' report, dated 14 July 2016 was not contentious. It is convenient for descriptive purposes to divide the route of the furrow into two parts. The first part, from its juncture with the Donkerkloof-upper Watervalstroom, near the perennial spring from which it was built to convey water, to the place where the De Eike dam now straddles the original path of the furrow will be referred to as the 'upper furrow', and the second part, below the De Eike dam, as the 'lower furrow'. The intersection of the upper furrow with the lower furrow, at the spot where the De Eike dam is now situated, coincided with the watercourse of a tributary (or side stream) of the Watervalstroom. The side stream discharged into the Watervalstroom principally via a channel referred to in the evidence as the 'groot sloot'. The course of the 'groot sloot', which is part of the lower furrow system, is identified in Du Plessis' figure 2-1 with the numbers 9-3. It intersects with the Watervalstroom at a spot below the first diversion point. The lower furrow system is also characterised by a number of lesser channels, which are a mixture of manmade and natural watercourses, also identified with numbers on Du Plessis' diagram. I shall describe these other channels later in this judgment to the extent necessary.

[17] In their notice of motion in the court a quo the respondents sought the following substantive relief pending the final determination of the action in case no. 15076/14:

1. An interdict directing Conradie, the Kromspruit Trust and Du Preez to comply with the tripartite agreement (para. 2.1 of the notice of motion). (The tripartite agreement was the label given to the aforementioned water sharing agreement concluded when the respondents, in 2006, sold off the part of Dennelaan that they had purchased from Conradie in 2003.[11])

2. Without derogating from the effect of the aforementioned interdictory relief, an order directing Conradie, the Kromspruit Trust and Du Preez to put in place a water diversion system in the damsloot at the second diversion point whereby the water flowing in the 'damsloot' would be diverted so that $^{1}/_{16}^{th}$ of the water would flow to Dennelaan and $^{15}/_{16}^{ths}$ would flow to the dams on De Liefde and Org Viljoen's farm (para. 2.2 of the notice of motion). The relief thus sought was directed at enforcing the implementation of the aforementioned tripartite agreement.

3. An interdict directing Conradie, the Kromspruit Trust and Du Preez to cease any form of water abstraction from the Watervalstroom or any of its sources, other than at the first diversion point in accordance with the court order made on 25 June 2014 in case no. 9833/14 - incorrectly cited in the notice of motion as 'case no. 833/14' (para. 2.3 of the notice of motion).

4. Without derogating from the general effect of the interdictory relief in terms of the preceding sub-paragraph, an order directing Conradie, the Kromspruit Trust and Du Preez immediately to close the furrow and to remove the pipes and all related works which Du Preez had installed therein and by which water from the Watervalstroom or its sources was led to Kanonkop (para. 2.4 of the notice of motion).

5. Authorising the first to third respondents to exercise access to the water sources on Bergplaas in order to inspect, preserve and maintain them (para. 2.5 of the notice of motion).

[18] It will be apparent from the description at the outset of this judgment of the order made by the court a quo[12] that it provided, in essence, a reformulated version of

[11] See para. [14] above.

[12] See para. [1] above.

the relief that had been sought in terms of sub-paragraphs 2.3 – 2.5 of the notice of motion. Importantly, however, the order did not prohibit Kanonkop from continuing to receive water that had flowed into the Watervalstroom below the first diversion point via the 'groot sloot' and its associated water channels in the lower furrow system. Somewhat unusually in a case in which interim relief is granted pending a final determination of the parties' contested rights, the appellants were ordered to pay the respondents' costs of suit.[13] No relief was granted in terms of sub-paragraphs 2.1 and 2.2 of the notice of motion. There is no cross-appeal against the decision of the court to grant only part of the relief sought.

[19] The interim relief was sought on an urgent basis because, so it was alleged, the actions of Du Preez in abstracting water via the furrow could have the effect of depriving the respondents of any water from the water resource, with 'huge and unquantifiable resultant loss'.[14] This was because the water diverted into and stored in the dam on De Liefde is used to irrigate the farm.

[20] The appellant's counsel argued that the relief granted by the court a quo was final in character and that the court had been required to approach the evidence on the papers in accordance with the rule in *Plascon-Evans*.[15] Approached in that manner, the application should have been dismissed because on the papers the factual disputes in the evidence would have fallen to be decided on the appellants' version. In my view, however, counsel's characterisation was misconceived. The relief sought and the order granted did not involve the court a quo in making any final determination of the questions in issue between the parties. It was plainly provisional in nature. The fact that the interim relief granted against the appellants is 'final' in the sense that it irreversibly deprives the appellants of the use of the upper furrow pending the conclusive determination of the parties' rights *inter se* in the action proceedings was a consideration relevant to deciding whether or not the court a quo's decision was appealable; cf. e.g. *Phillips and Others v National Director of Public Prosecutions* [2003] ZASCA 74; [2003] 4 All SA 16 (SCA) at para. 17-22 and *Maccsand CC v*

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[13] There is, however, no challenge to the costs order *per se* in the grounds of appeal set out in the appellants' notice of appeal.

[14] '*... met geweldige, onkwantifiseerbare skade wat daarop sal volg*'.

[15] *Plascon-Evans Paints (Tvl) Ltd. v Van Riebeck Paints (Pty) Ltd* [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623 (at 634E-635C SALR).

Macassar Land Claims Committee and Others [2004] ZASCA 114; [2005] 2 All SA 469 (SCA), at para. 12. It is nowadays generally accepted that it may be in the interests of justice in a given case for an appeal against the grant of an interim interdict to be entertained.[16] Whether the order was appealable is, however, an entirely different issue to the whether the interdict was interim or final. An interdict is not final if it does not finally and conclusively determine the rights in issue, or have an irrevocable legal effect.

[21] The position consequent upon the order made in the court a quo was entirely distinguishable from that in *Minister of Finance v Paper Manufacturers Association* [2008] 4 All SA 509 (SCA), 2008 (6) SA 540, on which the appellant's counsel relied for his submission that the interdict granted by the court a quo was final in effect. In *Paper Manufacturers Association*, the order in question finally determined the ability of the Minister of Finance to include certain items on amendments to schedules 1 and 4 to the Customs and Excise Act that had been proposed in terms of a Taxation Laws Amendment Bill. The effect of the interdict granted against the Minister was that the amendments that the Minister had already made to the schedules administratively lapsed and, in consequence, were no longer amenable, in terms of the governing provisions, to being confirmed by Parliament. It was therefore plain in that case that notwithstanding that the application for interdictory relief had been framed as an application for interim relief, the effect of what had been sought and granted was final. And, as Harms DP observed at para. 6 of the judgment, if the interdict granted was in fact a final interdict, the applicant was required to meet the

[16] The respondents accepted that the judgment of the court a quo was appealable. Their counsel cited *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC), at para. 25 and *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) at para. 39-40 in his heads of argument in support of his understanding that the definitive question in respect of appealability is 'the interests of justice'. See also *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6, 2010 (5) BCLR 457 (CC), 2012 (4) SA 618, at para. 47-59. The Constitutional Court judgments must, however, be read mindful that the test for access to that court was not governed by s 21 of the Supreme Court Act 59 of 1959, nor is it currently by s 17 of the Superior Courts Act 10 of 2013. As I understand it, the test for appealability to the full court of a division of the High Court, or to the Supreme Court of Appeal remains that stated in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-533A; it being recognised that the criteria identified in *Zweni* are not cast in stone and that the courts do have the flexibility to meet the interests of justice of a given case; see e.g. *S v Western Areas* 2005 (5) SA 214 (SCA), at para. 28 and *Philani-Ma-Afrika & Others v W M Mailula & Others* [2009] ZASCA 115, [2010] 1 All SA 459 (SCA), 2010 (2) SA 573 at para. 20. As Howie P observed in *Western Areas* the criteria stated in *Zweni* were formulated with the interests of justice in mind. I am in some doubt about the appealability of the order of the court a quo, but as the point is debatable on the peculiar facts of the current case and the issue was not raised in argument I am prepared to accept that the appeal was properly before this court.

requirements for such an interdict; satisfying the requirements for interim relief would not suffice.

[22] In the current matter no questions had to be, or were, finally determined by the court a quo. Similarly, nothing in the determination of this appeal in any manner pre-empts what falls to be decided in the pending action in case no. 15076/14.

[23] The requirements for an interim interdict *pendente lite* are well-established; see e.g. *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* [1969] 1 All SA 430 (C), 1969 (2) SA 256, at 442 (All SA). The applicant must show-

(a) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;

(b) that, if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(c) that the balance of convenience favours the granting of interim relief; and

(d) that he has no other satisfactory remedy.

[24] The proper approach to determining whether a case in support of the right relied on for an interim interdict has been made out is that stated in the oft cited judgments in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, *Gool v Minister of Justice and Another*, 1955 (2) SA 682 (C) at pp. 687-8 and *Simon NO v Air Operations of Europe AB and others* [1998] ZASCA 79; 1999 (1) SA 217 (SCA), [1998] 4 All SA 573, at 228G-H (SALR). In the latter matter (loc. cit.) Smalberger JA described it as follows: 'The accepted test for *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he cannot succeed'. (Footnote omitted.)

[25] Du Preez admitted that in the latter part of 2015 he had cleared the first part of the upper furrow to facilitate the leading of water from Bergplaas to Kanonkop. It was also common ground that he has laid a pipe from a spot not far from the beginning of the upper furrow to increase the efficiency of the conveyance of water from the furrow to the top dam on Kanonkop. The route of the pipeline does not faithfully follow that of the furrow. Significantly, it bypasses the place where the owners of a neighbouring farm, De Eike, had obstructed the furrow; first, by building a weir across it in 1983 to abstract water, and subsequently, in 2002/3, by building the aforementioned De Eike dam. (It is not altogether clear whether the weir was built across the manmade course of the furrow or at a place where its route coincided with the natural course of the tributary of the Watervalstroom mentioned earlier that discharged down the mountain slope on De Eike's land.[17]) Du Preez says that he took these measures after investigating whether the then owners of Kanonkop had used the furrow for the purpose of leading water from the spring to the farm during the 'existing use' window period in terms of the National Water Act, and determining that they had. Du Preez testified that he found the entrance to the furrow to be fully functional when he first saw it in August 2015. He maintained that the stone walls that are in place to prevent water diverted into the furrow from running back into the Donkerkloof stream were present when he first visited the upper furrow. He says that he showed the upper furrow in the state in which he had found it to his attorney. He also put in photographs that he had taken in August and early September 2015 as support for his claim.

[26] The question whether the upper furrow had been in use during the window period was contentious. Org Viljoen, who was 59 years of age when he made his supporting affidavit, and has lived and farmed in the area all his life, asserted that it had not been. He said that he was aware of the water arrangements on Kanonkop at the time because he had visited the farm frequently during the period 1996-1999, when the farm had been owned by Messrs Boonzaaier and Louw, respectively, to assist and give advice, amongst other matters, on water-related issues. Viljoen testified that the upper reach of the furrow had in any event been 'cut off' when one Pieterse, the owner of De Eike, had built a dam adjacent to it on the neighbouring

[17] See para. [16] above.

farm, De Eike. (It seems clear that Viljoen was referring in this regard to the construction by the owners of De Eike of a weir across the furrow in 1983.) He said that he often used a path that crossed the route of the upper furrow and was in a position to confirm that the furrow was grown over to the extent that it did not even lead water to De Eike. Viljoen confirmed, however, that during the time that he assisted the owners of Kanonkop the lower part of the furrow (i.e. the 'groot sloot') had caused water to flow onto Kanonkop in periods of rainfall. (It is evident from figure 2-1 in Du Plessis' report that such water would have flowed to Kanonkop via a stretch of the Watervalstroom below the first diversion point.)

[27] Viljoen also testified that he had on occasion noticed water running from the lower furrow system into the Watervalstroom above the first diversion point. It is probable that this must have been at the mouth of a manmade channel indicated as route 6 on Prof. Du Plessis' aforementioned figure 2-1. Route 6 was identified by Conradie as the small channel by which spring water had been led via the furrow to provide summer water to De Liefde before his father sunk a borehole in 1966. The channel along route 6, which has not been maintained, is the only channel in the lower furrow system which leads into the Watervalstroom above the first diversion point. Viljoen stated that Du Preez had informed him more recently that he had altered a route of the lower furrow in 2013 to prevent any water flowing from it into Watervalstroom upstream of the diversion point. That report, made in an affidavit deposed to on 12 May 2016, was consistent with the observations made by Du Plessis on his second visit to the area in July 2016, of a manmade channel along the route indicated on figure 2-1 in Du Plessis' second report as route 5. (I deal further with the route 5 channel in paragraph [44] below.)

[28] Du Preez has called Viljoen's credibility into question, pointing out that he has an interest in the case that coincides with that of the respondents because his dam is also filled from water diverted from the Watervalstroom at the first diversion point. Objectively considered, Conradie's position is also not disinterested. Conradie has an evident interest in Du Preez' enterprise being able to sustain his ability to service the purchase price of the land that has been bought from Conradie on a payment in instalments basis. I therefore do not consider that there is any reason for any greater or lesser a priori scepticism about Org Viljoen's credibility, to the extent that it can be

assessed on paper, than there is about Conradie's. Conradie's evidence is in any event not inconsistent with that of Viljoen in the most important respects.

[29] Whilst Conradie, as well as Mr Werner Louw and a number of witnesses who had worked on Kanonkop during the relevant time did indeed testify that the furrow had been used during the window period, their evidence went essentially to the use of the lower part of the furrow below De Eike.[18] They did not say anything to corroborate Du Preez' claim that the upper furrow system had been operational at the critical time. Their evidence differed from that of Viljoen only insofar that they testified that the lower furrow had not discharged any water into the Watervalstroom above the first diversion point during the window period and for some time before that.

[30] Based on his observations during an inspection of the area, Prof. Du Plessis opined that the upper furrow must have been thickly blocked by vegetative growth. He considered that the slightest blockage would have caused the upper furrow to cease to function and any water diverted into it from the natural watercourse would have tended to run back into the watercourse of the Donkerkloof-Watervalstroom. He formed the impression that it was unlikely that the upper furrow had been used for decades and considered that in its blocked state it would have been incapable of leading water from the Donkerkloof to Kanonkop.

[31] There was thus a fundamental dispute of fact in respect of the critical questions that could not be answered determinatively on paper, particularly in the face of the photographic evidence put in by Du Preez in support of his claim that the upper furrow had remained functional up to 2015. In order to decide whether a case for interim relief had been made out, the court a quo was nonetheless called upon to evaluate on an overall assessment of the evidence on the papers in the manner described earlier what the likely answers to the questions would appear to be.

[32] Somewhat unusually in the context of an application for interim relief *pendente lite*, where, similarly to the position with applications for provisional sequestration and winding-up, the case is determined on the probabilities as they appear on the papers, the judge a quo acceded to an application by the respondents

[18] See para. [55]- [55] below.

that Conradie (and only Conradie) should be called to give oral evidence. The object was to seek clarity on the perceived conflict between the content of instructions given by Conradie to counsel (Advocate Willem de Haan) in 1996, which seemed to have suggested that the furrow led water back into the Watervalstroom above the first diversion point, and his evidence in the current proceedings. The scope of the oral evidence, according to the tenor of the learned judge's ruling, was 'to determine the question: Was water extracted via the furrow during the two years preceding the coming into operation of the National Water Act …, and if so, did the water extracted flow [back] into the Watervalstroom, at a point above the water division point referred to as "die Eerste Verdeelpunt"?'. The instructions to counsel in 1996 had included a hand drawn sketch by Conradie that depicted the furrow as following an almost semi-circular route from the abstraction point high up in the Watervalstroom (which Conradie labelled as the 'hoofstroom') back to a point lower down on the Watervalstroom just above the first diversion point. The sketch also showed a side stream (*Afr*. 'systroom') above the weir built on the furrow at De Eike – this was plainly the tributary described earlier[19] – but it did not show the 'groot sloot' or any of the detail of the associated lesser channels in the lower furrow system traced in figure 2-1 of Prof. Du Plessis' report.

[33] Before considering Conradie's instructions to counsel and his subsequent testimony in the proceedings in the court a quo, it will be useful to consider the evidence of Professor Du Plessis concerning the flow of water. Du Plessis inspected the area at the instance of the respondents on two occasions, in May and July 2016, respectively. He produced a written report after each of his visits, both of which were put in evidence. The first report dealt chiefly with the characteristics of the upper furrow, that is from its source to the dam that had been built over it by the owners of De Eike in about 2002. The second report described in some detail the water courses below the De Eike Dam. On the face of it, whilst his opinion of the factual situation that probably obtained during the window period was, by itself, of limited weight in my view, Du Plessis does appear to be well qualified to have expressed an expert opinion on the working characteristics or mechanisms of the furrow. Nothing in the record suggests that he was anything other than independent and objective.

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[19] At paragraph [16] above.

[34] Du Plessis reported that on his first visit to the area on 3 May 2016 he found a spot high up in the Donkerkloof with a significant flow of water that disappeared underground after a distance of about 50 metres. Further down the mountain slope water was again visible in the course of the Donkerkloof stream more or less in line with an adjacent spring on state land, which it is accepted is the perennial source of water for the furrow. He described how a significant flow (*Afr.* ‘’n beduidende vloei’) of water emanated from the spring and joined the Donkerkloof water course, in which it ran for 3-4 metres before reaching the diversion point at the entrance to the upper furrow. The photographs taken by Du Plessis during his visit, and included in his report, demonstrate that water flowing from the spring was diverted from the Donkerkloof-Watervalstroom watercourse into the furrow by some medium size rocks in the bed of the watercourse.

[35] The photographic evidence bears out Du Plessis’s opinion, based on his observation of the situation as he saw it in May 2016, that when the Donkerkloof was in spate most of the water would pass by the furrow and disgorge down the course of the Watervalstroom in the direction of the first diversion point. Having regard to the winter rainfall character of the region, this would tend to substantiate the reported role of the furrow historically as a means of directing water from the perennial spring to the lower areas during the dry summer months when the course of the Watervalstroom would run dry. It seems clear that in the winter months the greatest volumes of water would have been conveyed, not down the furrow, but rather via the two relevant natural watercourses, namely the Watervalstroom and the side stream that discharged from De Eike into the ‘groot sloot’. The evidence was that these two natural watercourses (i.e. those of the Watervalstroom above the first diversion point and of the side stream-cum-‘groot sloot’) were on opposite sides of an intervening watershed.

[36] Du Plessis pointed out that the topography at the entrance to the furrow was such that the slightest blockage would have stopped water from entering it. He also indicated that the furrow entrance required fortification by a wall-like structure on the lower side to keep the water in the first five to eight metres of the course of the furrow from running down the slope and back into the course of the Donkerkloof-Watervalstroom. Du Plessis included a photograph depicting a low wall built with loose rock that had been constructed to provide this fortification. He said that in

times of flood the water would tend to wash over the fortified entrance and run down the course of the Watervalstroom. Du Plessis was of the opinion that the fortification wall seen in the photograph had been quite recently constructed. Its appearance, insofar as that can be judged from the photograph at figure 4-5 of Du Plessis' first report, bears out that observation. Du Plessis observed that the water in the furrow was led via a course lined with concrete slurry to a manhole type structure, from which it was fed into the pipeline laid by Du Preez to take it to a dam on Kanonkop.

[37] It should be mentioned that the beginning of the upper furrow runs over land which is part of a neighbouring farm called Kyk in die Pot before it reaches Bergplaas. What is now Kyk in die Pot was subdivided from De Liefde-Bergplaas by Conradie's grandfather in 1948. He caused a servitude to be registered against the title deed of Kyk in die Pot reserving the exclusive right to the water conveyed in the furrow in favour of De Liefde-Bergplaas, and giving the owner of the latter the right of access over Kyk in die Pot for the purpose of maintaining the furrow. Some years after the subdivision that created Kyk in die Pot, Conradie's grandfather – apparently in 1973 – sold off a further piece of his land to the then owners of Kanonkop (the Zeeman family), who incorporated their acquisition with their existing holding in terms of a certificate of consolidated title. The aforementioned furrow servitude was then also registered in favour of the section of land sold by Conradie's grandfather that was incorporated in Kanonkop. The servitutal rights of aqueduct over Kyk in die Pot thereafter vested (apparently equally) in favour of both De Liefde and the sold off portion of Kanonkop. These features corroborate the evidence of Conradie that the furrow was a longstanding means of leading water diverted from the upper reaches of the Watervalstroom to the lower slopes. Conradie's evidence was that the main purpose of the furrow was to afford a supply of water to De Liefde and Kanonkop during the summer months.

[38] Du Plessis' second report was compiled after his visit to the area on 12 July 2016. Its focus was on the lower furrow system. It described that water that flowed down from the position of the De Eike dam could take various routes to reach the Watervalstroom.

[39] The principal route of the lower furrow system would be along the 'groot sloot', identified by a blue line numbered 9-3 on figure 2-1 in the report. This appears to be a natural watercourse or drainage route. Conradie also called it the

'wintersloot'. It seems that this is the line of the side stream referred to in the De Haan opinion. The lower furrow appears to have taken advantage of the natural course provided by the side stream and/or 'groot sloot'. Water would be led via this route to a point on the Watervalstroom below the first diversion point; in other words to a place below the spot from which water is led into the respondents' dam via the 'damsloot'. Conradie's evidence was that the 'groot sloot' ran strongly shortly after heavy rainfall, but was dry for much of the year below the place along its course at which the furrow system was used to abstract summer water.

[40] Another, apparently natural, watercourse runs along a route, more or less parallel to route 9-3. It was indicated by Du Plessis on figure 2-1 by a blue line numbered 8-4. Route 4 joins the first mentioned route along that part of route 9-3 numbered 3 on Du Plessis' figure. It therefore also leads water into the Watervalstroom at the same place as the 'groot sloot' does, downstream of the first diversion point.

[41] Du Plessis found a manmade channel (which he indicated on figure 2-1 using a broken red line numbered 7) that had been excavated between the 'groot sloot' and the line indicated by the number 8 above its juncture with line 4. Conradie's evidence was that route 4 was in fact a channel by which the summer water abstracted via the furrow system from the higher reach of the 'groot sloot' was taken to Kanonkop.

[42] According to Du Plessis' observations, as depicted in figure 2-1, the only manner in which water from below the De Eike dam could reach the Watervalstroom above the first diversion point would be via a shallow channel excavated from the juncture of lines 8 and 4 on the second of the aforementioned natural routes. This channel, which has been referred to earlier,[20] was indicated by Du Plessis on figure 2-1 with a green line numbered 6.

[43] Assuming it existed at the relevant time, the water diverted via the channel at line 6 could also have included water diverted from the line 9-3 watercourse using the interconnecting channel excavated along line 7. Indeed, Conradie described that as being the pathway of what he called the 'somersloot', by which water was led for domestic purposes to the farmhouse on De Liefde where he grew up. It was called the

[20] At paragraph [27] above.

'somersloot' because water ran in it from the furrow even in the summer months when the lower reaches of the 'groot sloot' (or 'wintersloot') had dried up.

[44] Du Plessis also found that a manmade channel had been excavated from the juncture of the aforementioned lines 8, 4 and 6 to a point along line 3 just before the first mentioned natural watercourse route intersected the Watervalstroom. He indicated this channel on figure 2-1 of his second report with a broken red line identified by the number 5. The only apparent purpose of channel 5 would be to divert water that would otherwise flow via line 6 to a point above the first diversion point to make it flow instead to the inlet of route 3 into the Watervalstroom below the diversion point. The circumstances in which channel 5 was dug are not apparent on the record, but Conradie testified that it was not there in his time on Bergplaas, so it follows that it must have been dug at the instance of Du Preez sometime after 2012 when he took occupation of the farm. It is probable that channel 5 was the alteration to the lower furrow system that Org Viljoen alleged Du Preez had told him about previously.[21]

[45] Mr De Haan recorded his instructions as having been to the effect that the furrow was constructed to take water from the Watervalstroom (to which he referred as 'die Hoofstroom') at a spot near the farm Kyk in die Pot across the upper reaches of the then unsubdivided De Liefde to a point in a side stream at the border between De Liefde and De Eike (labelled 'E' on the sketch drawn by Conradie), whence the water in it was conveyed down the course of the side stream - which for some of its course appears to correspond with what I have referred to as the 'groot sloot' - to a point in the Watervalstroom just above the first diversion point. De Haan's instructions were that in 1982 a channel had been constructed from the branch stream at a point just downstream from 'E' to feed a dam on De Eike. As a consequence of this, so De Haan recorded himself as having been instructed, De Liefde obtained no benefit in respect of the water in the Watervalstroom. (It seems probable that the channel to the dam on De Eike mentioned in De Haan's brief was related to, or the same thing as, what has elsewhere been described as the construction by the owner of De Eike in 1983 of a weir across the furrow.)

[21] See paragraph [27] above.

[46] Conradie testified before the court a quo that his sketch had been incorrect. The independently established features of the topography bore him out. His sketch plainly had not shown the lower furrow system correctly. It did not, for example depict how the furrow coincided for part of its route with the 'groot sloot', nor did it show how the furrow was used to supply summer water via route 8-4 on Du Plessis's figure 2-1, or the junction of route 8-4 and route 8-6 where the waters had been divided for that purpose between De Liefde and Kanonkop. Had the issue of a water supply to De Liefde from the furrow system been the focus of Conradie's interest when he sought an opinion from Mr de Haan, it is most improbable that he would not have given a more comprehensive explanation of its working, including the 'groot sloot' and the further diversion of any water abstracted therefrom at junction of routes 8-6 and 8-4 for division between De Liefde and Kanonkop. It emerged from Conradie's evidence that his primary concern in 1996 had been whether the owners of Kyk in die Pot were entitled to cut off De Liefde's primary source of water, which was the winter flow down the Watervalstroom. The Watervalstroom ran through a section of Kyk in die Pot upstream of the first diversion point. Conradie's explanation in this respect seems entirely plausible.

[47] There is also no reason to doubt Conradie's evidence that the weir that the owners of De Eike had built across the upper reaches of the furrow near the current situation of the De Eike dam did not materially effect the winter flow down the (9-3) route of the branch stream. Any water running in the upper furrow would obviously contribute to such winter flow. But having regard to Du Plessis' evidence concerning the upper furrow's limited capacity and that in times of winter flood most of the water from the mountain spring would run down the main course of the Watervalstroom, it seems probable that the main contributor by far to the supply of winter water along route 9-3 and its side courses in the lower furrow system would have been the side stream.

[48] It will be evident from the description of the lower furrow system given earlier that Conradie's evidence that the construction of the weir in 1983 had cut off the summer water supply to De Liefde necessarily implied that it would have had the same effect for Kanonkop. His evidence clearly indicated that the lower reaches of the 'groot sloot' ran dry in summer; the furrow having operated on the basis of the diversion of water higher up the 'groot sloot', where it was diverted to route 8 on Du

Plessis's figure 2-1, and thence, via routes 6 and 4, respectively, to De Liefde and Kanonkop. Conradie's evidence also implied that not only De Liefde, but also Kanonkop had established independent supplies of summer water by the time that the furrow supply was cut off by the erection of the weir. Moreover, had that not been the case, and had the water abstracted by De Eike at the weir not been from the side stream rather than a manmade section of the upper furrow, the probabilities are that the owners of Kanonkop would have done something effective at the time to enforce their servitutal rights and restore the perennial water supply.

[49] Conradie's evidence was of no assistance to the determination of the question whether the upper furrow was operational after 1983. His description of the operation of the furrow when he was still a child suggested that the area was heavily overgrown, to the extent that one could hear the sound of water running, but not actually see the furrow. The spring could have caused the sound reported by Conradie irrespective of whether or not the furrow was running. What Conradie was able to hear or see when he was a child had no bearing in any event on the situation after 1983, when Conradie was already into his 30's. Conradie said that the furrow had been of no interest to him or his father after a borehole had been sunk near the homestead on De Liefde in 1966. He said that the furrow had virtually ceased to supply any water to De Liefde after the 1969 earthquake, but he did not identify any geological or topographical effect that would explain the change.

[50] It follows from Conradie's evidence that the present day De Liefde would have been reliant on winter water coming down the Watervalstroom to fill its dam, not the furrow system. Indeed, he confirmed that when the dam on De Liefde was enlarged by his father in 1969, the 'damsloot' had also been enlarged for the purpose of diverting more water to make use of the increased storage capacity. It would have been incongruous to have enlarged the 'damsloot', but left the 'somersloot' in the shallow and narrow form it is still in today, if the latter had been regarded as a material means of obtaining winter water for the dam.

[51] It was clear from Conradie's oral evidence that he had no interest at the relevant time (1996-1998) whether or not the upper or lower furrow system was being maintained. He had no idea whether it contributed to the water supply in the Watervalstroom above the first diversion point, even in winter. His concession under cross examination by the respondents' counsel that some of the flood waters from the

'groot sloot' would push into the remnants of the summer water furrow system along route 6 on Du Plessis' figure 2-1 was speculative and based only on his (quite reasonable) assessment of the probabilities.

[52] In the result, Conradie's evidence contributed nothing to resolve the dispute on the papers as to whether water was being led from the spring in the Watervalstroom catchment area via the upper reaches of the furrow during the window period. It showed that he was actually unable to give direct evidence on that question one way or the other. It did, however, confirm that even if the upper furrow were working at the time, it would have provided little water, if any, back into the Watervalstroom above the first diversion point at the place indicated as 'B' on the sketch plan with which he had instructed De Haan; and then only quite incidentally.

[53] Probably the most important effect of Conradie's evidence was that it provided nothing to upset the inherent probability that the owners of Kanonkop could have had no apparent reason at the time, if they were not to impugn the erection of the weir on De Eike – which they did not – to maintain the upper reaches of the furrow during the period after 1983. On the contrary, the general effect of Conradie's evidence was that the water that flooded down the side stream and into the 'groot sloot' in winter had always been, and would have continued to be, a sufficient source at the time to fill the dams on Kanonkop. Recent extreme drought conditions may, of course, have altered that situation, but they have no bearing on the inherent probabilities of how the water resources were being used twenty years ago.

[54] The implication in Conradie's evidence that no work was done on the upper reaches of the furrow after De Liefde obtained an independent supply of summer water is consistent with the evidence of Org Viljoen and of one, Benjamin Goliath, who had been an employee, since 1967, successively of Conradie's father, Conradie himself, and thereafter, until his retirement in 2014, of the respondents. Goliath averred that he was unaware of work ever having been done on the upper furrow. He stated that he was reasonably certain that had any such work been done, he would have known about it. It is also consistent with the report by a previous owner of Kanonkop (Professor Zeeman) in a letter to his family, dated 13 October 1979, that '*Die Furrow is baie jare gelede gemaak en tans met bosse oorgroei en deur die*

Kampsrivier heeltemal verspoel op die plek waar dit die rivier gekruis het; dus in die Kroongrond volgens die kaart'.[22]

[55] As mentioned earlier, a number of witnesses testified that Kanonkop had received water via the furrow from a juncture with the Watervalstroom below the first diversion point during the statutory window period. I refer in this regard to the affidavits of Werner Louw (the son of Mr Kallie Louw, who farmed Kanonkop from 1996 to 1999) and of Elias ('Gys') Kerr and Dawid Swarts who worked on Kanonkop during the relevant period. They all spoke of water received via the lower furrow system. The omission of any mention in testimony of these witnesses of the operation or maintenance of the upper furrow supports an inference that the upper furrow had probably fallen into desuetude long before the window period. Further support for such a conclusion is afforded by the direct evidence of Org Viljoen and the anecdotal content of Prof. Zeeman's letter.

[56] As to the evidence of Werner Louw et al that, unlike Org Viljoen, they were not aware of any water ever flowing from the lower furrow system into the Watervalstroom above the first diversion point, it must be said that even allowing for the fact that some amount of water probably did flow along the disused part of the lower furrow (along route 6) into the Watervalstroom above the first diversion point during periods of high flood (hence Du Preez' action in excavating channel 5), there would be no reason for Louw, Kerr or Swarts to have noticed that. The occurrences would probably have been sporadic and the amount of water involved would have been insignificant in comparison with the much greater flow down routes 9-3 and 9-7-8-4 during such events into the river below the first diversion point, whence it was taken into the dams on Kanonkop. I think that the court a quo would have been entitled to proceed accepting the evidence that the furrow along route 6 was indeed dry most of the time.

[57] None of these witnesses gave any evidence to support the notion inherent in Du Preez' claim that the upper part of the furrow had been operational during the 1990's. On the contrary, their evidence concerning the furrow as a water supply to

[22] 'The Furrow was made many years ago and is currently overgrown with bushes and completely washed away by the Kamps River at the spot where it crossed the river; that being on Crown Land according to the map.' (My translation.) It will be recalled that 'Kamps River' was a name by which some people referred to the Watervalstroom.

Kanonkop was founded on the effect of the water coming down the 'groot sloot' below De Eike (i.e. the lower part of the furrow). None of them testified that the furrow had been kept open above De Eike.

[58] Du Preez' claim that the upper furrow was operational when he first saw it is irreconcilable with the opinion of Du Plessis that the furrow would have been rendered inoperative by the slightest blockage and would have ceased to flow meaningfully if it had been allowed to become overgrown. There seems little doubt that the upper furrow would have become overgrown if it were left unmaintained for decades, as appears to have been the case. Org Viljoen's observation that it was in fact overgrown is supported by the observation recorded in Prof. Zeeman's 1979 letter, quoted earlier.[23] Moreover, the only persons who would have had a possible interest in keeping the upper furrow clear during the relevant period would have been the owners of Bergplaas/De Liefde (i.e. Conradie and his late father), the owners of De Eike and the owners of Kanonkop (Zeeman, Boonzaaier and Kallie Louw). None of the evidence procured by either side from any of those sources supported the notion that the upper furrow had been maintained in the period between the 1970's and the time Du Preez took possession of the farms that he is in the process of purchasing.[24]

[59] Du Preez's claim that the stone diversion-and-supporting wall structures were in place at the mouth of the furrow when he first saw it is inconsistent, in the context of the lack of any evidence concerning maintenance of the upper furrow during the preceding 35 years or more, with the opinion of Prof. Du Plessis that the annual winter floods would have tended to wash away such structures. In the absence of any indication that maintenance work had been done on the upper furrow during the

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[23] At para. 53.

[24] No evidence by the owners of De Eike was adduced. There was also no evidence from Boonzaaier, who appears to have owned Kanonkop only for a short time in 1995-1996. Prof. Zeeman's son, Donald Zeeman, testified that he had owned and farmed on Kanonkop in the period 1986-1995, having spent several years before that growing up on the farm. He indicated that Du Preez had recently approached him to enquire about the furrow. Zeeman testified that in all the time that he had lived and farmed on Kanonkop he had been unaware of the existence of any 'so-called furrow' running over Kyk in die Pot and part of the then De Liefde (incorporating the present day Bergplaas) farm. He said that he had not carried out any maintenance work on the furrow, which he had seen for the first time in 2016 when invited by Du Preez to inspect it. Donald Zeeman confirmed that Kanonkop had received water from the sloot below De Eike, but said that he had never concerned himself with its source. I have already treated earlier in this judgment of the evidence of Conradie and the son of Kallie Louw.

intervening period, Du Preez' claim is also strikingly incongruent with the indication in Prof. Zeeman's 1979 letter that the diversion works at the mouth of the furrow had long since been washed away.

[60] In the circumstances I consider that the court a quo should have decided on the papers that the probabilities strongly favoured the respondents' assertion that water had not been abstracted from the course of the Donkerkloof-Watervalstroom via the upper furrow during the statutory window period. The result would be, as the court a quo recognised, that the current use of the furrow by Du Preez is not the continuation of an 'existing lawful water use' within the meaning of the National Water Act and thus, absent a licence granted by a responsible authority, not a currently permitted water use. It should therefore have been found on that basis that unlawful conduct on the part of the first appellant had been established.

[61] The right of the respondents to at least a share in the water that flowed down the course of the Watervalstroom was not in contention. Indeed, the parties' interim settlement agreement in the proceedings under case no. 9883/14 afforded a basis to recognise that the respondents had a prima facie right to divert a substantial part of the winter water coming down the Watervalstroom before it could reach Kanonkop until such time as the De Liefde dam had been filled. Thus, if the evidence supported the conclusion that the abstraction of water since 2016 by Du Preez at the upper furrow was diminishing the amount of water that would otherwise flow down the watercourse in winter, an infringement of the respondents' rights would thereby be established.

[62] Prof. du Plessis' evidence established that water diverted into the furrow would indeed diminish the volume of water that would otherwise have run down the course of the Watervalstroom. This evidence was not contradicted. Du Plessis explained that the amount of water that would effectively be diverted from the watercourse by the furrow would be related to the effectiveness of the diversion works in the body of the watercourse and the strength and height of the reinforcement walls provided to keep the diverted water in the initial part of the furrow once it had been diverted. It was material in this regard that Du Plessis noted on his second visit in July 2016 that significant additional works had been effected at the point of diversion into the upper furrow. He stated that these works included the clearance of vegetation in the immediate vicinity of the point of diversion and the widening of the

furrow entrance. He also noted that the natural course of flow in the Watervalstroom ('hoofstroom') watercourse had been further blocked off by means of the extension of the stone wall that he had observed on his previous visit in May 2016. He also observed that further measures had been implemented to more effectively keep water that had been diverted into the furrow inside the channel. His conclusion was that –

> Verskeie onlangse intervensies wat die blok van die natuurlike vloeipad tydens hoë vloei by die inkeer [?veroorsaak], asook die uitgrawe van en wysiging van bestaande vloei roetes bokant die eerste verdeling, het die gevolg dat heelwat minder van die vloei wat oorspronklik by die eerste verdeling sou uitkom, nou nie meer daar sal uitkom nie. Die wysigings aan die inkeer sal ook tot gevolg hê dat beduidend meer vloei na die pyp-inlaat gelei sal word, wat glad nie by die eerste verdeling sal uitkom nie.[25]

[63] It follows that if the actions of the first appellant were depriving the respondents of some of the winter water that would otherwise have been disgorged down the watercourse of the Watervalstroom to the first diversion point, they were being occasioned irreparable harm and would reasonably apprehend further such harm if the infringing conduct were permitted to continue. The evidence is that the respondents have been unable to fill the dam on De Liefde. Whereas this may in material part be due to the prevailing drought conditions, it seems probable, on the basis of Du Plessis' evidence, that their plight would be less severe if water that is currently being diverted into the furrow were able to reach the first diversion point.

[64] The balance of convenience weighs in favour of the respondents in my judgment. The evidence supports the conclusion that it is improbable that the upper furrow has been operative for many years and that the current abstraction of water by Du Preez from the Donkerkloof is therefore probably unlawful. It would appear that during that time Kanonkop has been receiving its winter water from two primary sources, viz. (i) the main course of the Watervalstroom after the flow has passed through the first diversion point and (ii) the water coming down the lower furrow or 'groot sloot' via routes 9-3 and 9-7-8-4. The order granted by the court a quo will not interfere with either of those established supplies.

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[25] 'Various recent interventions which block the natural flow of water at the point of diversion into the furrow, as well as the excavation of and alteration to existing flow routes above the first diversion point have the result that significantly less of the flow that originally would have come out at the first diversion point will now reach there. The alterations to the diversion works at the furrow will also result in considerably greater flow to the pipe inlet which will not come out at the first diversion point.' (My translation.)

[65] It is equally clear, I think, that the primary supply of winter water to the respondents is the water that courses down the bed of the Watervalstroom to the 'damsloot' at the first diversion point. The effect of the interim interdict would restore, but not enhance the extent of that supply. It seems to me on the papers that the respondents enjoy reasonable prospects of successfully establishing in the action their entitlement to water transported downstream to the first diversion point unaffected by any abstraction via the upper furrow. Such entitlement would in principle be unaffected by the outcome of the dispute about the respondents' entitlement to actively divert water into the damsloot using temporary diversion works each winter until the dam on De Liefde has been filled.

[66] The effect of the interim interdictory relief granted by the court a quo is to restore the status quo ante pending the final determination of the action in case no. 15076/14.

[67] It has not been suggested that the respondents enjoyed any reasonable alternative remedy, and I am unable to conceive of any.

[68] In the result I have not been persuaded that the order made by the court a quo should be set aside. It is true that the court a quo does not appear to have reached (or at least stated) a conclusion on whether or not the upper furrow had been operational during the statutory window period, and to have founded the relief that it granted on its finding that the current use by Du Preez of the furrow system is on any approach different to the historical use and thus not permitted in terms of the National Water Act. The appellants' counsel submitted that the court a quo had misdirected itself by failing to appreciate that, having regard to the definition of water use in terms of s 21 of the National Water Act, the diversion of water in and abstraction thereof from the Donkerkloof, and not the subsequent rerouting of the water already abstracted into the manmade furrow, was the relevant consideration for the purpose of determining whether Du Preez' conduct was covered as an existing lawful water use. In view of the conclusions to which I have come, it has not been necessary to consider the correctness of the approach of the court a quo, or to determine whether counsel's criticism of it was well founded. It is trite that appeals are concerned with the result of the proceedings in the court a quo, not with the court's means of arriving at the result.

[69] Suffice it to say, however, that even were the appellants' counsel's argument, based as it was on his construction of pertinent provisions of the National Water Act – in particular, the effect of the import of the words 'watercourse' and 'water resource' in s 21 thereof – correct in principle, I do not think that its application in the context of the peculiar facts of the case would have been as clear or simple as his submissions would have us accept. I say this because the evidence suggests that the furrow system is not manmade along its entire course. The water abstracted for use on Kanonkop during the statutory window period was taken from the 'groot sloot', which appears to be a natural watercourse. Therefore, assuming in favour of the appellants for argument's sake that the upper furrow had been operational at the relevant time, the amount of upper furrow water reaching the 'groot sloot' during the window period would have been only that which was surplus to the requirements of De Eike, and not the whole of that abstracted from the Watervalstroom as has been the case using the piping system installed by Du Preez. This indicates a different extent of water use via the furrow system by Kanonkop today from that which might have obtained during the window period. As observed by Van Heerden J in *Starke NO and another v Schreiber and others* [2001] 1 All SA 167 (C), at 184, an existing lawful water use right within the meaning of the National Water Act comprehends, amongst other things, 'the same extent … [of water] … actually *used* … during the two-year period preceding 1 October 1998'.[26] It seems doubtful therefore that the current use could qualify, even on the most favourable postulate, as the continuation of an existing lawful water use.

[70] The question of costs remains to be determined. Whilst, as mentioned, fixing the liability for the costs attendant on an application for interdictory relief *pendente lite* is ordinarily stood over for determination in the pending proceedings when an interdict is granted, the same considerations do not apply in respect of an unsuccessful appeal against the grant of an interim interdict. There is no reason why costs should not follow the result in the appeal.

[71] The following order is made:

> The appeal is dismissed with costs; such costs to be paid by the first to fifth appellants jointly and severally, the one paying, the others being absolved.

[26] Underlining supplied; italics in the original.

A.G. BINNS-WARD
Judge of the High Court

D.V. DLODLO
Judge of the High Court

C.M. FORTUIN
Judge of the High Court