Republic of South Africa

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

Before: The Hon. Mr Justice Binns-Ward
Hearing: 6 and 7 March 2017
Judgment: 30 May 2017

Case No. 6928/2005

In the matter between:

MATTHEUS LOURENS GELDENHUYS	Applicant
and others	Second and Third Applicants

and

PIETER ROSSOUW CILLIE	First Respondent
and others	Second to Twenty-Second Respondents

JUDGMENT

BINNS-WARD J:

[1] The applicants, who are the owners of rural land in the area near Ceres in the Western Cape Province, have applied for an order declaring that they, and the seventeenth and eighteenth respondents in the current case, are entitled, for their exclusive use, as successors in title to the respondents in Water Court case no. 351/1957, to so much of the water that is diverted into the Inverdoorn Canal via the Spek River - and - Valschgat diversion headworks

as had been awarded to their predecessors in title in terms of the order made in the Water Court case.[1] They also sought certain other relief, including a prohibitory interdict against the first to seventh respondents forbidding the latter from interfering with the water that is diverted into the Inverdoorn Canal allegedly for the exclusive use of themselves and the seventeenth and eighteenth respondents pursuant to the Water Court's order.

[2] The Water Court's order was made in chambers at Cape Town on 19 January 1960 (per Beyers JP). It endorsed and adopted the terms of a settlement agreement that had been entered into by the litigants in that case. The matter before the Water Court had concerned an application for an order declaring that the respondents in that matter were not entitled to divert or cause to be diverted any water out of the Spek River Kloof and the Valsgat Kloof for use on their properties. The water in issue was diverted into a channel constructed in the late nineteenth century between the Spek and Valschgat river courses and then beyond the Valschgat River to the non-riparian lands of the so-called 'Inverdoorn farmers', being the properties currently owned by the applicants and the seventeenth and eighteenth respondents. The channel between the two rivers has been referred to in the applicants' counsel's heads of argument (and in the judgment of Harms ADP in *Hexvallei Besproeiingsraad en 'n Ander v Geldenhuys NO en Andere* 2009 (1) SA 547 (SCA)) as 'the Spek River Canal'. The channel to the applicants' lands beyond the Valschgat River is commonly known as 'the Inverdoorn Canal'.

[3] The settlement agreement provided for the respondents in the Water Court case to enjoy the right, annually, to stipulated quantities of water diverted into the Inverdoorn Canal from the Spek and Valschgat Rivers. The settlement agreement further provided that '*Hierdie ooreenkoms sal op generlei wyse die oewerregte van die eienaar/s van die plaas "Die Vlakte" inkort of raak nie en die hoeveelhede water in paragraaf (1) hierbo genome sluit nie in enige water waarop die eienaar/s van gemelde plaas geregtig is om as oewereienaars op gemelde plaas te gebruik nie*'.[2] The agreement provided that the

[1] The Water Courts were established in terms of s 34 of the Water Act 54 of 1956. The Water Courts were presided over by sitting judges of the provincial divisions of the late Supreme Court having concurrent territorial jurisdiction with the respective Water Courts. They were disestablished upon the repeal of Act 54 of 1956, in terms of the National Water Act 36 of 1998, and were to some extent replaced by the Water Tribunal, which has nationwide jurisdiction.

[2] '*This agreement shall in no way restrict or affect the riparian rights of the owner/s of the farm "Die Vlakte" and the volumes of water mentioned in paragraph (1) above do not include any water to which the owner/s of the said farm are entitled as riparian owners to use on the said farm*'. (My translation.)

respondents in that litigation would, at their expense, construct on both rivers the diversion headworks that were necessary to implement the agreed arrangement. The works were to be constructed in accordance with plans to be approved by an engineer appointed by the applicants in that matter. Various issues have arisen out of the character of the works that were subsequently constructed but, by virtue of the separation of issues to be described presently, it is not necessary to go into them at this stage.

[4] The current proceedings were instituted because it is alleged that water is being extracted, by or at the instance of the first to seventh respondents, at sluices on the canal near the diversion works on the Valschgat River in breach of the terms of the Water Court order as subsequently implemented by way of the diversion works and the associated sluices. The applicants allege that the effect has been to significantly reduce the flow of water to the further reaches of the Inverdoorn Canal, with the result that they have for many years now (since 1997, when the Vlaktedam - also known as the Topdam - was built to increase the storage capacity of the water diverted at the aforementioned sluices) been receiving only a small fraction of the volume of water that they used to receive, and to which they are allegedly entitled.

[5] The law regulating water resources in this country has been fundamentally reformed in the time that has intervened since the making of the Water Court order on which the application is founded. The reform is manifested in the provisions of the National Water Act 36 of 1998, which (save for certain provisions that were brought into operation later) came into effect on 1 October 1998.

[6] The preamble to the Act recognises that ‘water is a natural resource that belongs to all people’ and acknowledges ‘the National Government’s overall responsibility for and authority over the nation’s water resources and their use, including the equitable allocation of water for beneficial use [and] the redistribution of water’. The statute abolished the dichotomous characterisation of water under the earlier legislation as ‘public water’ or ‘private water’. Section 3 of the Act appoints the minister in the national cabinet responsible for water affairs as the functionary ultimately responsible for the administration of the national government’s role as ‘the public trustee of the nation’s water resources’. Subsection (4) provides that ‘The National Government, acting through the Minister, has the power to regulate the use, flow and control of all water in the Republic’. The Minister of

Water and Sanitation (cited in the papers as the 'Minister of Water Affairs and Forestry') is the sixteenth respondent in the application.

[7] The Minister delivered an affidavit deposed to on her behalf by the Deputy Director: Catchment Management Strategy and Water Resource Planning for the Berg-Olifants proto Catchment Management Agency, to whom, for convenience, I shall refer simply as the Deputy Director. The Deputy Director averred that the Minister opposed the relief sought by the applicants on a number of grounds. Only three of them have been persisted with.

[8] The first, which appears to bear on the exercise of the court's discretionary power in respect of declaratory relief, is that the applicants should rather have requested the Minister to verify the lawfulness of the parties' existing water uses in terms of s 35 of the Act.[3] It was alleged in that regard that an exercise by the Department of verifying the existing lawful water uses of the first to seventh respondents was in any event currently underway and about half-way completed at this stage, and that the verification of the uses of the applicants and the seventeenth and eighteenth respondents was also 'in progress'. The Deputy Director averred that the Department intended to recommend that the Minister should issue the first to seventh respondents with notices in terms of s 35(1). The effect of a notice in terms of s 35 is that the recipient is obliged to apply for the verification of his or her existing water use. Should the recipient fail to do so within the prescribed time, he or she is thereupon prohibited from exercising the water use until an application for verification in compliance with the notice has been made.

[9] The applicants' response to the Minister's contentions is that the water in the Inverdoorn Canal is not susceptible to regulation in terms of s 35 and that the 'existing water use' within the meaning of the term in the legislation takes place when the water is diverted from the rivers at the diversion works, and not when it is extracted from the canal.

[10] The second ground of opposition is that any rights to water that might have been conferred by the Water Court's order were cut across by the determinations made for the purposes of the allocation of public water within the Sanddrift Water Control Area in terms

[3] Section 33(1) of the Act provides that '[a'] person may apply to a responsible authority to have a water use which is not one contemplated in section 32(1)(a), declared to be an existing lawful water use'. It is evident from the definition of 'responsible authority' that it is a catchment management agency, if the Minister has delegated the authority to it, failing which it is the Minister herself. Any decision made in terms of that provision falls to be regarded as if it were made on an application in terms of s 41 of the Act, and is therefore also amenable to appeal to the Water Tribunal in terms of s 148.

of Government Notice 1801 of 1981 issued in terms of the then subsisting Water Act 54 of 1956 (the statutory predecessor to the National Water Act, 1998). The Minister contends that 'whatever rights to water the owners of the properties referred to in the annexure to Notice 1801 of 1981 might have had under the 1960 order were effectively extinguished by that notice'.[4]

[11] The third ground of opposition by the Department is that the provisions of the Water Court order have in any event been overtaken by the Act; more particularly, by reason of the definition of 'existing lawful water use' in terms of s 32 of the Act, which, so it was contended, limited the applicants to the water use that had taken place within the two years immediately preceding the commencement of the Act. Section 32 provides, insofar as currently relevant, that '[a]n existing lawful water use means a water use- (a) which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which- (i) was authorised by or under any law which was in force immediately before the date of commencement of this Act'.

[12] It seemed to me that if there were merit in any of these points of opposition raised by the Minister they would be dispositive of the application, and that it would then not be necessary to engage with the voluminous paper generated in respect of the disputes between the applicants and the first to seventh respondents. I therefore directed, without opposition from any of the parties, that the contentions advanced by the Minister should be argued and determined before the remaining issues in the case. In the circumstances counsel for the first to seventh respondents took no part in the hearing on the separated issues.[5]

[13] Before I turn to consider the Department's aforementioned grounds of opposition, however, it is necessary first to address an issue raised by the Minister's counsel in oral argument. Mr *Duminy* SC, who appeared for the Minister, stated during his address to the court that the sixteenth respondent's real concern was that it should be seen to be clear that any determination of the application by the court could not fetter the subsequent exercise by the Minister of any of her powers under the Act. Mr *Duminy* advised in this connection that the Department had 'no legal interest in the outcome of the (private) dispute between the

[4] Para. 9.2.2 of the Minister's heads of argument.

[5] Junior counsel for the first to seventh respondents attended the hearing on a watching brief.

applicants and the non-institutional respondents[6] regarding the correct construction of the settlement agreement incorporated in the 1960 order, or to the extent to which their rights *inter se* were affected or amended by the design of the water works in the Spek river and the Valschgat river'.

[14] That sounded to me, in a sense, like an informally advanced special defence of misjoinder. If it was, it was misconceived in my view.

[15] Whilst there is no doubt that the court cannot competently negate or frustrate the Minister's powers and functions in terms of the Act, there is also no basis to overlook the reality that those powers fall to be exercised with proper regard to the applicable legal context. So, for example, when it comes to whether a particular water use qualifies as an 'existing lawful water use' within the meaning of s 32(1)(a)(i) of the Act, which provides –

> An existing lawful water use means a water use-
> *(a)* which has taken place at any time during a period of two years immediately before the date of commencement of this Act and which-
> (i) was authorised by or under any law which was in force immediately before the date of commencement of this Act,

it is pre-eminently within the court's jurisdiction, should it be pertinent to do so in the context of an unresolved dispute, to pronounce upon the question whether a particular water use was indeed 'authorised by or under any law'. The postulated question, in respect of which the Minister clearly has a direct and substantive legal interest, falls to be answered by 'the application of law' within the meaning of s 34 of the Constitution Nothing in the Act to which my attention has been drawn supports the notion that the court's jurisdiction has been ousted in favour of some other tribunal or forum. The fact that the Department would be bound by the court's determination would not, however, fetter the Minister's authority under the Act to regulate water use. It would not, for example, limit the Minister's power, in the context of a subsequent determination in terms of s 35 of the Act, to limit the existing water use,[7] nor would it impinge on the responsible authority's power to subsequently require the water user to apply for a licence – something that might result in the alteration, or even extinction, of the existing water use.

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[6] The 'institutional respondents' were the Worcester-East Water User Association (cited as the thirteenth respondent) and the Hex Valley Irrigation Board (cited as the fourteenth respondent). The Minister of Public Works was cited as the fifteenth respondent. None of the aforementioned respondents participated actively in the litigation.

[7] In terms of s 35(4).

[16] I also do not agree with the contention advanced by the Minister's counsel that the issue in the current case would only become cognisable by this court if it were brought to it on appeal from the Water Tribunal in terms of s 149 of the Act. An appeal in terms of s 149 can arise only as the culmination of a process in terms of the Act that would afford the Tribunal jurisdiction to make a determinative decision. A determination by the responsible authority in terms of s 35 would be an example. In the current case, however, none of the parties has, at this stage, even been required to submit an application for such a determination. No relevant process in terms of the Act, which arguably might entail even the deferment of the court's jurisdiction, has yet been set in train. The argument therefore finds no traction on the facts, and there is nothing in the Act to support it. It is well-established that '[o]uster of jurisdiction occurs only when that conclusion flows by necessary implication from the statutory provisions and then only to the extent indicated by such implication'.[8]

[17] Counsel's argument, moreover, does not find support in any jurisprudential precedent. On the contrary, the existing jurisprudence tends to support my conclusion that it is misplaced. The declaratory order sought in the current matter has been applied for to confirm the legal foundation for the interdictory relief that the applicants seek against the first to seventh respondents. The interdictory relief is analogous in its character to the sort of relief that was in issue in the *Hexvallei Besproeiingsraad* case mentioned earlier.[9] That matter concerned the enforcement by the applicant in that case of an existing lawful water use (within the meaning of the National Water Act) arising out of the terms of the very same Water Court order that is foundational to the relief sought in the current case. It is evident from the judgment that the appeal court was fully alert to the fundamental change in the applicable regulatory regime wrought by the National Water Act. It is implicit in the court's approach to the determination of the case that it did not find anything in the reformed legislative framework that ousted the court's jurisdiction to deal at first instance with disputes concerning the ambit of existing lawful water uses under the new Act. (The Minister was the fifth respondent in *Hexvallei Besproeiingsraad*.)

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[8] *Roestorf and Another v Johannesburg Municipal Pension Fund and Others* 2012 (6) SA 184 (SCA), at para. 30. See also, amongst others, *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A), at 502, *Local Road Transportation Board and Another v Durban City Council and Another* 1965 (1) SA 586 (A), at 592-594, and *Jockey Club of South Africa and Others v Feldman*, 1942 AD 340 at 351-2.

[9] In paragraph [2] above.

[18] Having regard to the Minister's statutory role as the regulator of the use, flow and control of all water in the Republic,[10] it was clear in my judgment that she had a sufficiently real and direct legal interest in the determinations sought in the current proceedings to have been joined as a necessary party. That that is so has, if anything, been confirmed by how the matter has developed, more particularly in respect of the applicants' response to the Minister's contentions; especially in regard to what they contend is the nature of the 'existing lawful water use' in issue, namely diversion of the water at the diversion headworks on the rivers rather than abstraction of the diverted water from the canal. Furthermore, the Minister's second ground of opposition identified above[11] unambiguously raises a legal question, the determination of which by the court is binding, not only on the parties to what has been labelled as the 'private dispute' between the non-institutional parties, but also on the Minister.

[19] Reverting then to the Department's three aforementioned grounds of opposition. It is convenient to commence the discussion of them by identifying the provisions of the Act that appear to be most pertinent to the arguments that are involved.

[20] Section 4 of the Act regulates the entitlement to water use. It provides:

> **Entitlement to water use**
>
> (1) A person may use water in or from a water resource for purposes such as reasonable domestic use, domestic gardening, animal watering, fire fighting and recreational use, as set out in Schedule 1.
>
> (2) A person may continue with an existing lawful water use in accordance with section 34.
>
> (3) A person may use water in terms of a general authorisation or licence under this Act.
>
> (4) Any entitlement granted to a person by or under this Act replaces any right to use water which that person might otherwise have been able to enjoy or enforce under any other law-
>
> (a) to take or use water;
>
> (b) to obstruct or divert a flow of water;
>
> (c) to affect the quality of any water;
>
> (d) to receive any particular flow of water;
>
> (e) to receive a flow of water of any particular quality; or
>
> (f) to construct, operate or maintain any waterwork.

[21] In terms of s 22(1) of the Act, a person may only use water –

> (a) without a licence-

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[10] Section 3(4) of the Act.

[11] In paragraph [10].

(i) if that water use is permissible under Schedule 1;

(ii) if that water use is permissible as a continuation of an existing lawful use; or

(iii) if that water use is permissible in terms of a general authorisation issued under section 39;

(b) if the water use is authorised by a licence under this Act; or

(c) if the responsible authority has dispensed with a licence requirement under subsection (3).

[22] The water use in issue in these proceedings does not fall under any of the categories of use listed in Schedule 1 to the Act. There has been no suggestion that the water use in issue is or requires to be authorised by a licence or that it has been permitted in terms of a general authorisation in terms of s 39. It is evident that the alleged entitlement by the applicants to, and the use by first to seventh respondents of, water in the Inverdoorn Canal purport to be on the basis of a continuation of respective existing lawful uses.

[23] As mentioned, s 32 of the Act defines what is meant by 'existing lawful water use'.[12] Section 34 authorises any person or that person's successor in title to continue with an existing lawful water use, subject to any existing obligations or conditions attached to such use, and subject also to its replacement by a licence in terms of the Act, or any limitation or prohibition by or under the Act.

[24] Section 35 of the Act provides:

Verification of existing water uses

(1) The responsible authority may, in order to verify the lawfulness or extent of an existing water use, by written notice require any person claiming an entitlement to that water use to apply for a verification of that use.

(2) A notice under subsection (1) must-

(a) have a suitable application form annexed to it;

(b) specify a date before which the application must be submitted;

(c) inform the person concerned that any entitlement to continue with the water use may lapse if an application is not made on or before the specified date; and

(d) be delivered personally or sent by registered mail to the person concerned.

(3) A responsible authority-

(a) may require the applicant, at the applicant's expense, to obtain and provide it with other information, in addition to the information contained in the application;

(b) may conduct its own investigation into the veracity and the lawfulness of the water use in question;

(c) may invite written comments from any person who has an interest in the matter; and

[12] See paragraph [15] above.

(d) must afford the applicant an opportunity to make representations on any aspect of the application.

(4) A responsible authority may determine the extent and lawfulness of a water use pursuant to an application under this section, and such determination limits the extent of any existing lawful water use contemplated in section 32 (1).

(5) No person who has been required to apply for verification under subsection (1) in respect of an existing lawful water use may exercise that water use-

(a) after the closing date specified in the notice, if that person has not applied for verification; or

(b) after the verification application has been refused, if that person applied for verification.

(6) A responsible authority may, for good reason, condone a late application and charge a reasonable additional fee for processing the late application.

Any determination made in terms of s 35 is, in terms of s 148 of the Act, subject to appeal to the Water Tribunal. The Water Tribunal is comprised of persons with knowledge in law, engineering, water resource management or related fields. The members of the Tribunal are appointed on the recommendation of the Judicial Service Commission and the Water Research Commission. The decisions of the Tribunal are amenable to further appeal on points of law to the High Court,[13] and also, if appropriate, to judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000.[14]

[25] In support of the first of the aforementioned grounds of opposition, the Deputy Director has averred that it would be more appropriate for the dispute between the applicants and the first to seventh respondents to be determined in terms of the Act; that is initially, at least, by persons with appropriate technical expertise in water matters, rather than by a court as port of first call.

[26] In principle there is much to be said in favour of the Department's contention. Whilst the terms of the Water Court's order and the basis of its subsequent implementation by the parties to that litigation informs the content of the applicants' alleged existing lawful water use and the question whether the first to seventh respondents' abstraction of water from the Inverdoorn Canal infringes the applicants' rights are in the main questions of law that the courts are best qualified to determine, a verification process in terms of the Act would

[13] In terms of s 149(1) of the Act.

[14] See *Makhanya NO v Goede Wellington Boerdery (Pty) Ltd and Another* [2013] 1 All SA 526 (SCA), at paras. 25-31.

facilitate their determination with regard to the present day objects of the regulatory legislation. Mindful that any determination by the court might shortly be overtaken by an administrative decision in terms of the Act, considerations of pragmatism and efficiency militate in favour of the administrative process as the more sensible route. The process of verification in terms of s 35 is inquisitorial and, as alluded to earlier, it may result in a limitation – and therefore effectively an amendment – of existing use rights in furtherance of the objects of the legislation, or, to the same end, prompt the imposition of a licensing requirement. The hearing of any appeal to the Water Tribunal is also inquisitorial in character; it is effectively a rehearing in respect of the administrative decision-making process at first instance.[15]

[27] It has been recognised that, at least conceptually, there are material advantages to the determination at first instance of matters concerning the public administration by domestic tribunals with relevant technical expertise. So, in *Koyabe and Others v Minister for Home Affairs and Others* 2009 (12) BCLR 1192 (CC), 2010 (4) SA 327, at para. 35, Mokgoro J observed that 'Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigants with access to justice, the importance of more readily available and cost-effective internal remedies cannot be gainsaid.' The learned judge made reference in this connection to two passages in Hoexter, *Administrative Law in South Africa* (Juta, 2007).[16] In the first, the author had stated, at p. 52, 'Courts are unable to adjudicate effectively on many specialised matters, while administrative bodies are able to do this more informally, quickly, cheaply and expertly- and not necessarily any less justly.' The second, at p. 64, qualified the truism with a reality check: 'In the South African context, however, the advantages of speed, efficiency and expertise cannot be taken for granted as they may perhaps be in older and more established administrative systems.'

[28] The pertinence of the reference by the learned Constiutional Court judge to the second passage in Hoexter is borne out in the context of the current case by two features.

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[15] See s 148(4) of the Act read with paragraph 6 in the Sixth Schedule thereto.

[16] In footnote 30.

[29] The first is that notwithstanding the commencement of this litigation as long as 12 years ago, in 2005, no effective steps have yet been taken by the Department, in terms of s 35 of the Act, to verify the water uses in contention. In my view, despite the Deputy Director's averments that progress has been made in this regard, effective steps in terms of the provision commence only when the notice contemplated in terms of s 35(1) of the Act is given to the affected water user. That has not happened.

[30] The second is that the provisions that would potentially afford a basis for an effective administrative determination of the questions raised in the current litigation have not been efficiently administered. Thus, as appears from the judgment in *Exxaro Coal (Mpumalanga) (Pty) Ltd and Another v Minister of Water Affairs and Another* [2012] ZAGPPHC 354 (7 December 2012), the Water Tribunal effectively ceased to exist, apparently as a result of the failure by the Minister to see to it that appointments were made to ensure that it remained legally constituted; Nic Olivier, *Non-performance of constitutional obligations and the demise of the water tribunal – access to justice denied?*, 2014 TSAR 163.

[31] Upon enquiry after the hearing, I was informed by the Minister's counsel that the longstanding vacancies on the Water Tribunal were eventually filled in 2015. I have noted, however, that no decisions by the Tribunal have been reported, either on SAFLII or the Department's website, since a decision given at the end of 2011.

[32] In the circumstances I have not been persuaded that it would be appropriate for the court to exercise its discretion against deciding the declaratory relief sought by the applicants on the merits of the case. I therefore find against the Department on the first of the aforementioned grounds of opposition.

[33] Turning now to the second ground of opposition. The Minister was empowered, in terms of s 59(1) of the Water Act 54 of 1956, by notice in the Government Gazette to declare any area to be a water control area. The Minister was also empowered in like manner to amend or repeal any such notice. The properties concerned in the current proceedings were included in the Sanddrift water control area in terms of Proclamations No.s 140 of 13 June 1975 and 277 of 30 November 1979. Section 62 of the 1956 Act empowered the Minister to control the use of public water in water control areas. The effect of Government Notice 1801 of 1981 was to allocate the quantity of public water that might be abstracted from the Spek and Valschgat Rivers in the water control area above the Lakensvalley Dam to various farms with which the current proceedings are concerned. The position was summarised in the

appeal court's judgment in *Hexvallei Besproeingsraad*. As described in that judgment, the proclamation of the water control area in respect of the properties described in Proclamations No.s 140 of 13 June 1975 and 277 of 30 November 1979 was repealed by a notice published in the Government Gazette on 18 February 1994.[17] The repealing notice stated that 'Resulting from this, control over the abstraction, impoundment, storage and use of public water from all public streams in the areas concerned shall hence force *inter alia* be effected in terms of sections 9, 9B and 10 of the Water Act, 1956'.

[34] The effects of the declaration of a water control area and the consequent imposition of use controls overrode the rights of riparian property owners to the use of public water. Allocations of water in terms of s 62 of the 1956 Act would also displace the effect of allocations made in terms of any pertinent orders by the Water Court. The question raised by the Minister's second ground of opposition is whether the effect of the Water Court's order in the present matter was resuscitated when the relevant part of the water control area was deproclaimed.

[35] Section 9 of the 1956 Act (read with s 52) regulated the use by owners of the normal flow of water in a public stream[18] to which their properties were riparian. As Harms ADP explained in *Hexvallei Besproeingsraad* 'Openbare water is hetsy normale of surplusstroming. Alle oewereienaars het kragtens art 9 'n aanspraak op 'n redelike aandeel in normale stroming (dit is die hoeveelheid openbare water wat werklik en sigbaar in 'n openbare stroom vloei en wat deur regstreekse besproeiing, sonder opgaring, vir die besproeiing van oewergrond nuttig aangewend kan word). … [I]n 'n winterreënvalgebied …, beteken dit in effek dat die meeste van die water wat in die droër maande vloei, in redelike aandele verdeel moet word'.[19]

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[17] Notice No. 290, dated 18 February 1994.

[18] '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'. It therefore included what would ordinarily be called a river.

[19] '*Public water consists of either normal flow or surplus water. In terms of s 9 all riparian owners were entitled to a reasonable share of the normal flow (that is the volume of water that actually and visibly flows in a public stream and which can be used beneficially for the direct irrigation of riparian lands without the aid of storage facilities). …*[I]*n a winter rainfall area … that means in effect that most of the water that flows during*

[36] The rights of riparian owners in terms of s 9 were, according to the tenor of the provision, subject to any 'existing right'. The expression 'existing right' was defined in s 1 of the Act to mean, amongst other things, 'any right to water acquired by any person by deed of servitude, agreement or order of a competent court'.

[37] Section 10 served the same purpose in respect of the 'surplus water'. Surplus water was defined as 'in relation to a public stream, means public water flowing or found in that stream, other than the normal flow, if any'. Rights in terms of s 10 were also subject to any 'existing right'.

[38] Section 9B of the 1956 Act was directed at the control of the impoundment and abstraction of public water. The provision empowered the Minister to control the construction or enlargement of waterworks. It did not bear on the waterworks constructed pursuant to the 1960 Water Court order with which the current case is concerned. It was, however, of relevance to the construction of additional dam storage capacity in or about 1996 for use on the properties owned by the first to seventh respondents.

[39] In *Hexvallei Besproeingsraad*, Harms ADP expressed the opinion that the effect of the deproclamation in terms of Notice No. 290 of 18 February 1990 was (as had also been found by Fourie J in this court at first instance in that matter) that the pre-proclamation state of affairs was restored. After referring to the passage in Notice No. 290 that I have quoted above,[20] Harms ADP stated 'Die verwysing na art 9 (wat met normale stroming handel) en art 10 (wat met surpluswater handel) kan alleen maar beteken dat die gebruik van water in die gebied deur die gewone reëls oor die gebruik van water beheers sou word. Dis nie te versoene met 'n gedagte dat die ministeriële permittoekennings sou bly voortbestaan nie. Na my oordeel was die permitte se beperkings afhanklik van die voortbestaan van die staatswaterbeheergebied'.[21]

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the drier months has to be allocated in reasonable shares'. (My translation.) *Hexvallei Besproeingsraad* supra, at para. 5.

[20] In paragraph [33].

[21] *Hexvallei Besproeingsraad* supra, at para. 12. '*The reference to ss 9 (which deals with normal flow) and 10 (which deals with surplus water) can but only mean that the use of water in the area would be regulated by the ordinary rules concerning water usage. It is irreconcilable with the notion that the ministerial permit system would continue in existence. In my judgment the permits were dependent on the continuance in existence of the government water control area*'. (My translation.)

[40] Mr *Duminy* argued that the abovementioned observations in *Hexvallei Besproeingsraad* were obiter. I am not convinced that he was right, but it is not necessary to decide the point because in my own judgment they correctly stated the legal position that pertained after the deproclamation of the water control area. The passage in the deproclamation notice quoted earlier unambiguously announced a change of regulatory regime consequent upon the deproclamation. It stated that ss 9, 9B and 10 would thenceforth 'inter alia' apply. The rights created or confirmed in terms of the Water Court order were 'existing rights' within the meaning of ss 9 and 10 of the 1956 Water Act. The employment of the term 'inter alia' appears to me to have been intended to underscore the intention that the status ante quo the proclamation was to be restored, including any regulatory controls that might have applied in a particular case beyond those expressly provided in terms of the mentioned provisions of the Water Act.

[41] For these reasons I also find against the Department on the second of its abovementioned grounds of opposition.

[42] The third ground of opposition concerns the applicants' 'existing lawful water use' within the meaning of the Act. Accepting for present purposes that the applicants' entitlement to relief is dependent on their 'existing lawful water use' in terms of the Water Court order, it is clear, as mentioned earlier, that the applicants contend that the nature of such existing use falls to be determined with reference to the abstraction of water from the Spek and Valschgat Rivers into the Inverdoorn Canal, and not with reference to the water that they were able to extract from the Canal itself. That is an issue I would prefer not to determine in the absence of the first to seventh respondents. I have therefore decided to refrain from dealing with that issue at this stage.

[43] All questions of costs in respect of the first stage hearing will be reserved for determination in the judgment to given on the remaining issues.

[44] The following order is made:

1. The following contentions raised by the sixteenth respondent in opposition to the application –
   (a) that the relief sought by the applicants should be refused on the grounds that they should more appropriately have applied for a verification of their existing water use in terms of section 35 of the National Water Act 36 of 1998 and

(b) that the applicants' water use rights remain determined in terms of Government Notice 1801 dated 28 August 1981, issued in terms of the Water Act 54 of 1956

are hereby determined adversely to the sixteenth respondent.

2. All questions of costs in respect of the first stage hearing on 6-7 March 2017 will be reserved for determination in the judgment to given on the remaining issues in the application.
3. The parties are directed to make arrangements through the presiding judge's registrar for the set down for hearing of the remaining issues in the application.

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