



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

Case No: 15203/2020

In the matter between:

KIM PEREIRA SERRAO DA RIBEIRA N.O. First Plaintiff

RAIL PEREIRA SERRAO DA RIBIERA N.O. Second Plaintiff

SAMANTHA PEREIRA SERRAO DA RIBIERA N.O. Third Plaintiff

CHRISTINA ELIZABETH LE ROUX Fourth Plaintiff

and

WILLEM PETRUS WOUDBERG First Defendant

WERNER JANSE VAN RENSBURG N.O. Second Defendant

**THE TRUSTEES FOR THE TIME
BEING OF THE ESLO TRUST** Third Defendant

**THE TRUSTEES FOR THE TIME
BEING OF THE SONADOR TRUST** Fourth Defendant

**EXECUTRIX ESTATE LATE PETRONELLA
JANSE VAN RENSBURG** Fifth Defendant

COSMIC GOLD TRADING 575 CC Sixth Defendant

GERRIT LE ROUX Seventh Defendant

Coram: De Wet AJ

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time of handing down judgment is deemed to be 14h00 on 23 September 2022.

JUDGMENT

DE WET AJ

Introduction:

1. The first defendant raised two grounds of exception against the particulars of claim filed by the plaintiffs on the basis that it does not disclose a cause of action, alternatively that it lacks averments which are necessary to sustain an action. In response, the plaintiffs filed an application for leave to amend (“the amendment application”), which application includes a request that a new cause of action for interdictory relief based on certain sections of the National Heritage Resources Act, 25 of 1999 (“the NHRA”), be introduced. This application is opposed.

2. At the core of this matter lies a dispute over whether the first defendant, as the holder of a servitude of *aquaeductus*, has the ancillary right to pipe a water furrow known as the Molen River sloot, on the properties of the plaintiffs, which properties are the servient tenements.

Background:

3. The first to third plaintiffs are the trustees for the time being of the Pereira Serrao Da Ribeira Family Trust (“the PSDR Trust”) who is the registered owner of the remainder of farm 134, Eden District Municipality Uniondale, Western Cape and the fourth plaintiff is the owner of farm 3/134, Uniondale, Western Cape.

4. The PSDR Trust bought the remainder of farm 134 in terms of a deed of sale dated 1 June 2004 from the first defendant. In terms of an addendum to the deed of sale, it was recorded that:

“5. Die koper bevestig dat hy daarvan bewus is dat die eienaars geregtig is op water uit die stroom wat vloei oor die eiendom, die reg het om die verdelingspunte van die water van tyd tot tyd te inspekteer en die bestaande pad tot op daardie punt kan gebruik¹.

8. Die Verkoper is tans besig om die bestaande watervoor in pype om te skep en sal die Koper sodra dit voltooi is die kostes daarvan vergoed soos reeds bespreek”²

5. According to the title deed of the remainder of farm 134, the PSDR Trust’s right to ownership is subject to an agreement pertaining to water rights dated 25 March 1879 and a notarial deed dated 1894. The 25 March 1879 agreement provided the following water rights in respect of the “Molen River Water Courses”.

“Further, that the water courses of Molen River the under-mentioned have shares as ... , viz.

C.L. du Plessis five days viz. Monday morn to Sat morn.

J.P van Tonder five days viz. Wednesday morn to Sat morn.

¹ Clause 5 records that the purchaser is aware of the sellers right to water from the stream that flows over the property, to inspect the divisions points from time to time and to use the existing road up to such point – this accord with the terms of the servitude agreement.

² Loosely translated clause 8 stipulates that the seller (the first defendant) was at that time busy transforming or changing the existing water furrow to pipes and that the purchaser (the PSDR Trust), shall compensate the seller when completed, for such costs as discussed.

JIP van Jaarsveld four days viz. Saturday morn to Wed morn.

Also that a stream of water (one inch in diameter) shall be allowed to flow for drinking purposes during the times in which CL du Plessis & JP van Tonder have the use of the Molen River water courses, each for the other.

Further, that the Molen River water courses shall be cleaned twice during the course of each year, viz. on the 1st day of April, & on the 1st day of October, each shareholder to contribute equal assistance.

Further that CL du Plessis is to have the right of making a water course (for the Molen River water) through the grounds of JP van Tonder (at Mealie Hoek) for irrigation of the lower lands”.³

6. The 1894 notarial deed recorded the following agreements pertaining water rights:

“The following rights which “Keyter ... secured from ... [J.P.] van Tonder [the PSDR Trust’s predecessor in title]”, in order for him “better to enable him to enjoy” the water use rights obtained from C L du Plessis:

“[The right to a furrow along the Southern Boundary of [Van Tonder’s] properly [viz. Lot D Molen River] [in accordance with the conditions stipulated in an arbitration award, viz.:] ...

³ Para 19 of the particulars of claim.

“(1) [K]eyter shall have the full right at all times to a free right of way along the sluit, and will further have the right, four feet on each side of the sluit to excavate material for repairing the said sluit.”

(2)[K]eyter shall be bound to keep in good order the drifts where the present road crosses the said sluit twice, to enable [JP van Tonder] to cross with his wagon and oxen ...”⁴

7. The plaintiffs issued a summons on 20 October 2020 pursuant to an urgent application for interdictory relief under case no. 8446/2020⁵, claiming the following declaratory relief:

7.1. An order declaring that the first defendant does not have a right to pipe the Molen River sloot in terms of the deed of sale, the 25 March 1879 Water Servitude Agreement and the 1894 Notarial Deed;

7.2. An order declaring that the first to fourth defendants do not have the right to pipe the Molen River Slood in terms of the 25 March 1879 Water Servitude Agreement.

8. Only the first defendant filed a notice of intention to defend and later, on 2 February 2021, an exception in terms of rule 23(4). The exception was first enrolled for hearing on 5 May 2021, not allocated and postponed to 9 November 2021. On 4

⁴ Para 23 of the particulars of claim.

⁵ According to para 29 of the particulars of claim, the first to fourth defendants undertook in the urgent application before Saldana J, to remove the piping and restore the relevant section of the sloot to its previous condition and refrain from taking further steps to pipe the sloot pending the plaintiffs’ institution of proceedings for final relief.

November 2021 the plaintiffs filed the amendment application in terms of rule 28(1). The exception and the further conduct in relation to the amendment application were regulated in an order postponing the matter to 15 February 2022. It is common cause that the proposed amendment was not the reason for the exception not being allocated on 9 November 2021.

9. The plaintiffs failed to file heads of argument in terms of practice directive 50(3) of this division in respect of the amendment application. Despite this fact, Mr van Staden SC, on behalf of the first defendant, requested that the matter not be struck from the roll for non-compliance and that the court proceed to hear both matters: the exception and the amendment application. I conceded to his request but point out that the plaintiffs' failure to comply with the applicable practice directives hampered the proper ventilation of the issues in dispute. After hearing argument, the matter stood down for the parties to try and mediate their disputes.

10. The court was advised during June 2022 that the parties failed to settle the matter and it was requested that both parties be allowed to file further heads of argument given the limited court time that was available for argument on the previous occasion and the plaintiffs' failure to file heads of argument in respect of the amendment application. Both parties subsequently filed further heads of argument.

The amendment application:

11. In a nutshell, the proposed amendments to claims 1 and 2, which introduces allegations that the plaintiffs would be prejudiced if piping is installed in the sloop, were

as a result of the exception filed by the first defendant. The plaintiffs' further request to add a new claim 3 for interdictory relief in the event of the plaintiffs failing to obtain the declaratory relief sought in claims 1 and 2.⁶

12. The first defendant filed an opposing affidavit to the amendment application, to which the plaintiffs did not reply.

13. It is trite that the primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties in order for justice to be done. A court hearing an application for an amendment has a discretion whether or not to grant an amendment. The general approach, as set out in *Moolman v Estate Moolman* 1927 CPD 27 at para 29, is to allow amendments unless the application is *mala fide* or would cause an injustice to the other side which cannot be compensated by costs.

14. I will deal with the proposed amendments in respect of claims 1 and 2 in conjunction with the exceptions raised and separately from the proposed introduction of claim 3.

General approach of the courts when exceptions are raised:

15. Rule 18(4) of the Uniform Rules of Court provides that every pleading shall contain a clear and concise statement of the material facts upon which a pleader relies

⁶ In terms of the proposed new claim 3 under the heading: Interdictory relief pursuant to section 34(1) of the Nation Heritage Resources Act, the plaintiffs seek an order "prohibiting the First to Fourth Defendants from carrying out any work with a view to piping the Molen River Slood until such time as they have obtained a permit under section 48 of the NHRA which authorizes the alteration and/or demolition thereof."

for his/her or its claim with sufficient particularity to enable the opposite party to plead thereto. An exception is a legal objection. Even if an exception is dismissed, the point can be re-argued at the trial.⁷

16. It is well established that an exception provides a useful mechanism for weeding out cases without legal merit.⁸ Thus, an exception founded upon the contention that a summons discloses no cause of action, or that a plea lacks averments necessary to sustain a defence, is designed to obtain a decision on a point of law which will dispose of the case in whole or in part, and avoid the leading of unnecessary evidence at the trial.

17. To succeed an excipient has the duty to persuade the Court that on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed. Failing this, the exception ought not to be upheld.⁹

18. Where an exception is taken, the Court must look at the pleading excepted to as it stands:¹⁰ no fact outside those stated in the pleading can be brought into issue except in the case of inconsistency¹¹ and no reference may be made to any other document.¹² In the recent decision of *Naidoo and Another v Dube Transport Corp & Others* 2022 (3) SA 390 (SCA) it was reaffirmed that the court must accept the factual averments in the particulars of claim as truthful, unless manifestly false and cannot go

⁷ See *Maize Board v Tiger Oats Ltd* 2002 (5) 365 (SCA) at 373 B-D

⁸ *Telmatrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) at 465; *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC) at 199 B

⁹ *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F

¹⁰ *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H

¹¹ *Cassim's Estate v Bayat and Jadwat* 1930 (2) PH F81 (N); *Soma v Marulane* NO 1975 (3) SA 53 (T)

¹² *Wellington Court Shareblock v Johannesburg City Council* 1995 (3) SA 827 (A) at 833F and 834D; *Dilworth v Reichard* [2002] 4 All SA 677 (W) at 681j – 682a

beyond the pleadings. I can consequently not take into consideration the allegations contained in the affidavits filed in respect of the amendment application when determining the exceptions.

19. An exception should further be dealt with in a sensible and not over-technical manner.¹³

20. The definition of cause of action was stated in the matter of McKenzie v Farmer's Co-operative Meat Industries Ltd 1922 AD 16 at 23 as “..every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved” and has been applied on innumerable occasions and need not be restated.

The exceptions:

21. The first ground of exception is that the averments contained in paragraphs 27.1.1 to 27.1.3 of the particulars of claim, do not justify a finding that the deed of sale, and more particularly the addendum thereto, are not valid and binding.

22. The second ground of exception is against the averment that the piping of the Molen Rivier sloot would violate a condition of the servitude agreement or notarial deed as there is no legal basis for such averment in light of the common law position that “anyone who has a right of water-leading can either put a pipe in the channel or do

¹³ Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA) at 465 (H)

anything else as he pleases, whereby he may take the water more freely, provided that he does not worsen the passage of water for the owner or for other users of the channel”¹⁴. In this regard the plaintiffs averred in paras 27.2 and 27.3 as follows:

“27.2 The proposed piping of the Molen River slood would destroy the furrow, thus violating a condition of the 1879 Water Servitude Agreement that a one-inch stream of water be allowed to flow for drinking purposes during the time in which the successors in title of C.L. du Plessis and J.P. van Tonder have the use of the Molen River water courses.

27.3 The First Defendant’s failure to comply with his obligations under the 1879 Water Servitude Agreement and/or the 1894 Notarial Deed to maintain the Molen River slood prohibits him from relying on any alleged reduction in the efficacy of the slood in support of his claim.”

23. The second ground of exception also raise the issue that the plaintiffs did not allege, having regard to the common law position, that the laying of the pipe as envisaged, will worsen the passage of water for other users or that the plaintiffs will be prejudiced by it.

24. In response to the exception, the plaintiffs seek leave to supplement para 27 of the particulars of claim by adding the following sub-paragraphs:

¹⁴ Voet 8.4.16 – Ganes’ translation read with the comments by Van der Walt, Servitudes, page 224, para 3.3 where he states that: “(T)he wording of a servitude creating contract is interpreted within a framework of property principles that are partly peremptory, which means that effect can only be given to the intention of the parties to a servitude grant insofar as the servitude they intend to create is permissible in terms of property principles. One of these principles determines that the interest of the servitude holder enjoy preference of those of the servient owner”

“27.4. The Plaintiffs will suffer prejudice if a pipe is installed in the furrow, inasmuch as –

27.4.1. their existing right to draw water from any section along the Molen River Slood on their respective farm portions for drinking purposes when the owners of the highest and intervening farms take their water turns, as expressly provided in the 25 March 1979 agreement, would be frustrated or unduly limited;

27.4.2. the laying of a pipe in the Molen River Slood would change the nature of the plaintiffs’ joint maintenance obligations detailed at paragraph 19 above and result in a more onerous financial burden....

34.3 ...the piping of the Molen River Slood will prejudice the Plaintiffs in the manner detailed at paragraph 27.4 above”

25. The aforesaid amendments were objected to on *inter alia* the basis that even if the aforesaid amendments are allowed, the particulars of claim would still fail to disclose a cause of action based on the main ground of exception set out below, alternatively would still lack averments necessary to sustain a cause of action as the plaintiffs do not set out why and how their existing right to draw water would be frustrated and unduly limited, and how the nature of the joint maintenance mandate would result in a more onerous financial burden.

The first ground of exception:

26. The first defendant contends that the contents of the addendum to the deed of sale and more particularly, paragraphs 5 and 8 thereof, whilst not clear in every

respect, is sufficient to establish a valid and enforceable agreement to pipe the Molen River slood.

27. During argument, the plaintiffs abandoned reliance on the grounds set out in paras 27.1.1 and 27.1.2¹⁵ of the particulars of claim and only persisted with the averment contained in para 27.1.3¹⁶ read with paras 27.2. and 27.3, in support of the contention that para 8 of the addendum to the deed of sale is not a binding contractual term.

28. It was further contended that the addendum was not valid and binding as it is contrary to the express terms of the servitude agreement and that if the first defendant is allowed to pipe the slood, the furrow will be destroyed as alleged in para 27.2 and the joint maintenance obligation unilaterally altered as alleged in para 27.3.

29. The first defendant contends that the plaintiffs, in para 27.2, has failed to plead primary facts in support of the inference that the condition that *'a stream of water (one-inch in diameter) shall be allowed to flow for drinking purposes during the times in which C L du Plessis and Mr J P van Tonder have the use of the Molen River water courses'* will be violated by the piping and that the plaintiffs furthermore do not explain why a one-inch stream of water cannot be allowed to flow for drinking purposes if a pipe is installed.

¹⁵ These paragraphs stated that the addendum is not valid and binding as it was not initialled by the PSDR Trust's representative, the first defendant or the witnesses and it is undated and does not refer to the deed of sale.

¹⁶ "27.1.3 Paragraph 8 of the Addendum is not of the nature of a binding contractual term."

30. The further complaint by the first defendant is that the averment in para 27.3 of the particulars of claim, that the first defendant's failure to comply with his obligation under the 1879 Water Servitude to maintain the Molen River Slood, prohibits him from relying on any reduction in the efficacy of the slood in support of his claim, is not supported by factual allegations, especially in light of the fact that he is only one of the parties who has a maintenance obligation.

31. In response to the aforesaid complaints the plaintiffs' counsel argued that the averments were not merely conclusions, that the pleadings should be read as a whole, and that the exception should only be upheld if on every interpretation which the pleading in question can reasonably bear, no cause of action or defence is disclosed.

32. *Prima facie*, the addendum clearly records that the first defendant was in the process of piping the Molen River slood, to at least the first to third plaintiffs' knowledge, and that the PSDR Trust undertook to compensate the first defendant for the costs in this respect once completed. Whether it was the intention of the parties at the time of entering into the written agreement to amend the servitude agreement (which according to the plaintiffs expressly limits or circumscribes the rights and obligations of the servitude holder), is of course a completely different question to which I will return later and is not dealt with by the plaintiffs in the particulars of claim.

33. The deed of sale and addendum thereto, were concluded between the PSDR Trust and the first defendant. On what basis the first defendant can rely on the

addendum to bind the fourth plaintiff and the other parties to the servitude agreement, although raised during argument, is not set out in the particulars of claim.¹⁷

34. The plaintiffs, whether the amendments requested in respect of claims 1 and 2 are granted or not, have in my view failed to plead facts to support the legal conclusion they request the court to draw in respect of the validity of the addendum to the deed of sale. To simply allege that the furrow would be destroyed does not suffice. Even if it is accepted that piping the furrow would unilaterally change the method of conveying the water as contemplated in the servitude agreement, why this would render the addendum void and unenforceable, is similarly not set out in the particulars of claim. It does not assist the plaintiffs to argue that the first defendant can call for further particulars for trial in this regard as it is the duty of the plaintiffs to set out all the facts on which they rely to sustain the cause of action. They did not.

35. Insofar as it was contended that the addendum to the deed of sale is vague and ambiguous and hence cannot be enforced, this was also not pleaded.

36. In the circumstances the first ground of exception is upheld.

The second ground of exception:

37. This brings me to the main ground of exception: whether the first defendant, as the holder of a servitude of *aquaeductus*, has the implied ancillary right to pipe the

¹⁷ I do however point out that whether a valid and binding addendum was entered into, will be of little or no import if it is determined that the first defendant has the implied right to pipe the sloop on the basis as set out in the second ground of exception.

furrow along which water is led given the legal position that the interests of the servitude holder enjoy preference over the conflicting interests of the servient owner.

38. The plaintiffs dispute in the particulars of claim that this particular servitude agreement contains an implied term that the servitude holder may pipe the sloop to exercise the right. It is the plaintiffs' case that the express words of the servitude agreement preclude or limit the first defendant's implied right to pipe the sloop. To decide whether the first defendant has such right is matter of interpretation.

39. It was held in the well-known matter of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18 that: "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighted in light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document...the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document".

40. In the matter of Glaffer Investments (Pty) Ltd and Others v Minister of Water Affairs and Forestry and Another 2000 (4) SA 822 (T), Van Dijkhorst J confirmed that the position in our law is that a servitude must be interpreted according to its ordinary grammatical meaning and by having regard to the surrounding circumstances prevailing when the servitude was granted. It must further be interpreted restrictively.¹⁸

41. In the matter of Braude v Clanwilliam Municipality 1954(4) SA 669 (A) the issue was whether the laying of a pipe-line was “work of a kind different from that contemplated by the parties” when they entered into an agreement during the 1920’s. The court of appeal found that “it cannot be said, when an entirely different method of conveying water is substituted for the method contemplated by the parties, that that substitution is the same as ‘maintaining the new furrow in a proper state of repair’ within the meaning of clause 5 of the 1922 agreement”.

42. In my view, with reference to the express wording of the servitude agreement and the authorities referred to, it can be argued that the parties to the servitude agreement had not anticipated the furrow being piped. The servitude agreement, for example, refers to “a stream of water for drinking purposes” and further makes provision for bi-annual maintenance of the furrow for which the first defendant was afforded the free right of way along the sloop and the right to excavate material four feet on each side of the furrow, for repairing the sloop. It further imposes a joint maintenance obligation, which is atypical to servitudes of this nature.

¹⁸ In *Murray v Schneider* 1958(1) SA 587 (A) the meaning of the word “domestic” in the phrase “water for domestic purposes” and whether it was anticipated that domestic use would include water for the swimming bath were at issue. The court considered the prevailing circumstances at the time the agreement was entered into between the parties and applied the judgment of *Cliffside Flats (Pty.) v Bantry Rocks (Pty.) Ltd.*, 1944 AD 106 at 117 where Feetham, J. A., confirmed with reference to a servitude agreement that amongst the relevant facts are the circumstances existing at the time of the creation of the servitude.

43. Bearing in mind that the servitude holder has full and effective use of the servitude, it was argued by the first defendant, with reliance on *Zeeman v De Wet* 2012 (6) SA 1 (SCA), in the further submissions filed, that peremptory principles are not amenable to consensual amendment and will outweigh even clearly and precisely formulated contractual provisions to the contrary¹⁹.

44. I agree with Mr Van Staden SC that it is implied that the servitude holder acquires, together with the servitude, all the entitlements without which the servitude cannot be exercised, provided that those ancillary entitlements do not burden the servient property unduly. In other words: the servitude holder must be placed in a position to exercise the servitude effectively. I also agree that the principle that the servitude holder must be enabled to exercise the servitude effectively cannot be evaded or suspended completely, since doing so would undermine the viability of having a servitude in the first place. It follows that the servitude holder is therefore entitled to undertake all actions that are reasonably necessary for the proper exercise of the servitude and that there is a baseline of necessary entitlements below which the servitude is not feasible and cannot exist. I however cannot agree that implied rights of the servitude holder cannot be amended by consensus. In the *Zeeman* matter the court considered the principle of efficacy in light of the amendment by the parties of the servitude agreement in respect of the common law maintenance obligations on the servitude holder. As in the case of *Zeeman*, the trial court in this matter will have to consider whether it is indeed necessary for the efficacy of the servitude to pipe the

¹⁹ Reference was also made to an article by Johan Scott dealing with the *Zeeman v De Wet*-case called *Aquaeductus en sommige gevolge van goeie buurmanskap* (2013) and the comments by Van der Walt, the *Law of Servitudes*, pages 190 – 191.

sloot and what impact, if any, it will have on the parties' joint maintenance obligation as set out in the servitude agreement.

45. That the piping of the sloot will change the nature of the maintenance obligation as set out in the servitude agreement cannot be disputed. Whether it would place a bigger financial burden on the servient tenement will similarly have to be determined by the trial court. The same applies to the question as to how the first defendant plans to ensure that the one-inch stream will be maintained, whether the furrow would remain intact, whether the pipes will be above the ground or underground or next to or in the furrow.

46. Only the trial court, after hearing evidence, will be able to determine whether, on the wording of the servitude agreement, the implied right asserted by the first defendant had been established and if so, whether it was limited by the express wording of the servitude agreement as pleaded by the plaintiffs. The Constitutional Court, in the matter of *University of Johannesburg v Auckland Park Theological Seminary and Another* 2021 (6) SA 1 (CC) reiterated that in many scenarios words alone ring hollow and that "context gives life and meaning to what is said or written".

47. The second ground of exception is consequently dismissed.

The proposed claim 3:

48. The plaintiffs request leave to introduce a claim 3 in terms whereof they seek an order prohibiting the first to fourth defendants from carrying out any work with a

view to piping the Molen River slood until such time as the latter have obtained a permit under section 48 of the NHRS which authorises the alteration and/or demolition of the slood.

49. This new claim is predicated on the court refusing the declaratory relief sought in claims 1 and 2 that the defendants do not have the right to pipe the slood.

50. With reference to a vast number of authorities it appears that an interim interdict is normally (some say always), claimed by way of an application “pending the outcome of an action or application instituted or to be instituted; pending the final determination of the application; or as an adjunct to a rule nisi calling upon the respondent to show cause upon the return day why the interim interdict should not remain in force pending the outcome of the main application or action”.^{20 21} The first defendant contends that the plaintiffs have employed the incorrect procedure and that the new claim should not be allowed on this basis.

51. In response the plaintiffs contended that despite the wording of the new claim 3, it is not an interim interdict but rather final relief that is being sought and that it is not an immutable rule that interdictory relief must be claimed by way of application. Whilst there may conceivable be factual situations which would justify departing from the general approach, this is not such a situation.

²⁰ Lawsa (2nd Edidtion) Vol 11, para 402;

²¹ Also see: Prest, The Law and Practice of Interdicts, pages 5 and 213 and Herbstein & Van Winsen, The Civil Practice of the High Courts of South Africa (Vol 2) page 1478.

52. The plaintiffs are further seeking declaratory relief in circumstances where no dispute has arisen. The primary function of the court is to adjudicate competing claims and not to address a mere hope of a right or anxiety about future litigation. This issue was dealt with in *Family Benefit Friendly Society v Commissioner for Inland Revenue and Another* [1995] 1 All SA 557 (T), as follows:

“There must be a right or obligation which becomes the object of enquiry. It may be existing, future or contingent but it must be more tangible than the mere hope of a right or mere anxiety about a possible obligation. The word “contingent” (Afrikaans: “voorwaardelik”) is not used in a broad and vague sense, but (as the Afrikaans text indicates) in the narrow sense of “conditional”. The word “contingent” is used as opposed to “vested”. The rights and obligations to be enquired into are either vested (present and future) or conditional (contingent).”

53. On the issue of convenience and the contentions that to refuse the introduction of this claim would result in further litigation, I point out that it is crystal clear that question whether the defendants have the right to pipe the slood, is a separate issue to whether the slood is a structure as contemplated in section 1 and 34(1) of the NHRA which is of cultural significance. The fear that the slood, if the defendants are allowed to pipe, will be destroyed or damaged irreparably as a heritage site, is also a separate issue to whether the defendants have the right in terms of the servitude of *aquaeductus* to pipe the slood. If claims 1 and 2 are dismissed and the defendants proceed to take steps to pipe the slood, without the necessary permit that is according to the plaintiffs required, it can approach the court for appropriate relief. I agree with the first defendant that the plaintiffs should in such anticipated application, at the very

least, join the South African Heritage Resources Agency who has an interest in the relief the plaintiffs allege they are entitled to.

54. In the circumstances, the plaintiffs request to amend the particulars of claim by the inclusion of paragraphs 37 to 45 and the inclusion of claim 3, is refused.

55. The amendment application was filed in response to the exceptions raised by the first defendant. The opposition to the amendment application was inextricably linked to the exceptions raised and the first defendant successfully opposed the introduction of claim 3. I see no reason why the plaintiffs should not be ordered to pay the costs of the amendment application. The first defendant further raised important and complicated legal issues in the exception which justifies in my opinion the employment of senior counsel.

56. In the circumstances, the following order is made:

1. The plaintiffs are granted leave to amend claims 1 and 2 of the particulars of claim and are to pay the costs of the amendment application, including the costs of senior counsel;
2. The first ground of exception raised by the first defendant is upheld. The plaintiffs are granted leave to amend their particulars of claim within 15 days of this order;
3. The second ground of exception is dismissed;

4. The plaintiffs are ordered to pay 50 % of the costs of the exception, including 50% of the wasted costs occasioned by the postponement on 5 May 2021 and 9 November 2021, including the costs of senior counsel.

A De Wet
Acting Judge of the High Court

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