Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 20765/2017

In the matter between:

WITZENBERG PROPERTIES (PTY) LTD Applicant

and

BOKVELDSKLOOF BOERDERY (PTY) LTD First Respondent

THE MINISTER OF WATER AFFAIRS AND SANITATION Second Respondent

Court: Justice J Cloete

Heard: 5 February 2018, 9 and 10 May 2018

Delivered: 28 June 2018

JUDGMENT

CLOETE J:

Introduction

[1] This is a dispute between neighbouring commercial farming enterprises in a winter rainfall area known as *'Op die Berg'* in the Prince Alfred Hamlet.

[2] During the course of argument and partly as a result of a decision taken by the second respondent ("the Minister") on 24 April 2018, the applicant ("Witzenberg") narrowed down and amended the relief sought to the following.

[3] Witzenberg seeks an interdict against the first respondent ("Bokveldskloof") to prevent the latter from taking water from three boreholes on Bokveldskoof's property which are situated in close proximity to one of Witzenberg's dams, for any purpose other than the uses permissible under Schedule 1 of the National Water Act 36 of 1998 ("NWA").

[4] On 24 April 2018 the Minister's delegate, the Acting Director-General of the Department of Water and Sanitation, issued a final determination of the extent and lawfulness of Bokveldskoof's existing water uses in terms of s 35(4) of the NWA, limiting its use of groundwater to 161 400 cubic metres per annum. Bokveldskoof is appealing that determination in terms of s 148 of the NWA and may also pursue further redress by way of judicial review in due course.

[5] Section 148(2)(b) of the NWA suspends the operation of the Minister's determination under s 35(4) pending conclusion of the internal appeal in the Water Tribunal.

Witzenberg thus asks that the interdict sought operates until Bokveldskoof has been issued with a water use licence under the NWA (which at this stage it does not have), finally authorising it to use water in a particular borehole, or until Bokveldskoof has exhausted its appeal as well as any subsequent review remedies, whichever occurs first.

[6] It is Witzenberg's case that Bokveldskoof has for a number of years in fact been limited to taking groundwater on its property of not more than 161 400 cubic metres per annum. This is disputed by Bokveldskoof, hence its opposition in this application and its appeal against the Minister's determination.

[7] It is not in dispute that Bokveldskoof has not, and will not, limit its taking of groundwater from the three boreholes to any of the uses permissible under Schedule 1 of the NWA. These pertain to the taking of groundwater for domestic use, small gardening (other than for commercial purposes), and watering of grazing cattle in certain instances.

[8] Nor is it in dispute that over the 19 week period spanning 11 December 2017 to 23 April 2018, Bokveldskoof abstracted groundwater from the three boreholes in a total volume of 458 430 cubic metres. This constitutes 82.8% of the total volume abstracted from all operating boreholes on Bokveldskoof's property during this period.

[9] Despite the length of the papers and depth of the arguments advanced, the Minister's decision has the consequence that the parties are in fact engaged in the very initial stage of their dispute. This case has evolved to the point that it is no longer appropriate to deal with the substantive merits. The internal appeal process must still run its course. To delve into the Water Tribunal's territory at this stage would not only encroach on the separation of powers doctrine, it could well also be tantamount to pre-empting the decision on appeal (as well as any subsequent judicial review). This is also Bokveldskoof's position. Witzenberg holds a different view, maintaining that the "discrete issue" pertaining to the three boreholes has no relevance in the internal appeal. To my mind, this argument pre-supposes that Witzenberg's view (as well as that of the Minister as reflected in the April 2018 determination) prevails. I will return to this later.

[10] The parties approached the matter in accordance with the test for final interdictory relief.[1] In *Apleni v Minister of Law and Order and Others*[2] Vivier JA stated:

> *'The interim interdicts sought would have been operative for the duration of the appellants' detention. In this sense it would have had final effect in that nothing which may subsequently have been decided could detract from the efficacy which the orders enjoyed while they were in force. However, on the facts of the present applications the grant of interim interdicts did not involve a final determination of the rights of the parties and did not affect such determination…although final in effect, the interdicts sought were thus certainly not final in substance. The fact that the*

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1 i.e. the Plascon-Evans rule.
2 1989 (1) SA 195 (AD) at 200I-201D.

determination of the issues would only have taken place after the risk of injury had passed was obviously no bar to the granting of the orders…'[3]

[11] It is settled law that an applicant for final relief must show: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy: *Hotz and Others v University of Cape Town.*[4]

[12] It is Bokveldskoof's case that Witzenberg has no *locus standi* in respect of the relief sought and that, in any event, it has failed to establish any of the requirements for a final interdict.

Existing lawful water use

[13] The concept of *'existing lawful water use'* was introduced by ss 4, 22 and 32 to 35 of the NWA. In essence it means that a user is permitted to continue with any actual lawful use which occurred at any time during a period of two years immediately prior to the date of commencement of the NWA, i.e. 1 October 1998 (*'the qualifying period'*).

[14] Witzenberg's case is that Bokveldskoof, acting on a flawed interpretation of the NWA, has caused multiple boreholes to be sunk on its property to abstract huge volumes of groundwater, the extent of which (a) it has never declared to the authorities; (b) bears no relation to the volume actually abstracted during the qualifying period; and

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3 See also *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (WLD) at 54J-55E.
4 2017 (2) SA 485 (SCA) at para [39].

(c) which Bokveldskoof wrongly maintains is limited only by the size of land allegedly cultivated during the qualifying period, and which it can therefore increase or expand at will.

[15] Witzenberg contends that, on Bokveldskoof's own version in a previous application to the responsible authority under s 35 of the NWA, its existing lawful water use is limited to 161 400 cubic metres per annum for groundwater. The present application was sparked by Bokveldskoof's drilling of borehole 3 ("Nuwe Boorgat") in 2017. This borehole, together with boreholes 1 ("Nuwe Dam") drilled in 2010 and borehole 2 ("Fancourt") in 2004 are the 3 boreholes in close proximity to one of Witzenberg's dams, and yield far more than that volume per annum.

[16] Bokveldskoof's case is that at all relevant times it abstracted and used water from the boreholes on its property lawfully in terms of the NWA. It maintains that during the qualifying period it was authorised to irrigate a total of 201 hectares, whilst at present only 112 hectares are under actual irrigation (so that, in effect, it is presently only utilising 55.5% of its total maximum water use entitlement under the NWA).

[17] According to Bokveldskoof, the irrigation of the permissible 201 hectares is done from two water sources in conjunction with each other: from surface water through infrastructure directing rainfall on the adjacent mountainous area into storage dams located on the property, and from an aquifer (by way of 9 productive boreholes on the property which supply water to the storage dams from where the irrigation takes place through a pumping system).

[18] Bokveldskoof maintains that the *'extent'* of its water use entitlement equates to that volume of water required for the irrigation of a maximum of 201 hectares of land, from either source or a combination of these two sources. Accordingly, the *'extent'* of a water use entitlement, upon a proper contextual interpretation, can be determined by way of more than one method of measurement, and the standard irrigation practice historically utilised in the area (including that of Witzenberg itself) has been to rely on both surface water and ground water in conjunction with each other, the one supplementing the other depending on the hydrological and climatic conditions prevailing in a particular season. If it transpires during any season that the available surface water is not sufficient for the irrigation of lawfully developed hectares on a farm, it is supplemented by groundwater. In the result the actual volumes of surface water and groundwater used vary from season to season. Whatever volume comes from whichever source, this water is used reasonably and beneficially for the lawful irrigation of a specific and measured area of land.

[19] According to Bokveldskoof's Mr Phillipus Van Zyl, when he had to complete the application referred to by Witzenberg, he was confronted with the problem that the new regulatory dispensation, reflected in the prescribed form, did not fully accommodate the characteristics of the existing lawful water use enjoyed by Bokveldskoof under the old Act.[5] He was told that he had to make a distinction between the two water sources, to estimate the relative percentage of water used from each water source during the qualifying period and that accordingly:

[5] The repealed Water Act 54 of 1956 which was replaced by the NWA.

'On that impossible basis I derived at these figures, representing an estimate of the average position over a few years and not reflecting what the reality would have been in a drought or under different hydrological conditions.'

[20] Herein lies the nub of the dispute. The Minister's determination under s 35 of the NWA makes no reference to a specific number of boreholes nor to any specific identified borehole(s) on Bokveldskoof's property. It merely determined that the existing lawful water use for Bokveldskoof is 1 012 925 cubic metres per annum for surface water and 161 400 for groundwater. The Minister earlier filed an explanatory affidavit in which, in general terms, her Department agrees with the interpretation advanced by Witzenberg.

[21] It is this very same issue which will form the substance of Bokveldskoof's internal appeal as well as any subsequent judicial review. Witzenberg itself expressly acknowledges that this dispute involves an interpretation of the relevant provisions of the NWA.

[22] The determination of the dispute is thus not, as I see it, a "discrete issue" pertaining to the lawfulness or otherwise of Bokveldskoof's abstraction of groundwater from 3 specific boreholes in close proximity to one of Witzenberg's dams. The abstraction of water from these boreholes is inextricably linked to whether or not Bokveldskoof is entitled to abstract groundwater exceeding 161 400 cubic metres per annum. One cannot be determined to the exclusion of the other. Herein lies Witzenberg's fundamental problem in persisting with relief on the merits, in the knowledge that this very issue is presently the subject of an internal appeal and may in future be the

subject of judicial review. I am accordingly not persuaded that it is appropriate for this court to make any such determination at this stage.

Locus standi

[23] Witzenberg argues that it derives legal standing on the basis that it is the registered owner of the neighbouring farm, and that as a neighbouring water user it is dependent on water available in the same drainage region. It maintains therefore that it is an entity, or at least a member of a class of persons, in whose interest the restrictions on the use of groundwater were imposed under the NWA.

[24] Given that Witzenberg seeks interdictory relief in pursuit of its own interests, the issue of legal standing is approached in accordance with the principles set out in *Patz v Green & Co*[6] read with *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd*[7], which were encapsulated in *Latsky & Another v Showzone CC & Others.*[8] In essence, these principles are:

24.1 When it appears that a statute was enacted in the interest of a particular person or any class of persons, a party who shows that he or she is one of such class of persons, and seeks judicial intervention by way of interdictory relief premised on the statute, is not required to show harm as a result of a contravention of the statute, such harm being presumed;

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6 1907 TS 427.
7 1933 AD 87 at 95-96.
8 2007 (2) SA 48 (C) at para [13].

24.2 However, when a statutory duty was imposed, not in the interest of a particular person or a particular class, but in the public interest generally, the applicant must show that he or she has sustained or apprehends actual harm in order to obtain interdictory relief on the ground of breach of the statute.

[25] As Cameron J put it in *Giant Concerts CC v Rinaldo Investments (Pty) Ltd*:[9]

> *'[33] The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. <u>But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.</u>*
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> *[34] Second, it means that an own-interest litigant may be denied standing even though the result could be that an unlawful decision stands. This is not illogical. As the Supreme Court of Appeal pointed out, standing determines solely whether* this *particular litigant is entitled to mount the challenge: a successful challenge to a public decision can be brought only if "the right remedy is sought by the right person in the right proceedings". To this observation one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest.*

[9] 2013 (3) BCLR 251 (CC).

> *[35] Hence, where a litigant acts solely in his or her own interest, there is no broad or unqualified capacity to litigate against illegalities. Something more must be shown.'*
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> [emphasis supplied]

[26] The preamble to the NWA expressly recognises that (a) water belongs *'to all people'*; and (b) national government has overall responsibility for and authority over the nation's water resources and their use, including the equitable allocation of water for beneficial use.

[27] Witzenberg cited the Minister as second respondent purely because she has *'a substantial and direct interest in the subject matter of these proceedings and is accordingly a necessary party hereto'.* Section 3 of the NWA stipulates that national government, acting through the Minister, is the public trustee of the nation's water resources. It is clearly for this reason that the Minister is empowered, under Part 3 (ss 32 to 35) of the NWA to determine, where necessary, an *'existing lawful water use'*.

[28] Chapter 16 of the NWA deals with offences and remedies and provides in its preamble that:

> *'In common with other Acts of Parliament which aim to make non-compliance a criminal offence, this Chapter lists the acts and omissions which are offences under this Act, with the associated penalties. It also gives the courts and water management institutions certain powers associated with prosecutions for these offences, such as the power to remove the cause of a stream flow reduction.'*

[29] Section 151 lists the offences which render a person liable for prosecution. In particular s 151(1)(a) prohibits any person from using water otherwise than as permitted under the NWA, and s 151(1)(j) prohibits any person from unlawfully and intentionally or negligently committing any act or omission which detrimentally affects or is likely to affect a water resource.

[30] Sections 152 and 153 authorise a court, after convicting any such person, to hold an enquiry into compensation for harm, loss or damage suffered by any affected person and to order the accused to pay damages to that person and/or the cost of any remedial measures required.

[31] Section 155 stipulates that:

> *'**155 Interdict or other order by High Court***
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> *A High Court may, on application by the Minister or the water management institution concerned, grant an interdict or any other appropriate order against any person who has contravened any provision of this Act, including an order to discontinue any activity constituting the contravention and to remedy the adverse effects of the contravention.'*
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> [emphasis supplied]

[32] The parties agree that the NWA introduced a fundamental reform of the law relating to water resources by moving away from the riparian principle of preferential and hierarchical water use rights to an administered authorisation system for

circumscribed water uses, in the interests of all water users, thereby moving the traditional "water law" from the domain of private law to that of public law.[10]

[33] Bokveldskoof thus argues that the above contextual considerations support the conclusion that the provisions dealing with entitlement to water use under the NWA are intended to provide for the controlled use of water for the general benefit of the public or, put differently, in the public interest generally. Unlike, for example, the National Environmental Management Act, which expressly legislates for the legal standing of private persons to enforce environmental laws for own interest or in public interest,[11] the NWA contains no comparable provision.

[34] It is thus submitted that any act prohibited by the NWA does not, without more, entitle Witzenberg as a private entity to interdictory relief for a breach of provisions of the NWA. In order to obtain such relief, it was necessary for Witzenberg to show that a breach has occasioned it harm, or is likely to do so, but Witzenberg has failed to demonstrate this (I deal with this later).

[35] Apart from the grounds upon which it bases its legal standing, Witzenberg advances two arguments. In the first instance it relies on *Sheffield Electro-Plating and Enamelling Works Ltd v Metal Signs and Nameplates (Pty) Ltd*[12] in contending that the prohibited actions covered by a statute (and at which the legal action is directed) are not required to have been passed solely in the interest of a specific person or

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[10] See also *S v Mostert and Others* 2010 (2) SA 586 (SCA) at para [10] and *Makhanya NO and Another v Goede Wellington Boerdery (Pty) Ltd* [2013] 1 All SA 526 (SCA) at para [38].
[11] Section 32(1)(a) and (c) of Act 107 of 1998.
[12] 1949 (1) SA 1034 (W).

class of persons – it will suffice if it can be said that the conduct was prohibited *'partly or wholly in the interests of the applicant'*.

[36] However in *Sheffield* the court was dealing specifically with an alleged contravention of the Merchandise Marks Act 17 of 1941, and it was with reference to that particular statute that it was held to have been enacted for the protection of merchants and manufacturers as well as the general public. This finding was clearly not intended to be elevated to a principle of general application.

[37] Second, Witzenberg relies on *Lester v Ndlambe Municipality*[13] in arguing that it is the duty of this court to uphold the doctrine of legality, which enjoins it not to countenance an ongoing statutory contravention and criminal offence.

[38] However in *Lester* it was common cause[14] that his property was an illegal structure, having been erected without approved building plans. This fact was of itself a contravention of s 4(1) of the National Building Regulations and Building Standards Act,[15] and s 4(4) thereof rendered it a criminal offence. At issue in the case was whether or not the High Court was correct in finding that it had a discretion to issue a consequent demolition order under s 21 of the Act. The Supreme Court of Appeal held that no such discretion existed and that:

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[13] 2015 (6) SA 283 (SCA).
[14] See para [20].
[15] 103 of 1977

'Absent such discretion, the court below simply had to uphold the rule of law, refuse to countenance an ongoing statutory contravention and enforce the provisions of the Act.'[16]

[39] In the present matter it is common cause that no criminal charge has been laid against Bokveldskoof by any official of the Department (or, for that matter, by any other person). Given the main, unresolved, dispute between the parties about whether or not Bokveldskoof has acted unlawfully at all, and the appeal process that is underway, this court is in no position to simply assume in Witzenberg's favour that Bokveldskoof has contravened a statute and is thus committing a criminal offence.

[40] Having regard to the above I agree with Bokveldskoof that Witzenberg does not fall into the first category referred to above, but rather the second. The NWA was enacted for the benefit of the general public and not in the interests of a particular person or class. That Witzenberg coincidentally is an entity forming part of the general public takes the matter no further.

[41] It is thus necessary to consider whether Witzenberg has demonstrated that it has sustained or apprehends actual harm.

[42] Witzenberg's complaint is set out in its founding affidavit as follows:

'68. The Applicant has been concerned about the negative effect which the abstraction of groundwater from boreholes that had been sunk in close proximity of the Vleidam might have on the volume of water that has been

[16] At para [28].

collected in and is being stored in the dam itself. As Vleidam is not lined, the Applicant is concerned that stored water would be abstracted or siphoned off via the boreholes concerned.

68.1 In order to assist the Applicant in evaluating this eventuality, the Applicant urgently requested specialist hydrogeologists, Messrs Geohydrological and Spatial Solutions (Pty) Ltd ("GEOSS") to investigate the likelihood of surface water which had been collected in and is being stored in Vleidam, being abstracted or syphoned off via the boreholes.

68.2 In this regard I refer the Honourable Court to the report of Mr Dale Barrow, a specialist hydrogeologist and director of GEOSS…

68.3 I draw the attention of the Honourable Court to his finding that, given the proximity of the new borehole to the dam and the shallow depth of the first water strike, it is likely that Borehole 1[17] *and the dam are connected and that abstraction of water from that borehole will increase the flow from the borehole to the dam.*

68.4 I also point out that he is of the view that the same would apply to additional boreholes (such as Boreholes 1 and 2) drilled proximal to the dam and adjacent wetland areas.

68.5 I therefore submit that the taking of water by means of Boreholes 1, 2 and the new borehole (Borehole 3) is likely to have a direct detrimental effect on the volume of water which is being stored by the Applicant in the Vleidam.'

[emphasis supplied]

[43] Photographs of Vleidam (the dam on Witzenberg's property in close proximity to the boreholes) were annexed to the founding affidavit, and showed that it was already

[17] This is a typographical error. It should read "Borehole 3".

almost empty. In its answering affidavit Bokveldskoof alleged that this had been the case for almost a year before *'which is understandable given that the Applicant has been constantly and continuously pumping whatever water remains in the Vleidam to one of the other storage dams on the farm… located on higher ground (and from where the Applicant presumably irrigates its orchards) and given the drought we are currently experiencing.'* This allegation was not challenged by Witzenberg in reply.

[44] The Barrow report is merely a desktop study. It states that the borehole drilled in October 2017 *'intersected water strikes'* on Bokveldskoof's property, that Vleidam is *'reportedly unlined'*, and that *'the eastward dipping lithological contacts are likely to be recharged by the dam, and the newly drilled borehole has most likely intersected water bearing zones that are directly recharged by the proximal dam'.*

[45] Although Barrow's opinion was self-evidently speculative, he concluded that:

> *'The abstraction from the newly drilled production borehole will result in a drop in water level at the borehole. This will increase the hydraulic gradient towards the borehole. Flow is directly proportional to hydraulic gradient, and assuming a constant hydraulic conductivity, this will result in increased flow from the dam towards the borehole.*
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> *Given the proximity of the borehole to the dam (16m) and shallow depth of the first water strike (24m), it is likely that the borehole and dam are connected, and that abstraction from the borehole will increase the flow from the borehole to the dam. This assumes that there are no impermeable layers or flow barriers between the dam and the borehole, or underlying the dam.'*
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> (emphasis supplied)

[46] This glaring material contradiction was raised with counsel for Witzenberg during argument, but remains unexplained, apart from his suggestion that it was an obvious error. This is not good enough. Barrow deposed to an affidavit confirming the contents of his report. It was also an annexure to the founding affidavit, and moreover Witzenberg's deponent, Mr Nicolaas Verhoef, himself stated that abstraction from the borehole will increase the flow from the borehole to the dam (and not vice versa). Accordingly little if any weight can be attached to the Barrow report.[18]

[47] In its answering affidavit Bokveldskoof reserved its right to supplement its papers by obtaining an expert report on the connectivity between the three boreholes and the dam. It subsequently filed the report of Mr Jan Myburgh of AGES Omega (Pty) Ltd together with his confirmatory affidavit.

[48] Myburgh is a senior hydrogeologist with 25 years' experience. He confirmed that two sources were sampled at the dam and the new borehole. The samples were sent to UIS Laboratories for SANS 241 analysis, and an additional three samples were taken from the dam, new borehole and another existing borehole nearby and submitted to iTemba Laboratories for Oxygen 18 and Deuterium stable isotope analysis. He reported that:

> *'From the stable isotope analysis results indicated in Table 2 and Figure 4, the water from the boreholes are deprived of Deuterium and oxygen – 18 when compared to*

[18] See also *Standard Bank of South Africa Ltd v Border* (2105/2014) [2015] ZAECGHC 14 (11 February 2015) at para [29] where the court, albeit in a different context, dealt with defences based on speculation in the absence of factual evidence confirming same.

the concentrations in the Dam water. The heavier or more Deuterium enriched dam water indicates that it has evaporated more than the borehole water that has a lower concentration of Deuterium.

There is therefore a clear difference in water quality and isotope signature between the dam water and groundwater.'

[49] Myburgh stated that there will always be a hydraulic link between groundwater and surface water and that his report was not intended to prove that there is no connection in this case. He cautioned however that the regulating authority should review all available information and state what is in addition required for it to responsibly consider whether water use can be authorised at borehole 3 and at what rate and duration, since *'to eliminate this borehole based just on the proximity to a surface water body without looking at specific on-site conditions could create a precedent that can negatively impact numerous groundwater users in this area'.*

[50] For reasons that are not apparent Witzenberg did not take up the challenge. It did not put up any further expert opinion on the issue of connectivity based on independently obtained scientific evidence. Instead, it relied on Myburgh's report to support the contention that he *'accepts the likelihood that the borehole and dam are connected'.* In my view, the fact of connectivity, without more, is of little, if any, assistance in determining whether Witzenberg has demonstrated, on a balance of probabilities, that it is suffering or apprehends actual harm because water is being siphoned off from the dam to the borehole.

[51] I thus agree with Bokveldskoof that, at best for Witzenberg, all that it has demonstrated is a theoretical possibility that the three boreholes are siphoning off

water from the dam. Witzenberg has according failed to show, on a balance of probabilities, that it has sustained or apprehends actual harm.

[52] In *Areva NP Inc v Eskom Holdings*[19] the Constitutional Court, referring to *Giant Concerts*, stated that:

> *'[41] It seems to me that, part of what this court held in* Giant Concerts *was that, where a litigant has failed to show that it has standing, the court should, as a general rule, dispose of the matter without entering the merits and that it should only enter the merits in exceptional cases or where the public interest really cries out for that. It does not appear to me that this is a case which cries out for that. In saying this, I am not suggesting that on the merits the challenge is necessarily without merit…'*

[53] Witzenberg has not approached the matter on the basis that it is an exceptional case or that the public interest cries out for the interdictory relief to be granted. In the particular circumstances of this matter the challenge on the substantive merits is already the subject of the internal appeal. However, if I am incorrect, the interdict sought cannot be granted because Witzenberg has failed to establish an injury actually committed or reasonably apprehended. It follows that it is not necessary to consider whether Witzenberg has any other clear right as well as the absence of similar protection by any other ordinary remedy.[20]

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[19] 2017 (6) SA 621 (CC).
[20] *Hotz* (*supra*) fn 4.

[54] **In the result the following order is made:**

'The application is dismissed with costs, including any reserved costs orders, as well as the costs of two (2) counsel where employed.'

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J I CLOETE