

FORM A
FILING SHEET FOR SOUTH EASTERN CAPE LOCAL DIVISION
JUDGMENT

PARTIES: Frans Antonie Gerber & 1 Other vs FF Gerber & 3 Others

- Case Number: 907/09
- High Court: Eastern Cape – Port Elizabeth
- Date Heard: 25 May 2009
- Date Delivered: 09 July 2009

JUDGE(S): REVELAS J

LEGAL REPRESENTATIVES –

Appearances:

- 1. for the Applicant(s): Adv J Huisamen
- 2. for the Respondent(s): Adv P Jooste

Instructing attorneys:

- Applicant(s): Goldberg & De Villiers obo Johan Sloet & Burger
- Respondent(s): Messrs Nel Mentz Inc c/o Jaquess Du Preez

CASE INFORMATION –

Motion Court

- 1. *Nature of proceedings:*
- 2. *Key Words:*

Not reportable

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE - PORT ELIZABETH**

Case No: 907/09
Date Heard: 29/05/09
Date Delivered: 9/07/09

In the matter between

**FRANS ANTHONIE GERBER
LOUISA PETRONELLA GERBER**

First Applicant
Second Applicant

and

**FF (FRANS) GERBER
SJ (FANIE) GERBER
JDW (DANIE) GERBER
OJO (OLIVIER) GERBER**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent

J U D G M E N T

Revelas, J

[1] The two applicants who are married to each other are farmers in the Joubertina district. On 9 March 2009 they approached the Eastern Circuit Local Division sitting in George on an urgent basis, seeking relief which is in the nature of a *mandament van spolie*. The four respondents are also farmers and own farms which are situated (as is the applicants' farm) on the Braam River (*the river*), but only higher up. The applicants allege that the respondents unlawfully interfered with their statutory water rights and the water supply from the river to their farm. The relief sought is to the effect that the respondents be ordered to remove two weirs and certain pipes installed in the river, opposite the fourth respondent's farm within 24 hours and to restore the riverbed and its course (through repairs thereto) to the position it was in, immediately prior to the

installation of the obstructions (weirs and pipes). In addition, the applicants seek an order in terms whereof the respondents are interdicted from building or placing any obstructions in the river which would result in interrupting its flow and preventing the supply of water to the applicants' farm, unless the respondents obtain the necessary authority in terms of the National Water Act, 36 of 1998 (*the Act*) first.

[2] On 27 March 2009, this case was transferred to this court by order of the Eastern Circuit Local Division in terms of section 3(1) of the Interim Rationalisation of Jurisdiction of the High Courts Act 41 of 2001, after the respondents objected to the jurisdiction of Eastern Circuit Local Division in George. By the time the matter was set down at the end of May, it had lost its sense of acute urgency, although it does remain a somewhat urgent matter, particularly because of the heavy drought in the area. Hopefully recent rains have alleviated the situation.

[3] Because the applicants' farm (Twannie) is registered in the name of the second applicant (Mrs Gerber), the relevant water use certificate issued in terms of the Act, in respect of the utilisation of water from the river, is registered in her name. In this regard the applicants have attached a six page document issued by the Department of Water Affairs and Forestry Water Use Licensing and Registration (the Department), on 8 September 2005, which permits water to be taken from the river for use on Twannie.

[4] It is not in dispute that the applicants, their farming operation and their workforce and families use the water obtained and stored from the river. The applicants farm mainly with ostriches which include the raising of ostrich chickens. These animals are by nature

notoriously prone to contracting diseases and must consequently be watered with potable water, according to the first applicant.

[5] It is common cause that the river is not a perennial river and that when this application was launched, the Joubertina district, where the farms concerned are situated, had been stricken with a terrible drought for some time and the water supply from the river became very limited. It is not in dispute that certain measures were taken by the respondents to change the water course in the river. Several sandbags were placed in the riverbed and at another point a hundred metres away, a stone and concrete construction was erected. The applicants describe the constructions as weirs ("keerwalle"). The riverbed is excavated in front of the first weir to ensure water damming up there. The second weir is equipped with a grid-like sieve to capture and lead any spare water into the underground pipes, which lead water to the various farms of the four respondents. These pipes were also newly installed. The two weirs and the pipes were installed on the fourth respondents' farm, which is the one above Twannie (the applicants' farm).

[6] The applicants contend that as a result of the installation of the pipes and the construction of the weirs, no water reaches the part of the river adjacent to the applicants' farm. Their employees and their ostriches also suffer from the cessation of the water which previously seeped or trickled down the river and to which the applicants were entitled to in terms of the Water Use Certificate issued to Mrs Gerber. The applicants maintain that the installation of the weirs and water pipes is unlawful, fall foul of the provisions of the Act and has infringed their peaceful and undisturbed exercise of their lawful right to take water from the river. They also contend that their constitutional right to potable water has been violated.

[7] Even though the third respondent disputes that the two constructions are weirs, the stone structure is admittedly constructed with stone and concrete and there are at least four sandbags placed in the riverbed which form part of the "sisteen" (term used by the third respondent) to alter the existing flow of the water. I will refer to both these structures as "weirs" in this judgment because of the nexus between their construction and the termination of the flow of water to Twannie.

[8] The applicant attached a handwritten letter sent to him by the fourth respondent to the founding affidavit. It appears from the letter that the applicant had asked him about a water distribution agreement pertaining to the farms upstream. The original agreement, according to the letter, could not be retrieved but an unsigned copy was found. The agreement must have been attached to this letter because the fourth respondent says with reference to him finding the agreement:

"Soos jy kan sien moet ons (Braamrivier) se water elke naweek vry loop in die rivier vir 24 uur. Onderplaas s'n vir 15 uur en so gaan dit verder af". (Emphasis added)

The fourth respondent intimated to the first applicant in this letter his view that he (the first applicant) is entitled to take water from the river on Saturdays at six o'clock in the afternoon. When the matter was argued before me no such concession was made on behalf of any of the respondents.

[9] The respondents deny that their actions are unlawful. They argue that the applicants are unable to show a clear right to the water, and that their reliance on the *mandement van spolie* is misplaced because the installation of the obstructions in the river was lawful.

[10] The third respondent contended that early in 2009, the state of the then existing cement furrows necessitated an alternative method of taking water from the river. According to the third respondent, the matter was taken up telephonically with the Department resulting in a Mr Jakobs (of the Department) inspecting the location where the respondents intended to install the new pipes (in lieu of the cement ducts or furrows) in the riverbed, the route these pipes would follow, and their final destination point, namely the dams.

[11] The third respondent states that the point in the river from where the water is taken (aftappunt) is more or less in the same vicinity as the previous point, the only difference being that the new pipes follow a shorter and alternative route, as opposed to the previous cement furrows which were longer and had many kinks and curves. The third respondent says he also pointed out to Mr Jakobs that the pipes would pass through the riverbed at two points, thus using two pipes instead of one. The former method of taking the water to the dams ensured a relatively constant trickle and seepage which the applicants appropriated for their use. The new arrangement would terminate that.

[12] On 10 February 2009, the Department, in response to an application by the respondents, granted the necessary authorisation to "change the method of taking water from the Braam River by means of 200 mm PVC pipes which will be laid in the existing furrow" (emphasis added), but subject to the following conditions:

- (a) The method of taking water may not contravene any water uses as stipulated in section 21 of the National Water Act. (The applicants' use of water falls within that section).
- (b) The respondents' "proposed activity" may not have a negative effect on "any water user downstream" or his property.

- (c) No “riparian vegetation” or trees may be removed in the process without consulting the Department.

[13] The letter addressed to the fourth respondent, but sent to the third respondent, and which contains the authorisation, warns that non-compliance with the above conditions will render the “proposed activity” unlawful. The letter also advises that application will have to be made (presumably by the fourth respondent because the pipes were to be installed on his farm) for a water use licence in terms of the Act, but states that “the issuing of such licence cannot be guaranteed”. It is of significance in this matter that the applicants bought Twannie from the fourth respondent, who seems to agree that the owner of that farm is entitled to take water from the river as of right. The pipes, stone weir and sandbags complained of, were installed on the fourth respondents’ farm and the authorisation from the Department with regard to the installation of the new pipes, is addressed to the fourth respondent. The latter did not provide a water licence or a registration certificate for the use of the water.

[14] There are two points (800 metres apart) in the riverbed from where the applicants take water. The first point is a stone weir and the second is a well. At the time the application was brought, the well contained water, despite the heavy drought which reigned in the Langkloof. According to the respondents, that well is never without water. The applicants alleged that the well does not contain potable water fit for human or ostrich consumption, and as can be gleaned from the founding affidavit, the lack of potable water is what brought the applicants to court. The respondents argue that the water used by the applicants emanates from springs along the riverbed and not from the river itself.

[15] Sandbags were installed in the river by the respondents. This method is not covered by the departmental authorisation. Neither is the stone weir. Furthermore it was the express wish of the Department that the installation pipes should not cut the downstream farms (like Twannie) completely off from water. Such a situation is also prohibited by section 22(2)(e) of the Act. The pipes were also not installed in "existing furrows" as required.

[16] Section 22(2)(e) of the Act provides that a person who uses water without a licence but with general authorisation issued under section 39 of the Act, (as the respondents are doing on the fourth respondent's farm), "must return any seepage, run-off or water containing waste emanating from that use, to the water resource from which the water was taken, unless the responsible authority or relevant authorisation directs otherwise". In this case the letter of authority (10 February 2009) does not dictate or direct otherwise. Its provisions (set out above) echo the provisions of this section.

[17] The respondents have failed to discharge the onus of proving that they have acted in accordance with their statutory or any other authority. It is also noteworthy that the registration certificates on which the first, second and third respondents rely (the fourth respondent did not produce one) are subject to the issue of valid water licences.

[18] The respondents also argued that the applicants need not have approached the High Court for the relief sought but should rather have approached the Department which has emergency measures and other methods in place to resolve water use disputes such as the one under consideration. In other words, the respondents contend that the applicants have an alternative remedy. The fact that the conditions set in the authorisation letter

from the Department, were not complied with is very, significant. There is no reason why the applicants should approach the Department when the respondents are in breach of the conditions imposed by the Department. The problem is of the respondents' making. It was also argued that the applicants' problems were caused by the drought which they must bear like everyone else in the area.

[19] The respondents further argued that the water dispute in question is not capable of being determined on the papers because of the many disputes of fact in the various affidavits. There are common cause facts and facts in the answering affidavit which are sufficient to determine this case. It is not open to the respondents to deny that the actions of the respondents resulted in the applicants' water being cut off. Clearly, the applicants' access to water has been impaired and their rights to water were infringed by the actions of the respondents.

[20] The next question to determine is the nature of the relief to be granted and whether this is a matter in which the *mandament van spolie* is of application. The latter remedy restores to another, *ante omnia*, moveable, immovable and incorporeal property, forcibly or wrongfully dispossessed and against his consent. It can also restore *quasi-possessio* of certain rights which "consists in the actual exercise of an alleged right or as formulated in *Zulu v Minister of Works Kwazulu, and Others* 1992 (1) SA 181 (D) at 188 C in "die daadwerklike uitoefening van handelinge wat in die uitoefening van sodanige reg uitgeoefen mag word". (See: *First Rand Ltd t/a Rand Merchant v Scholtz* NO 2008 (2) SA 503 at 509 para [12]; *Nino Bonino v De Lange* 1906 TS 120 and 122; *Bon Quelle (Edms) Beperk v Munisipaliteit van Otavi* 1989 (1) SA 508 (A)).

[21] In the *Bon Quelle* case, it was held that the undisturbed exercise of a right to the use of water fell within the concept of *quasi possessio*. In *Impala Water Users Association v Lourens NO and Others 2008 (2) SA 495*, Farlam JA had the following to say about the *Bon Quelle* judgment at 500J – 501 [20]:

"In my view, unless the Bon Quelle decision is to be overturned, the respondents have clearly established that the rights to water – were capable of protection by the mandement van spolie.

[20] The decision of this court in Bon Quelle was carefully reasoned in a scholarly judgment in which the previous case law and many, if not all, of the relevant authorities were canvassed. No new light on the matter was thrown by the argument of counsel for the appellant and I am satisfied that it cannot be held that the decision in question was clearly wrong".

Accordingly the applicants' water rights can be protected by the *mandement*.

[22] The next question is whether the spoliation was lawful. As shown above, the pipe installations were not in accordance with the conditions of the authorisation set by the Department and the installation of the sandbags and stone weir were not included in the authorisation. In addition, all the new installations in question were in breach of section 21 and section 22 of the Act. Consequently the applicants' rights to water in terms of the Act are worthy of the protection of the *mandement*.

[23] Because the two weirs were not methods to take water covered by the departmental authorisation, they should be removed. Similarly, because the pipes were not placed in existing furrows as required by the Department either, they should also be removed. Removal of these pipes will have the result that the water running to the dams of some of the respondents will be cut off. However, this inconvenient situation will be of short duration if

the respondents comply with the conditions of the authorisation and the Act, by causing the water pipes to run in the existing furrows. The third respondent contends that the letter of the Department does not convey what was intended by the parties. No explanatory affidavit by the official concerned was attached to the answering affidavit in support of that contention. Moreover, it appears that the applicants were not consulted by the Department concerning the effect of the new water use system on their water supply. It is almost inconceivable that the Department would have regarded the respondents new water use system as being in accordance with the conditions of the authorisation and provisions of the Act.

[24] Even though the drought is the largest contributing factor to the lack of water on the applicants' farm, the drastic changes made to the flow of water in the river will have a lasting and detrimental effect on the applicants' access to water. None of the respondents possess a licence or authority to effect such changes. Accordingly the applicants are entitled to the relief they seek and the following order is made:

3. The respondents are ordered to, within fourteen days of this judgment, remove the pipes and obstructions (sandbags, stone weir and sieve) mentioned in paragraph 5 of this judgment, and to restore the riverbed and its water course (through repairs thereto and utilizing the previous, existing water furrows) to the way they were, prior to the installation and construction of the abovementioned pipes and obstructions.
4. If the respondents fail to comply with paragraph 1 of this order, the Sherriff or his Deputy shall remove the obstructions and the pipes, to restore the riverbed and its course to their original position and the respondents will be

jointly and severally liable for the costs of such removal and/ or repairs.

5. The period of 14 (fourteen) days referred to in paragraph 1 of this order, may be extended by agreement between the parties, or with the permission of the applicants within their sole discretion, which permission may not be unreasonably withheld.
6. The respondents are interdicted from constructing or installing any obstructions in the river which will result in terminating or altering the water flow in the Braam River to the applicants' farm, without obtaining the proper and specific authorisation to do so, from the Department of Water Affairs and Forestry.
7. A copy of this judgment is to be served on the Department of Water Affairs and Forestry – Eastern Cape (Ms L Fourie), East London, within 5 days of this order.
8. The respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

E REVELAS
Judge of the High Court