



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No:2023-091417

In the matter between:

NAMUTONI BOEDERY (PTY) LTD

FIRST APPLICANT

SM VAN DYK BOEDERY (PTY) LTD

SECOND APPLICANT

and

**AFGRI POULTRY (PTY) LTD T/A
DAYBREAK FARMS**

RESPONDENT

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHER JUDGES: YES/NO
- (3) REVISED.

DATE 7 MARCH 2025

SIGNATURE

JUDGMENT

HF JACOBS, AJ:

INTRODUCTION

[1] Afgri¹ operates a poultry abattoir on Portion 8², which is adjacent Portion 10³ and Portion 35⁴. Portion 35 is owned by Namutoni⁵ and SM Boerdery⁶ conducts crop farming operations thereon. Portion 10 is owned by Mr van Rooyen who is not a party to these proceedings.

[2] Afgri uses a significant amount of water in its abattoir operations and has a wastewater treatment plant and a pond on Portion 8. In the answering affidavit, it explains that it slaughters 125,000 chickens daily, twenty four hours per day, seven days a week, substantially less than the capacity of 980 000 chickens per week that its infrastructure allows. The water Afgri uses is extracted from an underground water source on Portion 8 and it discharges wastewater after use (and after treatment) on Portion 10 into a pan. It does so with the permission of the applicants since 2012.

[3] The pan holds runs-off water and, as can be expected, the volume of run-off water that flows into the pan increases during the rainy season and decreases during the dry highveld winters. Afgri pumps its wastewater throughout the year and the level of the water in the pan on Portion 10 rises and encroaches onto Portion 35. This encroachment, so the applicants contend, is the direct consequence of the unmonitored volume of wastewater Afgri pumps into the pan on a full time basis. Over time, so the applicants

¹ The respondent

² Portion 8 of the Farm Modderfontein 236, Registration Division IR, Mpumalanga Province, 170 hectares in extent

³ Portion 10 of the Farm Modderfontein 236, Registration Division IR, Mpumalanga Province

⁴ The remaining extent of Portion 35 (a portion of portion 9) of the Farm Modderfontein 236, Registration Division I.R., Mpumalanga Province

⁵ The first applicant

⁶ The second applicant

say, the pan has become a permanent reservoir (dam) which encroaches onto arable land of the applicants to such an extent that, during 2023, the applicants revoked their permission granted 11 years earlier to Afgri and demanded from Afgri to cease pumping its wastewater to the pan on Portion 10. Afgri did not cease the pumping of its wastewater. In this application the applicants claim interdictory relief aimed at interdicting and restraining Afgri from pumping its wastewater into the pan on Portion 10.

[4] On 22 March 2023 SM Boerdery's attorney wrote to Applicant as follows:

- "1. We refer to the abovementioned matter and confirm that the writer hereof (hereinafter referred to as "we") received instructions from Mr SM van Dyk, a director and authorised representative of SM Van Dyk Boerdery (Pty) Ltd (hereinafter referred to as "our client") to address this letter to you and to place the following on record.*
- 2. It is our instruction that you conduct business as an abattoir and food processing operation on the agricultural holding known as Afgri Poultry t/a Daybreak Farms, on the remaining extent of portion 8 of the farm Modderfontein, Mpumalanga, situated directly adjoined to our client's agricultural holding, known as SM Van Dyk Boerdery (Pty) Ltd.*
- 3. It is our further instruction that you pump water directly into one of our client's water ponds situated on our client's agricultural holding in terms of an oral agreement concluded between our client and one of your erstwhile representatives. It was agreed that you may pump water from the abattoir and food processing operation directly into our client's pond to alleviate your excessive water challenges as experienced from time to time.*
- 4. We herewith confirm that it was an agreed term, alternatively an implied term that the water flow to the pond will be monitored and managed to ensure that the pond perimeter remains the same in extent and that the surface that the water occupies does not increase in perimeter.*

5. *You however fail to comply with the terms of the oral agreement in that you continue to pump wastewater in our client's pond to the extend that the pond perimeter increased so much so that it takes up valuable agricultural land (10 hectares under irrigation) which land cannot be utilised by our client and encroaches on our client's land and diminish their ability to use their land commercially and furthers causes economical and financial damage and loss to our client.*
6. *We herewith demand that you immediately refrain from further pumping wastewater into our client's pond. Should you fail to adhere to this demand we confirm that our client will continue to suffer irreparable harm in that they will not be able to utilise their agricultural land for agricultural purposes and to derive an income from its crops because of your unlawful utilisation of their agricultural land and your infringement and uptake of their agricultural economic land and agricultural economic units.*
7. *We herewith demand that you immediately refrain from pumping any further wastewater and/or any other water to our client's water pond and/or property in any manner whatsoever. Any permission and/or consent previously granted is herewith retracted and/or revoked. Your operation is encroaching on our client's agricultural land and our client is no longer willing to condone your conduct as explained and herewith placed on record.*
8. *Should you continue to pump any water and/or wastewater to our client's water pond and/or property after delivery of this letter of demand, our client will have no alternative remedy than to approach the High Court, for the granting of an interdict and we will also request that a cost order be granted against you herein on a punitive cost scale.*
9. *We trust you find the above in order and await your urgent response herein by no later than close of business on **31 MARCH 2023**.*
10. *Kindly acknowledge receipt of this letter in writing.*
11. *Our client's rights remain strictly reserved."*

[5] Following the applicants' attorney's letter of 22 April 2023 the parties met but could not resolve their differences and during September

2023 the applicants instituted these proceedings claiming the following relief in their notice of motion:

- “1. *The respondent is interdicted and restrained with immediate effect from pumping any further water from the wastewater treatment plant and pond on the property known as Portion 8 of the farm Modderfontein ("the **Abattoir property**") to the first applicant's farm known as the Remaining Extent of Portion 35 (a Portion of Portion 9) of the farm Modderfontein ("the **Irrigation Farm**").*
2. *That the interdict under paragraphs 1 supra operate, pending the finalisation of an action to be instituted by the applicants for a declaration of rights and damages within 20 days from the date of this order.*
3. *That the attorneys and client cost of the application be paid by the respondent.*
4. *Further and/or alternative relief.”*

[6] During argument counsel for the applicants informed me that a final order is sought by the applicants as claimed in paragraph 1 of the notice of motion and should such an order not be granted, that the application should be dismissed. I will, therefore, not deal with the requirements for an interim interdict and return to this aspect of the matter later in this judgment.

[7] Afgri contends that the papers show that there exist *bona fide* and material disputes of fact not capable of resolution in these motion proceedings that call for the application to be referred to trial or dismissed. I state the law applicable to disputes of fact in motion proceedings before I turn to the facts of the case.

DISPUTES OF FACT IN MOTION PROCEEDINGS: THE GENERAL PRINCIPLES

[8] Motion proceedings, unless concerned with interim relief, are designed for the resolution of legal disputes based on common cause facts. Unless the circumstances are special they cannot be utilised to resolve disputes of fact because they are not designed to determine probabilities.⁷ Long before the formulation of the Plascon-Evans rule⁸ our courts recognised that respondents frequently attempt to create disputes of fact when none exist. Our courts adopted the attitude that it should apply a “robust approach” to disputes of fact in such instances.⁹ It is expected from a court in such circumstances to undertake a careful perusal of the affidavits filed of record to determine whether the disputes can be decided on the affidavits.¹⁰

[9] The starting point is always the Plascon-Evans-rule that provides that “(W)here in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.”¹¹

[10] The Plascon-Evans-rule must be applied mindful of the law stated by Zondo CJ in his minority judgment in *Botha*¹². The Plascon-Evans rule has

⁷ See *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at [26]

⁸ See below

⁹ See *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E-H; *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; BR Southwood, *Essential Judicial Reasoning*, Lexis Nexis, 2015, pages 22-30

¹⁰ See *Trust Bank van Afrika Bpk v Western Bank Bpk en Andere NNO* 1978 (4) SA 281 (A) at 293H.

¹¹ *Mamadi v Premier, Limpopo and Others* 2024 (1) SA 1 (CC) at [22]

¹² *Botha v Smuts* 2025 (1) SA 581 (CC) at [271] – [280]

been refined and extended to encompass untenable evidence challenges in motion proceedings. In *Fakie*¹³ the Supreme Court of Appeal held:

"That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

[11] The Plascon-Evans-rule is applied always conscious of the further rule that an applicant will not be permitted to introduce new matter in its replying affidavit. When evidence is presented in reply, the rule against new matter in reply is not absolute and should be applied with a fair measure of common sense¹⁴. Practical application of the principled approach recorded above, appears from judgments such as *Wightman*,¹⁵ *Lombaard*,¹⁶ *Buffalo*,¹⁷ *Mokala*¹⁸ and *National Scrap Metal*¹⁹ where our Courts held that a genuine and

¹³ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at 55

¹⁴ *Juta & Co Ltd and Others v De Koker and Others* 1994 (3) SA 499 (T) at 511F; *Smith v Kwanonqubela Town Council* 1999 (4) SA 947 (SCA) at [15]

¹⁵ *Wightman t/a JW Construction v Headfour (Pty) Ltd & Another* 2008 (3) SA 371 (SCA) at par [13]; *MV New Endeavor and Others v Indian Oil Corp Ltd* 2024 (6) SA 64 (SCA) at [44]

¹⁶ *Lombaard v Droprop CC & Others* 2010 (5) SA 1 (SCA) at [26].

¹⁷ *Buffalo Freight Systems (Pty) Ltd v Crestleigh Trading (Pty) Ltd & Another* 2011 (1) SA (8) SCA at [19]-[21].

¹⁸ *Mokala Beleggings & Another v Minister of Rural Development and Land Reform & Others* 2012 (4) SA 22 (SCA) at [11].

bona fide dispute of fact can only exist where the Court is satisfied that the party who purports to raise the dispute has in its affidavits seriously and unambiguously addressed the facts said to be disputed. There will be instances where a bare denial meets the requirement but only if there is no other way open to a litigant to raise the dispute and nothing more than a bare denial can be expected. But even a bare denial would not always be sufficient if the fact lies purely within the knowledge of the averring party and no basis is set out in the opposing affidavit for disputing the veracity or accuracy of the disputed averment. If a litigant possesses knowledge of the facts and can provide an answer (or countervailing evidence) but instead of doing so rest his or her case on an ambiguous denial, a Court will generally have difficulty finding that the test for the existence of a genuine and *bona fide* dispute of fact is satisfied.²⁰ The starting point is always to list the facts that are common cause.

THE PERMISSION TO PUMP WASTEWATER IN THE FOUNDING PAPERS

[12] It is common cause that Namutoni is the owner of Portion 35 and what the extent of Afgri's operations entail. In their founding papers the applicants rely on its ownership of Portion 35 to found their right to assert their right to claim the interdictory relief. In connection with the consent it granted to Afgri to pump wastewater into the pan concerned it states as follows in paragraphs 18 – 22.8 of its founding affidavit:

¹⁹ *National Scrap Metal (Cape Town) (Pty) Ltd & Another v Murray & Roberts Ltd & Others* 2012 (5) SA 300 (SCA) at [17]

²⁰ *Wightman (supra)* at [13]

- “18. As already mentioned, the Irrigation Farm [Portion 35] borders the Abattoir Property [Portion 8] and there is a wetland area or pan and centre pivot irrigation system on the Irrigation Farm. The wetland or pan (hereinafter “the pan” or “dam”) and the irrigation system lie adjacent to AFGRI’s Abattoir Property. In corroboration of the aforesaid, I refer the Court to an image obtained via Google Earth. The image is attached and marked “FA1”.
19. The image (annexure “FA1”) shows the Abattoir Property (marked as A on the image), the pan on the Irrigation Farm (marked as B on the image) and the irrigation system on the Irrigation Farm (marked as C on the image).
20. During about 2012/2013, AFGRI approached the applicants and advised us that they had plans to expand their operations on the Abattoir Property. According to them, the expansion would benefit everyone.
21. The representatives of AFGRI also asked us permission to pump treated wastewater from the pond next to the abattoir facility to the pan on the Irrigation Farm and from there to another pan situated on my neighbour’s farm.
22. To the best of my recollection, the engagements mainly happened under the leadership of a man by the name of Mr Chris Venter. At the time of the approach:
- 22.1. There was already a pan on the Irrigation Farm. The water in the pan mainly amassed during summer. During the winter, the size of the pan would shrink significantly. There was never any encroachment by the water mass at any time on the arable land under the irrigation system on the Irrigation Farm.
- 22.2. In corroboration of the aforesaid, I again refer the Court to the images obtained via Google Earth. The image shows how the pan looked like in 2005 and 2012 before permission was granted to AFGRI to pump the treated wastewater to the pan. The images are attached and marked “FA2”.

- 22.3. *AFGRI's representatives assured us that there would be no issues and that the pumping of the water would not interfere with the farming operations on the Irrigation Farm because they would monitor and manage waterflows and because:*
- 22.3.1. *The expansion of the wastewater treatment plant would result in better and more effective use of the wastewater produced by the abattoir facility.*
- 22.3.2. *AFGRI would manage the quantities of water pumped from the pond on the Abattoir Property to the pan on the Irrigation Farm by installing pumps and associated equipment next the pan on the Irrigation Farm.*
- 22.3.3. *AFGRI would use the aforementioned pumps installed at the pan on the Irrigation Farm to manage the size of the pan by pumping water from the pan on the Irrigation Farm to the pan on the neighbour's farm.*
- 22.4. *According to AFGRI's representatives, there was just nothing to be concerned about.*
- 22.5. *Within the context set out above, the applicants agreed to allow AFGRI to pump water from the pond on the Abattoir Property to the pan on the Irrigation Farm and from there to the neighbours' farm.*
- 22.6. *It expressly communicated that the applicants were granting AFGRI and indulgence and was understood and tacitly agreed between the parties that:-*
- 22.6.1. *The applicants had the right to withdraw the permission given to AFGRI to pump water;*
- 22.6.2. *AFGRI had to monitor and manage the amounts of water pumped to make sure that it does not interfere with the applicant's operations on the Irrigation Farm;*

- 22.6.3. *AFGRI had to exercise the right to pump water reasonably and with due regard and respect to the rights of the applicants in relation to the Irrigation Farm.*
- 22.7. *Over time, AFGRI pumped so much water into the pan that size of the area expanded to the extent that the pan is now a permanent dam which encroaches on about ten hectares of arable land on the Irrigation Farm. The arable land lies underneath the applicants' irrigation system.*
- 22.8. *AFGRI has failed to monitor the amounts of wastewater it pumps to the pan and has also failed to use the pumps installed at the pan on the Irrigation Farm to manage water flows and the size of the pan. The pumps and the associated equipment are now underwater because of AFGRI's failures to monitor and manage the situation. The pumps cannot be used to pump excess water to the neighbour's farm."*

THE PERMISSION TO PUMP WASTEWATER IN THE ANSWERING PAPERS

[13] To this evidence, Afrgi answers in paragraphs 40 – 58 of its answering affidavit:

"40. AD PARAGRAPH 18 THEREOF:

- 40.1. *It is denied that Namutoni's property is an "irrigation farm" for the reasons already set out hereinbefore. It is denied that either of the Applicants made out a case that they are entitled to use water for any purpose of Namutoni's property for the reasons set out above.*
- 40.2. *It is submitted that Namutoni's property borders on the Respondent's property.*
- 40.3. *It is specifically denied that the pan, which only partially lies on Namutoni's property, is a wetland for the purposes of the NWA. I am advised that a wetland is defined by section 1 of the NWA to mean 'land which is transitional between terrestrial and aquatic systems where the*

water table is usually at or near the surface, or the land is periodically covered with shallow water and which land in normal circumstances support or would support vegetation typically adapted to life in saturated soil'. I am advised that full legal argument in this regard will be presented to the Honourable Court at the hearing of the application.

- 40.4. *I further specifically deny that the pan that is partially situated on the Remaining Extent of Portion 35 (a portion of portion 9) of the farm Modderfontein 236 IR, lies adjacent to the Respondent's property. In this regard, I refer the Honourable Court to paragraph 3.5.8 of Mr Vorster's report, specifically figure 20 on page 8. It is evident that the portion of the pan that is situated on the Remaining Extent of Portion 35, (a portion of Portion 9) of the farm Modderfontein 236, Registration Division IR which belongs to Namutoni is not situated adjacent to Portion 8 but borders on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR.*
- 40.5. *The remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR is a property that is owned by Nicolaas Jacobus Lourens van Rooyen in terms of Deed of Transfer T203/2017 a copy of which is attached hereto as "AA11". I further attach hereto a copy of the SG diagram A3404/14 as "AA12a" that shows that the pan that is situated on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR borders on the southern boundary of the Remaining Extent of Portion 35 (a portion of Portion 9) of the farm Modderfontein 236 IR.*
- 40.6. *It is evident from the Google Earth image that was attached to the founding affidavit as "FA1", that the deponent did not take the Honourable Court into his confidence and show the Honourable Court where the property boundaries of Namutoni's property is. I attach hereto a copy of the surveyor diagram of Namutoni's property indicating the boundaries of that property as "AA12b",*
- 40.7. *I deny that the irrigation systems that are situated next to the Respondent's properties may be used to apply water that is taken from*

underground resources illegally. In this regard, I specifically refer the Honourable Court to figures 13, 14, 15, 16 and 17 of Mr Vorster's report. The first time that an irrigation system was present on Numatoni's property was when a centre pivot was visible at fields 7 and 8 on the Landsat 7 satellite image of 15 July 1998.

40.8. The first time that any irrigation was visible on the area designated field 14 is on 23 April 2000 when field 16 is visible for the first time. Prior to this, field 16 formed part of field 14, which was probably not irrigated according to Mr Vorster's report.

40.9. I specifically deny that annexure "FA1" to the founding affidavit is helpful, as it does not provide a glimpse of what happened during the qualifying period being the period between 1 October 1996 to 1 October 1998, when the NWA came into operation.

40.10. I am advised that Google Earth images are unable to shed any light on what the historical water use on the property was as the earliest clear Google Earth image of the area was taken on the 27th of June 2002. This is the reason why the Respondent employed the services of Mr Vorster, an expert, in order to obtain the appropriate satellite images.

41. AD PARAGRAPH 19 THEREOF:

41.1. The contents of this paragraph are denied. The Google Earth image that is attached is only an indication of what happened at a specific time and the Google Earth image does not indicate the date of the imagery on the Google Earth image itself. I presume that the date that appears in the right top corner namely 12 September 2023 at 08:24:36am is not the date of the Google image as this date and various times appear also on all the pages of the founding affidavit.

42. AD PARAGRAPH 20 THEREOF:

42.1. Although it is correct that the Respondent approached the Applicants in about 2012, it is denied that the plans to expand the abattoir on the Respondent's property started at that time. The remainder of the

allegations in this paragraph is denied. The expansion of the abattoir took place even before the Respondent became the owner of the Remaining Extent of Portion 8 of the Farm Modderfontein 236 Registration Division IR. The first time that it was evident that any extension took place was on 2 May 2007, when construction is visible on the Google Earth imagery of that date. I attach hereto three Google Earth images as "AA13", "AA14" and "AA15", "AA13", taken on 3 February 2005, clearly shows only the existing buildings at the time, while "AA14" shows construction that was undertaken on 2 May 2007, while "AA15", taken on 1 March 2010, clearly shows the completed and extended abattoir,

42.2. The property was only registered in the Respondent's name on 12 December 2012 according to the Deed of Transfer T13522/2012.

43. AD PARAGRAPH 21 THEREOF:

43.1. The content of this paragraph is admitted.

44. AD PARAGRAPH 22 THEREOF:

44.1. The content of this paragraph is denied.

44.2. I do not know and could not, through enquiries, establish if a person by the name of Chris Venter ever worked for or represented the Respondent.

44.3. The deponent is probably mistaken. He refers most likely to Kobus Venter and not Chris Venter. This is but one further example of the inaccuracies contained in the Applicants' founding affidavit.

44.4. The Respondent engaged the local farmers when the abattoir was expanded. The Respondent was represented by Willem Breedts and Kobus Venter. Both gentlemen are no longer employed by the Respondent.

44.5. The Applicants concede on their own version that the expansion of the abattoir included the construction of the wastewater treatment plan,

which dramatically increased the abattoir's ability to use less water, to re-use water and to dispose of the same or less wastewater despite the increase in production.

44.6. *I will later, in this affidavit, return to the operation of the abattoir's wastewater treatment plant, the abattoir's capacity and water usage.*

45. *AD PARAGRAPH 22.1 THEREOF:*

45.1. *I deny that Namutoni's property is an irrigation farm for the reasons already set out above. Although it is correct that water collected in the pan during summer months and the area of the pan receded during winter, the remaining allegations in this paragraph are denied.*

46. *AD PARAGRAPH 22.2 THEREOF:*

46.1. *The contents of this paragraph are denied. Without the services of a remote sensing specialist, I respectfully submit that no deductions can be made from these Google Earth images.*

47. *AD PARAGRAPH 22.3 THEREOF:*

47.1. *The contents of this paragraph are denied. Part of the agreement that was reached between the Respondent and Namutoni was that the Respondent would make available extra land on the Remaining Extent of Portion 8 of the farm Modderfontein 236, Registration Division IR to compensate Namutoni for any loss of land that it would suffer as a result of water that is accumulated in the pan that is partially situated on Numatoni's property. The land that was so made available could be farmed free of charge the account of the Applicants. Up until the making of this affidavit, the Applicants are entitled to plant at least 9,41 hectares on the Respondent's property free of charge. The area that Numatoni could plant crops on is situated to the West of the pan that is situated on the Remaining Extent of Portion 8 of the farm Modderfontein 236, Registration Division IR. Currently an area of 9,41 hectares is planted.*

47.2. *I specifically deny that Namutoni's property is an irrigation farm for the reasons already set out above.*

48. AD PARAGRAPH 22.3.1 THEREOF:

- 48.1. *It is correct that the expansion of the wastewater treatment plant resulted in a better and more effective use of wastewater that is produced by the abattoir facility.*

49. AD PARAGRAPH 22.3.2 THEREOF:

- 49.1. *The Respondent has managed the quantities of water pumped from the pan on the abattoir to the pan, which is partially situated on Namutoni's property, It is specifically denied that Namutoni's property can be categorised as an "irrigation farm" for the reasons already set out herein. It is specifically denied that the pumps and associated equipment were installed on Namutoni's property. The pumps and associated equipment that were installed next to the pan were installed on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR that belongs to Nicolaas Jacobus Lourens van Rooyen. The water that was pumped from the pan is partially situated on Namutoni's property but mostly situated on the remaining extent of Portion 10 of the farm Modderfontein 236 IR. According to Mr Vorster's report and specifically page 26 thereof, only 3,48 hectares of the pan was situated on Namutoni's property, being the Remaining Extent of Portion 35 of the farm Modderfontein 236, Registration Division IR on 13 July 2015.*
- 49.2. *According to Mr Vorster's report and specifically page 27 thereof only 7,32 hectares are situated on Numatoni's property. The bulk of the pan that is partially situated on Nunatoni's property namely 25,97 hectares (on 13 July 2015 - see page 35 and figure 2 35,62 hectares (on 28 January 2023 - see page 36 and figure 30) is situated on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR, that belongs to Nicolaas Jacobus Lourens van Rooyen.*
50. AD PARAGRAPH 22.3.3 THEREOF:
- 50.1. *The contents of this paragraph are denied. It is reiterated that Namutoni's farm is not an "irrigation farm" for the reasons already set out above. It is further reiterated that the pumps that are installed to pump*

water from the pan that is partially situated on Namutoni's property has been installed on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR belonging to Nicolaas Jacobus Lourens van Rooyen.

50.2. *However, it is correct that the pumps are used to pump water from the pan that is partially situated on Namutoni's property to another pan which is situated on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR.*

51. *AD PARAGRAPH 22.4 THEREOF:*

51.1. *The contents of this paragraph are denied. As is evident from what is said herein before, there was a quid pro quo in the form of land that was provided by the Respondent on which Namutoni could farm and plant crops free of charge.*

52. *AD PARAGRAPH 22.5 THEREOF:*

52.1. *The contents are denied. The deponent on behalf of the Applicants do not take the court into its confidence. Nowhere in the founding affidavit is there any mention made of the quid pro quo that was provided by the Respondent to allow water to be pumped into the pan that is partially situated on Namutoni's property and that as a quid pro quo the Applicants were allowed to farm on a part of the Remaining Extent of Portion 8 of the farm Modderfontein 236, Registration Division IR free of charge.*

53. *AD PARAGRAPH 22.6:*

53.1. *The content of this paragraph is denied. There was no indulgence that was granted to the Respondent. As a quid pro quo for the storing of water in the pan that is partially situated on Namutoni's property, the Applicants were granted the right to farm on the Respondent's land free of charge. As I have indicated earlier, there are at least 9,41 hectares planted by the Applicants on the Respondent's property.*

54. AD PARAGRAPH 22.6.1 THEREOF:

54.1. *The content of this paragraph is denied. the agreement that was entered into between the parties was that water could be stored in the pan while Namutoni could farm at least 9,41 hectares of land on the Respondent's property. The agreement that was entered into was, therefore, reciprocal.*

55. AD PARAGRAPH 22.6.2 THEREOF:

55.1. *I repeat that Namutoni's property is not an "irrigation farm" as is alleged by the deponent for the reasons already set out hereinabove. As part of the quid pro quo the Respondent allowed Namutoni to farm on at least 9,41 hectares of the Respondent's property. The remainder of the paragraph is denied.*

56. AD PARAGRAPH 22.6.3THEREOF:

56.1. *I specifically deny that Namutoni's property is an irrigation farm for the reasons set out herein. It was always in the contemplation of the parties that the pan may extend beyond the boundaries at the time when the agreement was entered into, and it is for exactly that reason that the quid pro quo of farming on the Respondent's land was offered to the Namutoni and was accepted by the Applicants.*

57. AD PARAGRAPH 22.7:

57.1. *The contents of this paragraph are a blatant lie and are denied. As is evident from Mr Vorster's report, the area of the pan that encroaches upon Namutoni's property was only 7.32 hectares on 28 January 2023. This is a mere 3,84 hectares more than the area of 3,48 hectares that was covered by the pan on 13 July 2015. This is again an indication that the deponent is prone to over- exaggeration in an effort to create atmosphere. I categorically deny that 10 hectares of Namutoni's property is encroached upon by the pan. I further deny that Namutoni's property can be classified as an "irrigation farm" for the reasons already set out above. The remainder of this paragraph is denied.*

58. AD PARAGRAPH 22.8 THEREOF:

58.1. *The contents of this paragraph are denied.*

58.2. *In amplification of the denial, the court's attention is drawn to the fact that the pumps are not installed on Namutoni's property. As is evident from what is said herein, the pumps and associated infrastructure are situated on the remaining extent of Portion 10 of the farm Modderfontein 236, Registration Division IR. It is admitted that the pumps that were installed to pump water from pan 2 to pan 3 (pan 3 to pan 4 on Mr Vorster's report) are currently inundated. It is also admitted that no water can currently be pumped between these two pans. This is for various reasons:*

58.2.1. *Pumping stopped when the pumping infrastructure situated on the remaining extent of Portion 10 of the farm Modderfontein 236 IR, was inundated during rainstorms that the area received during November and December 2022;*

58.2.2. *A result of the flooding of the pump station was that the electricity that supplied the pumps tripped, and the pumps were submerged.*

58.2.3. *The pump station is still under water and is inoperable as a result of the current water levels.*

58.2.4. *The water can, in any case, not be pumped to the other pan that is situated on the remaining extent of Portion 10 of the farm Modderfontein 236 IR, as that pan was also filled up during the rainstorms that occurred during November and December 2022. I will deal with the rainfall that the area received later in this affidavit."*

THE PERMISSION TO PUMP WASTEWATER IN THE REPLYING PAPERS

[14] In their replying affidavit (paragraphs 9 – 22 and 58 – 65.5) the applicants states as follows:

- “9. Mr Manzini has no personal knowledge of the matter, and he has never had any dealings with me or my father, Mr Thinus van Dyk, regarding the pumping of treated wastewater from the Abattoir property to the Irrigation farm.
10. In my Founding Affidavit, I explained that we dealt with Mr Chris Venter of AFGRI during 2012/2013 and that Mr Venter approached us on behalf of AFGRI with a request to allow AFGRI to pump treated wastewater from the Abattoir property to the Irrigation farm.
11. Mr Manzini responded to the applicants' version by stating that we probably met Mr Kobus Venter and not Chris Venter. According to Mr Manzini, AFGRI was represented by Mr Willem Breedts and Kobus Venter. At the time, the aforementioned gentlemen were the representatives of AFGRI who had been mandated to deal with local farmers, including the applicants, on behalf of AFGRI.
12. The applicants accept that the gentlemen who approached them was Mr Kobus Venter and not Mr Chris Venter. I made a bona fide mistake in my Founding Affidavit by recording the name of Mr Venter as Chris instead of Kobus.
13. Returning to the version put forward by Mr Manzini on behalf of AFGRI:
- 13.1. Mr Manzini stated in paragraph 56.1 of the AFGRI affidavit as follows:
- "It was always in the contemplation of the parties that the pa may extend beyond the boundaries at the time when the agreement was entered into, and it for exactly that reason that the quid pro quo of farming on the Respondent's land was offered to Namutoni and was accepted by the Applicants. "*
- 13.2. Mr Manzini states in paragraph 88.2 of the AFGRI affidavit as follows:
- "The Second Applicant currently farms at least 9,41 hectares that belong to the Respondent free of charge. It is denied that Namutoni's property is an irrigation farm for the reasons already set out above."*

14. *The applicants and I were taken by total surprise when they read the aforementioned paragraphs because we never had any dealings with Mr Manzini regarding the permission that was granted by the applicants to AFGRI to pump treated water from the Abattoir property to the Irrigation farm and because what is stated by him is just a blatant lie.*
15. *The statements prompted me and the applicants' legal team to go and look for Mr Kobus Venter and Willem Breedt who were the representatives of AFGRI at the time the applicants' decided to allow AFGRI to pump water to the Irrigation farm.*
16. *AFGRI's legal team had consultations with both gentlemen. The applicants' legal team consulted with Mr Kobus Venter on 29 February 2024 and thereafter with Mr Breedt on or about 7 March 2024. In short, they confirm that Mr Venter dealt with the applicants and reported to Mr Breedt, and Mr Venter confirms the following:*
 - 16.1. *In 2012/2013, both gentlemen were duly authorised to represent AFGRI in its dealings with local farmers in the area. At the time, Mr Venter was the engineer who assisted AFGRI with managing the water purification part of the abattoir facility, and Mr Breedt was the factory manager. Later, in 2016, Mr Venter was appointed as one of AFGRI's Managing Directors and resigned after there was a change in AFGRI's shareholding and management.*
 - 16.2. *During our interactions Mr Venter communicated with my father, Mr Thinus van Dyk and me and asked us permission for AFGRI to pump properly treated wastewater from the Abattoir property to the Irrigation farm.*
 - 16.3. *We (the applicants) agreed to allow AFGRI to pump properly treated wastewater from the Abattoir property to the pan on the Irrigation farm subject to the following conditions:*
 - 16.3.1. *The applicants could withdraw the permission given to AFGRI to pump water at any time.*

- 16.3.2. *AFGRI had to monitor and manage the quantities of water pumped to the Irrigation farm to make sure that the water did not interfere with the applicants' farming operations on the Irrigation farm in any way or manner.*
- 16.3.3. *It was specifically discussed that AFGRI would not allow the size of the water mass created by AFGRI on the Irrigation farm to increase or rise beyond the gravel road that runs around the irrigation circle in the area where the water was going to be pumped.*
- 16.3.4. *AFGRI would manage the size of the water amassed on the Irrigation Farm by using pumps to pump the water it had pumped to the Irrigation Farm to Portion 10 of the Farm Modderfontein ("the Neighbours Farm").*
- 16.3.5. *AFGRI would at all relevant times exercise their right to pump water from the Abattoir property to the Irrigation farm with due regard to the rights of the applicants in relation to the Irrigation farm and their farming operations.*
17. *The version of Mr Venter regarding what was discussed and agreed to between the applicants and AFGRI back in 2012/2013, corroborates and supports what I have already stated on behalf of the applicants in my Founding Affidavit and Mr Venter's confirmatory Affidavit is filed simultaneously with this Affidavit.*
18. *Mr Venter also confirms that there was never any quid pro quo discussed between the parties at the time the applicants gave AFGRI permission to pump treated wastewater to the Irrigation farm and that the applicants received nothing in return for allowing AFGRI to pump water from the Abattoir property to the Irrigation farm. Again, I refer the Court to the confirmatory Affidavit of Mr Venter. The Affidavit is attached and marked as annexure "RA2".*
19. *Completely separate from the permission that was granted by the applicants to AFGRI to pump treated wastewater from the Abattoir property to the Irrigation farm towards the end of 2013:*

- 19.1. *AFGRI approached my father and me with a crisis; the local municipality had run out of water. At the time, AFGRI relied on the municipality for its supply of water to operate its abattoir facility and because the municipality was unable to supply water to AFGRI its operations had grinded to a halt and it was at risk of suffering enormous damages and losses. The abattoir facility of AFGRI cannot operate without water.*
- 19.2. *Mr Venter asked us whether there was any way we could assist AFGRI by supplying it with water from the borehole, which we also use for irrigation purposes on the Irrigation Farm.*
- 19.3. *M father and I always acted reasonably and in good faith towards AFGRI and did not want AFGRI to suffer damages. I add, at that point in time, the applicants had also supplied AFGRI with thousands of chickens to slaughter and sell to retailers.*
- 19.4. *We agreed to allow AFGRI to build and connect a second pipeline between the Abattoir and the borehole situated on the Irrigation farm and draw water from the borehole to enable AFGRI to operate the abattoir facility. The situation lasted for a couple of months while AFGRI got drillers to drill for water on its property to sink a borehole. AFGRI eventually found water and stopped pumping water from the borehole on the Irrigation farm to the abattoir facility.*
- 19.5. *As a sign of its gratitude, Mr Venter advised the applicants that they could plant about 9 hectares of arable land on the abattoir property. There was no agreement concluded between the parties regarding the applicants' right to plant the 9 hectares of arable land. AFGRI just granted the applicants permission to plant the arable land until such time as it had decided otherwise.*
- 19.6. *The applicants planted the 9 hectares for about three seasons, and AFGRI withdrew the permission that was granted to the applicants. The applicants stopped planting the 9 hectares on the Abbatoir property about 2016 and the lands on the abattoir property are now*

being planted by Mr Van Rooyen. Mr van Rooyen's confirmatory Affidavit is attached and marked as annexure "RA3".

- 19.7 *The applicants are not planting the 9 hectares of arable land on AFGRI's property, and Mr Manzini is being dishonest in his Opposing Affidavit, where he states that the lands are currently being planted by the applicants or SM. Mr Mazini lied about the terms of the agreement and about AFGRI planting the 9 hectares of arable land in an attempt to win the case for AFGRI.*
20. *At this juncture, I refer the Court to the confirmatory Affidavit of Mr Venter who confirms that the planting of the 9 hectares was a "completely separate deal" and had nothing to do with the permission that was granted to AFGRI to pump treated wastewater from the Abattoir property to the irrigation farm.*
21. *I also obtained a Confirmatory Affidavit of Mr Van Rooyen, who confirms that he has been planting arable land on the Abattoir property with permission from AFGRI. The Confirmatory Affidavit of Mr Van Rooyen is already attached.*
22. *Mr Manzini's false version effectively destroys AFGRI's entire case because it is beyond dispute that the applicants were, as they have done, entitled to withdraw the permission granted to AFGRI to pump treated wastewater from the Abattoir property to the Irrigation farm and that should be the end of the matter."*

"58. AD PARAGRAPH 40:

- 58.1. *The irrigation farm falls within the upper regions of the Quaternary Catchment C21 D in the Vaal Primary Catchment Group.*
- 58.2. *The Irrigation farm is a depressional wetland area which connects with the Blesbok Spruit.*
- 58.3. *With regard to the applicants' right to use water on the Irrigation farm for irrigation purposes, I refer the Court to what I have said.*

59. AD PARAGRAPH 42:

- 59.1. *The applicants do not know when exactly AFGRI started expanding the abattoir facility. The applicants were only engaged about the expansion in 2012/2013.*
- 59.2. *Between the period 2013 to 2015, the size of the water amassed on the Irrigation farm increased because of AFGRI pumping wastewater to the Irrigation farm.*
- 59.3. *From 2015 to 2023, the size of the wastewater amassed on the Irrigation farm increased even more because of AFGRI pumping even more wastewater to the Irrigation farm.*
- 59.4. *The size of the water amassed on the Irrigation farm is not reducing as AFGRI will have the Court believe. That statement by Mr Manzini is just not true.*
- 59.5. *The pumps next to the water, which were used by AFGRI to manage water levels, are still submerged.*
60. *AD PARAGRAPH 44:*
 - 60.1. *It is correct that the person who engaged the applicants was not Chris Venter but by Mr Kobus Venter.*
 - 60.2. *Mr Kobus Venter reported to Mr Willem Breedts, who was the factory manager at the time.*
 - 60.3. *Mr Kobus Venter is the one who dealt with the applicants and who approached my father and me for permission to pump treated wastewater from the Abattoir property to the Irrigation farm.*
 - 60.4. *The applicants were entitled to withdraw the permission that was given to AFGRI to pump treated wastewater from the Abattoir property to the Irrigation farm and at present AFGRI is unlawfully pumping polluted wastewater to the Irrigation farm.*
61. *AD PARAGRAPH 47:*
 - 61.1. *Mr Manzini is being dishonest in the paragraph under reply because:*

- 61.1.1. *He is acutely aware that he was never personally involved in any of the negotiations between AFGRI and the applicants regarding the pumping of treated wastewater from the Abattoir property to the Irrigation farm.*
- 61.1.2. *Without having any knowledge of the facts, Mr Manzini states that the applicants plant about 9.4 hectares of arable land on the Abattoir property, free of charge, in exchange for allowing AFGRI to pump wastewater to the Irrigation farm.*
- 61.1.3. *Mr Manzini is being dishonest in the paragraph under reply because the true position is that the applicants are not planting any land on the Abattoir property. The land is being planted by Mr Van Rooyen.*
- 61.1.4. *The planting of the 9 hectares had nothing to do with the permission that was granted by the applicants to AFGRI to pump treated wastewater to the Irrigation farm. The permission to pump treated wastewater and the planting of the 9 hectares have no relation to each other.*
- 61.2. *I repeat what I said in the exposition above regarding the permission that was granted by the applicants to AFGRI to pump treated wastewater from the Abattoir property to the Irrigation farm and how it came about that the applicants planted crops on the arable land which belongs to AFGRI.*
- 62. *AD PARAGRAPH 49:*
 - 62.1. *The Irrigation farm is correctly categorised as an Irrigation farm.*
 - 62.2. *AFGRI failed to manage the quantities of wastewater pumped from the Abattoir property to the Irrigation farm.*
 - 62.3. *This is borne out by the following:*
 - 62.3.1. *Before the abattoir facility was expanded, there was no permanent water mass in the area where the pan is now on the Irrigation farm.*
 - 62.3.2. *After AFGRI started pumping wastewater to the Irrigation farm, the size of the water amassed on the Irrigation farm increased over the*

years until a portion of the arable land on the Irrigation farm and pumps next to the water was submerged.

- 62.4. *As explained in my Founding Affidavit, AFGRI pumped so much water to the Irrigation farm that it created a permanent pan or dam on the Irrigation farm."*

[15] As mentioned in its replying affidavit, the applicants annexed thereto an affidavit of Mr Venter who represented Afgri during 2012 when it was granted permission to pump wastewater from Portion 8. Paragraphs 3.1 – 3.12 of Mr Venter's affidavit read as follows:

- "3.1. I was duly authorised to represent AFGRI in its dealings with local farmers.*
- 3.2. In 2012/2013 I was the engineer who assisted AFGRI with manging the water purification part of the abattoir which operates from the property known as Portion 10 of the farm Modderfontein ("the Abattoir property"). Mr Breedt was the factory manager and I reported to him.*
- 3.3. In 2016, I was appointed as AFGRI's Technical and Biological Executive, and I resigned after there was a change in AFGRI's shareholding and management.*
- 3.4. During my interactions with the applicants, I communicated with Mr Tinus van Dyk and his son, Mr Stephanus Martinus van Dyk. About 2012/2013 I asked the gentleman permission for AFGRI to pump treated wastewater from the Abattoir to property on Portion 35 of the farm Modderfontein ("the Irrigation farm").*
- 3.5. The applicants duly represented and authorised by the aforesaid gentleman agreed to allow AFGRI to pump properly treated wastewater from the Abattoir property to the Irrigation farm subject to the following conditions:*

- 3.5.1. *The applicants could withdraw the permission given to AFGRI to pump water at any time.*
- 3.5.2. *AFGRI had to monitor and manage the quantities of water pumped to the Irrigation farm to make sure that the water does not interfere with the applicants' farming operations on the Irrigation farm.*
- 3.5.3. *AFGRI will not allow the size of the water mass created by AFGRI on the Irrigation farm to increase or rise beyond the gravel road that runs around the irrigation circle on the Irrigation farm.*
- 3.5.4. *AFGRI would manage the size of the water amassed on the Irrigation Farm by using pumps to pump the water it had pumped to the Irrigation Farm from the Irrigation Farm to Portion 10 of the Farm Modderfontein.*
- 3.5.5. *AFGRI would at all relevant times exercise their right to pump water from the Abattoir property to the Irrigation farm with due regard to the rights of the applicants in relation to the Irrigation farm and their farming operations.*
- 3.6. *There was never any quid pro quo discussed between the parties at the time the applicants gave AFGRI permission to pump treated wastewater to the Irrigation farm. The applicants received nothing in return for allowing AFGRI to pump wastewater from the Abattoir property to the Irrigation farm.*
- 3.7. *Towards the end of 2013, I on behalf AFGRI approached Mr Van Dyk (snr) to assist AFGRI with water because the municipality became unable to supply water to the Abattoir property. AFGRI's abattoir facility cannot operate at all without water.*
- 3.8. *Mr Venter asked us whether there was any way we could assist AFGRI by supplying it with water from the borehole which we also use for irrigation purposes on the Irrigation Farm.*
- 3.9. *The applicants agreed to allow AFGRI connect pipeline to the applicants' borehole on the Irrigation farm and to draw water from the borehole to*

use to operate the abattoir facility. The situation lasted for a couple of months whilst AFGRI got drillers to drill for underground water for purposes of sinking a borehole. AFGRI eventually found water and stopped pumping water from the borehole on the Irrigation farm to the abattoir facility.

- 3.10. *As a sign of its gratitude, I advised the applicants that they could plant about 9.4 hectares of arable on the Abattoir property. There was no agreement concluded between the parties regarding the applicants' right to plant the 9 hectares of arable land on the Abattoir property. AFGRI just granted the applicants permission to plant the arable lands until such time as it had decided otherwise.*
- 3.11. *The second applicant ("SM") planted the 9 hectares for about three seasons whereafter AFGRI withdrew the permission that was granted to the applicants.*
- 3.12. *The applicants stopped planting the 9 hectares on the Abattoir property about 2016."*

APPLICATION OF THE LAW TO THE ISSUE OF PERMISSION TO PUMP THE WASTEWATER

[16] The evidence indicates that the applicants permitted Afgri to pump wastewater from its abattoir into the existing pan on Portion 35 at its request, as stated by Mr Venter. This consent could be revoked at any time. The applicants have communicated their withdrawal of permission, and there is no genuine dispute of fact on this point that cannot be resolved in these proceedings. Mr Manzini's denials and statements to the contrary are without substance and nothing more than assertions which have no evidentiary value

in civil proceedings of the kind afoot here.²¹ On the facts and in law the applicants were entitled to revoke the permission and they did.

[17] Afgri objects to the length of the replying affidavit. This affidavit is extensive because the challenge presented in the answering affidavit is elaborate, contrived, and materially false in several respects. It includes evidence that refutes Afgri's unmeritorious challenges, and the claim that it should be struck out must inevitably fail. The dispute raised by Mr Manzini, who swore to Afgri's answering affidavit, regarding the consent under which Afgri pumps the water and the conditions attached to it, is neither bona fide nor material. Mr Manzini asserts under oath that he has personal knowledge of the facts he presents. However, it later emerges from Mr Venter's affidavit that Mr Manzini either lacked personal knowledge or, if he possessed it, presented facts and devised a challenge in the High Court proceedings, knowing those facts to be incorrect. In my view Afgri's challenges on the facts and law in this context are untenable and must fall to be rejected. Afgri's approach to the matter affects the issue of costs, as recorded below.

THE LAW ON EXPERT EVIDENCE IN CIVIL LITIGATION

[18] Afgri relies on the expert testimony of Mr. Vorster, a "Remote Sensing and Value-Added Products Technologist," attached to its answering affidavit. I consider the expert evidence of Mr Vorster against the following

²¹ See: *South Africa Post Office v De Lacy* 2009 (5) SA 255 (SCA) at [37]

duties and responsibilities of expert witnesses recorded by Wallis JA in *PriceWaterHouseCoopers*²² at [97] – [99]:

"Opinion evidence is admissible „when the Court can receive “appreciable help” from that witness on the particular issue”. That will be when:

“... by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.”

As to the nature of an expert’s opinion, in the same case, Wessels JA said:

“... an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”

[98] Courts in this and other jurisdictions have experienced problems with expert witnesses, sometimes unflatteringly described as “hired guns”. In The Ikarian Reefer Cresswell J set out certain duties that an expert witness should observe when giving evidence. Pertinent to the evidence of Mr Collett in this case are the following:

“The duties and responsibilities of expert witnesses in civil cases include the following:

- 1. Expert evidence presented to the Court should be and should be seen to be the independent product of the expert uninfluenced as to form or content by the exigencies of litigation ...*
- 2. An expert witness should provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within his expertise ... An expert witness in the High Court should never assume the role of advocate.*
- 3. An expert witness should state the facts or assumptions on which his opinion is based. He should not omit to consider material facts which detract from his concluded opinion. . . .*

²² *PriceWaterhouseCoopers Inc and Others v National Potato Co-Operative Ltd and another* ZASCA 2 (4 March 2015) para [97]

4. An expert witness should make it clear when a particular question or issue falls outside his expertise."

These principles echo the point made by Diemont JA in Stock that:

"An expert ... must be made to understand that he is there to assist the Court. If he is to be helpful he must be neutral. The evidence of such a witness is of little value where he, or she, is partisan and consistently asserts the cause of the party who calls him. I may add that when it comes to assessing the credibility of such a witness, this Court can test his reasoning and is accordingly to that extent in as good a position as the trial Court was."

[99] Lastly when dealing with the approach to an expert witness I have found helpful the following passage from the judgment of Justice Marie St-Pierre in Widdrington:

"Legal principles and tools to assess credibility and reliability

[326] "Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist"

[327] "As long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more an expert relies on facts not in evidence, the weight given to his opinion will diminish".

[328] An opinion based on facts not in evidence has no value for the Court.

[329] With respect to its probative value, the testimony of an expert is considered in the same manner as the testimony of an ordinary witness. The Court is not bound by the expert witness's opinion.

[330] An expert witness's objectivity and the credibility of his opinions may be called into question, namely, where he or she:

- accepts to perform his or her mandate in a restricted manner;
- presents a product influenced as to form or content by the exigencies of litigation;
- shows a lack of independence or a bias;
- has an interest in the outcome of the litigation, either because of a relationship with the party that retained his or her services or otherwise;
- advocates the position of the party that retained his or her services; or
- selectively examines only the evidence that supports his or her conclusions or accepts to examine only the evidence provided by the party that retained his or her services."

THE EXPERT EVIDENCE OF MR VORSTER

[19] The report of Mr Vorster (annexure AA3 at F118 of the Caselines Record) is dated November 2023 and records under the heading "Introduction" the following:

"1 Introduction

1.1 The South African National Space Agency (SANSA) as represented by Willem Adriaan Vorster (Remote Sensing Specialist, with specific field of expertise in satellite image processing) was request to assist in a field irrigation investigation by means of using available satellite imagery and satellite data.

1.2 The incident, which is the subject matter of this water irrigation investigation, occurred on the farm Modderfontein 236, portions 08 (Daybreak Farms), in the Sundra area in Mpumalanga, and the specific request was to establish with the aid of satellite imagery whether the area was irrigate within the qualifying periods between October 1996 and 1 October 1998."

[20] In paragraph 1.3 of his affidavit Mr Vorster states, with reference to his report of November 2023 that :

"31. I confirm that I conducted a satellite image-based assessment and analysis of field irrigation and water bodies on the Remaining Extent of Portion 10, Portion 8 and on Portion 35 (a Portion of Portion 9) of the Farm Modderfontein 236, Registration Division IR, titled Assessment and Analysis of Field Irrigation Near Sundra that is dated November 2023."

APPLICATION OF THE LAW TO THE EXPERT EVIDENCE PRESENTED BY AFGRI

[21] In my view the evidence of Mr Vorster is of very little if any evidentiary value. He is not to be blamed for that. It is from his affidavit and report not clear that his report and affidavit have been formulated while mindful of his obligations mentioned in the quoted passages from PriceWaterhouseCoopers. Alternative methods of disposal of Afgri's wastewater are not considered by Mr Vorster. He was clearly not briefed or mandated to provide any such expert testimony as interpreter of satellite images. I accept Mr Vorster's testimony that not more than 3.9 hectares of the 170 hectares of Portion 35 becomes encroached by water from the pan. That amounts to just over 2% of the surface of Portion 35 which begs the question: How much more surface must the applicants be expected to sacrifice for the convenience and financial benefit of Afgri? I am of the view it should not be compelled to sacrifice any.

AFGRI'S SUBMISSIONS WITH REFERENCE TO THE NATIONAL WATER ACT 36 OF 1998 AND ITS COMMERCIAL STATUS

[22] In its answering affidavit Afgri raises a plethora of legislative provisions. Afgri submits with reference to those provisions that "*When following the triad of language, context and purpose it is submitted that the pans are not water resources for the purposes of the NWA.*" The order granted below is granted mindful of the interpretation offered and submitted by Afgri.

[23] Afgri refers to its shareholding, its participation in the provision of food and its contractual obligations to supply meat to retailers and the enormity of the investment in the facility on Portion 8. I am mindful of those allegations but am of the view that it does not outweigh the right of the applicants to exercise their ownership of Portion 35 and their rights attendant thereto.

THE REQUIREMENTS FOR A FINAL INTERDICT

[24] An order for permanent cessation of the wastewater pumping may only be granted if it is shown that the applicants have a clear right according to substantive law shown on the evidence to exist on a balance of probability; that Afgri commits an act of interference on a continuing basis; and the absence of any alternative legal remedy available to the applicants.²³

JUDICIAL DISCRETION

[25] Once an applicant has satisfied the requirements for final interdict, judicial discretion only exists on a limited aspect, namely the availability of an adequate alternative remedy. If a final interdict should issue, a court has a discretion to order suspension or to order deferment of the interdict where the circumstances of the case outweighs an applicant's right to immediate cessation of the infringement.²⁴ The evidence before me shows that the applicants have no adequate or alternative remedy other than the interdictory relief they seek. Sections 24 and 27 of the Constitution²⁵ and the regulatory remit the concept of public trusteeship in natural resources imposed over the past decades require, in my view, that Afgri be afforded two months to ensure that its wastewater is managed and provided for. I impose this deferment, not for the benefit of Afgri, but for the common good. Afgri has had the benefit and luxury to dispose of its wastewater for more than a decade free of charge. Afgri's right to pump its wastewater to the pan on Portion 10 since termination of the permission it had,

²³ LAWSA Vol 43 par 505 - 506

²⁴ *Laskey and Another v Showzone CC and Others* 2007 (2) SA 48 (C) at [40] – [47]

²⁵ The Constitution of the Republic of South Africa of 1996 read with section 3 of the National Water Act, 36 of 1998

with the resulted encroachment on Portion 35, continued for a period just shy of two years. Under the circumstances and should Afgri for any reason whatsoever be unable to dispose of its wastewater within the two month period mentioned in the executive part of this judgment, the interdictory relief shall take effect as stated in the order.

COSTS

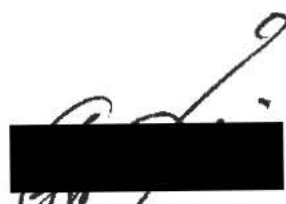
[26] Afgri's opposition to the application is unreasonable, spurious and at variance with what one would expect from a reasonable neighbour who had been enjoying and still enjoys the opportunity to dispose of its wastewater yielded by a commercial activity. In my view judicial displeasure should be expressed with the appropriate cost order and the applicants should be indemnified in respect of the costs they had to incur to obtain the relief on the appropriate scale of costs. I, therefore, exercise my discretion in this regard to award the costs of this application to the applicants on a scale as between attorney and client.

THE ORDER

Under the circumstances I make the following order:

1. The respondent is interdicted and restrained from pumping water from the wastewater treatment plant and pond on the property known as Portion 8 of the Farm Modderfontein 236, Registration Division IR, Mpumalanga Province to the first applicant's property known as Portion 35 (a portion of portion 9) of the farm Modderfontein, 236, Registration Division I.R., Mpumalanga Province.

2. The order set out in paragraph 1 above shall become effective after 2 months from date of this order to allow the respondent time to arrange its affairs to dispose of the wastewater it produces on its property mentioned in paragraph 1 above.
3. The respondent shall pay the applicants' costs on a scale as between attorney and client.



H F JACOBS
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is on the 7TH of MARCH 2025 at 14h00.

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