

53/98

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Case No: 265/96

In the matter between

L W WILLIAMS

Appellant

and

J M HARRIS

Respondent

CORAM:

SMALBERGER, NIENABER, MARAIS, SCOTT *et*
PLEWMAN JJA

DATE HEARD: 5 March 1998

DELIVERED: 29 May 1998

JUDGMENT

MARAIS JA

MARAIS JA:

Who chooses to ride a tiger will find it difficult to dismount it unscathed. Much the same can be said of the decision of the parties to this appeal to indulge in litigation rather than settle their differences in a less acrimonious and costly way. A spat between neighbours about a boundary line, the source of water allegedly finding its way onto the property of one of them, and some overhanging ivy has generated a record on appeal of 501 pages. A petition in which leave to appeal was sought from the Chief Justice generated a further 400 pages. A further petition in which leave to place further evidence before the court was sought has spawned another 378 pages. All this expense has been incurred in an attempt to resolve by litigation issues which would have lent themselves to relatively easy resolution if the parties had at the outset joined in appointing and allowing appropriate independent experts to do on both

properties what they regarded as necessary in order to arrive at the truth. Instead, they have fought a long and costly battle in the courts. It is not possible to say who was to blame for no settlement of the dispute having been reached. However, it is now too late for tears.

Appellant is the registered owner of his home at 15 Hamilton Avenue, Craighall Park, Johannesburg which is situated on Erf 561 Craighall Park Township. Respondent is his neighbour and the registered owner of her home at 11A Hamilton Avenue which is situated on Portion 1 of Erf 557 Craighall Park Township. Appellant's property adjoins respondent's property on the southern boundary line of the latter. After some preliminary skirmishing by way of exchanges of correspondence, respondent launched motion proceedings against appellant in which she sought first, an order directing appellant to remove a steel wire mesh fence approximately six to seven metres in length which he had allegedly erected "some 550 mm into (respondent's)

property ----- and which intrudes some 550 mm. into (respondent's) property on the southern side thereof"; secondly, an order directing appellant "to restore a wooden splitpole fence on the boundary line between (respondent's) property and his, being the boundary line demarcated as D - C on the Land Surveyor's Diagram A 6059/1952"; thirdly, an order directing appellant to give her "*vacua possessio* of her property"; fourthly, an order that appellant remove ivy allegedly protruding into her property and keep the foliage in a proper and reasonable state; and fifthly, an order that appellant pay the costs of the application on the scale as between attorney and own client.

The case which respondent initially sought to make in the supporting affidavits was that there existed on the boundary between her property and appellant's property (shown as line D - C on the relevant surveyor's diagram) a wooden splitpole fence. Ivy planted on appellant's side of the fence allegedly covered the entire fence and protruded into and overhung

her property. It was alleged that flooding of outbuildings, converted into a cottage and a flat which respondent built close to the southern boundary in 1989 started to occur in 1994 and that the cause of the flooding was the diversion onto her property of rainwater from appellant's property. That diversion was said to have been caused by the removal of six to seven metres of the wooden splitpole fence on the boundary line and its replacement by a wire mesh fence which encroached some 550 mm onto her property. It was also alleged that the ground level of appellant's property had been raised in order to erect the fence and that that "had caused the natural flow of water to be diverted onto the outbuildings and flat". The protruding ivy was said to prevent access by respondent to the area between the wall of her outbuildings and flat and the boundary and it was alleged that appellant had refused to control the growth of ivy on the fence.

Before appellant could file his answering affidavit respondent filed

a supplementary affidavit in which she jettisoned most of the allegations she had made in connection with the diversion of rainwater onto her property and set up an entirely new case. The case now made was that respondent's property is situate below that of appellant and that "some of the stormwater and spring water falling on the (appellant's) land flows from a higher level to that of (respondent's) property and therefore flows onto (respondent's) property". It was alleged that "(w)ater flows freely off the (appellant's) land from approximately a south-easterly direction to a northerly direction and flows onto (respondent's) land". The erection of a dwelling house and other structures on appellant's property was said to have altered the natural arrangement of the soil and prevented the rainwater from flowing as it used to flow before the properties were developed.

Respondent said that since commencing proceedings she had become aware of a servitude over her property registered in 1954 in favour of

appellant's property. I shall quote only those parts of the servitude which are material.

"AND WHEREAS by reason of the contour of the land the storm and spring water from the property of the Grantee flows across the property of the Grantor;

AND WHEREAS it is expedient that facilities should be made for the drainage of the storm and spring water flowing from the Grantee's property over the Grantor's property along a specified route;

NOW THEREFORE THESE PRESENTS WITNESS:

The Grantor as the registered owner for the time being of the said Portion 1 of the said Lot No 557, situate in the TOWNSHIP OF CRAIGHALL PARK, hereby gives and grants to the Grantee as the registered owner for the time being of the said Lot No 561 situate in the TOWNSHIP OF CRAIGHALL PARK, who hereby accepts a servitude in perpetuity of drainage of storm and spring water from the Grantee's property over the Grantor's property along the route and subject to the conditions hereinafter set out.

1. THE servitude shall comprise a strip of ground two (2) feet wide running along and parallel to the whole length of the SOUTHERN boundary of the Grantor's property, and the Grantee as the registered owner for the time being of the said Lot No 561, TOWNSHIP OF CRAIGHALL PARK shall at all times be entitled and allowed to lead the storm and spring water from Lot 561, TOWNSHIP OF CRAIGHALL PARK over the said

Portion 1 of the said Lot 557, TOWNSHIP OF CRAIGHALL PARK along the strip of ground herein referred to into the Municipal Drain in Hamilton Avenue by means of the said drain hereinafter referred to.

2. THE Grantee as the registered owner for the time being of the said Lot No 561, TOWNSHIP OF CRAIGHALL PARK or his nominee shall have the right at all times to enter upon the premises of the Grantor for the purpose solely of building, repairing or maintaining a suitable drain whether it be an open furrow, either lined with brick or concrete or a pipe either buried or upon the surface of the ground comprising the servitude or such other system of drainage AS THE GRANTOR IN HIS DISCRETION MAY DECIDE UPON.
3. THAT the consideration payable by the Grantee to the Grantor in respect of the Servitude hereby granted shall be the sum of 150,00 (ONE HUNDRED AND FIFTY POUNDS) which shall be paid on the signing of this Deed of Servitude.
4. THAT the cost of preparing and laying and from time to time maintaining the said servitude drain shall be borne by the Grantee hereto who shall likewise bear the costs of preparing and registering this Agreement.
5. The Grantor and the Grantee agree that this servitude shall be registered against the Title Deeds of the properties affected thereby and they both contract for themselves, their heirs, executors, administrators or successors in title to their respective properties."

The distance of two feet referred to in clause 1 is equivalent to 0.63 metres (630 mm). Respondent alleged that her earlier allegation that the wire mesh fence had been erected some 550 mm closer to her property than the splitpole fence had been, was incorrect and based upon an "assumption" founded on advice she had been given by Mr Baikie, a land surveyor she had engaged. She alleged that Baikie had since then had an opportunity of inspecting respondent's property as a consequence of appellant commissioning him to survey the common cadastral boundary between the properties, and that he had ascertained that the existing boundary line does not accord with the cadastral boundary as measured and surveyed by the Surveyor General. That section of the existing boundary line (the fence line) which adjoined respondent's outbuildings was found to be 450 mm closer to respondent's outbuildings at their western end, and 140 mm closer to her outbuildings at their eastern end, than it should have been. I shall refer henceforth to these outbuildings as the cottage.

Respondent alleged that from time to time stormwater emanating from appellant's property flowed beyond the area to which the servitude relates and dammed up against the external wall of the cottage. She asserted that it was this water which was responsible for the flooding of the cottage and the dampness of its walls. She complained that appellant's failure to build a suitable drain as envisaged in clause 2 of the agreement of servitude was the cause of the problem. In an amended notice of motion respondent sought orders (corrected in terms of a concession made in argument) in the following terms:

- "1. That the (appellant) be interdicted and restrained from allowing stormwater and spring water flowing from his property, being Erf 561 Craighall Park Township, corresponding to 15 Hamilton Road, onto the (respondent's) property being Erf 557 Craighall Park Township, Johannesburg, corresponding to 11A Hamilton Road, Craighall Park, Johannesburg, beyond the servitude in favour of the (appellant) as contained in the agreement of servitude being Annexure "T" attached to the (respondent's) Affidavit.
2. Directing that the (appellant) build a suitable drain, whether it be an open furrow, either lined with brick or concrete, or a pipe either buried or upon the surface of the ground, comprising the servitude or such other system of drainage, as the (respondent) in her discretion, may decide upon in the servitude, as recorded on the Surveyor General's Plan being S.G. No. A 6058/52 which is attached to the (respondent's)

Affidavit as Annexure "A".

3. Directing that the (appellant) perform such works being those referred to in paragraph 2 above within a period of two months of the grant of this Order, alternatively within such period as this Honourable Court deems meet.
4. Directing that the (appellant) forthwith remove and cut back the foliage which protrudes and encroaches on the (respondent's) property, with particular reference to the area behind the cottage on the southern portion of the (respondent's) property, as illustrated on the sketch plan being Annexure "Q" attached to the (respondent's) affidavit.
5. Directing that the (appellant) pay the costs of this application on the scale as between attorney and own client, alternatively on the scale as between party and party."

I pause here to observe that it was implicit in respondent's case, and indeed its very foundation, that appellant had no right to discharge stormwater onto her property other than by virtue of the circumscribed right conferred upon him by the agreement or servitude.

Appellant responded to the application in this way. He criticised respondent for having set up the complaints originally raised by her without being able to substantiate them. Although respondent no longer sought in these

proceedings relocation of the fence as a consequence of an alleged encroachment by appellant when re-erecting portion of it, appellant dealt with the issue. He denied that when the relevant portion of the fence was re-erected it was re-erected closer to respondent's cottage than it had previously been. He maintained that the fence was re-erected in the same position as that in which it had always been, that the fence had been regarded for more than 30 years as demarcating the boundary of their respective erven, but conceded that "as now appears common cause between the parties, such boundary does not coincide with the boundary as shown on the Surveyor General's diagram".

Shorn of detail which tends to cloud rather than clarify the issues, appellant's further response may be summarised thus.

The stormwater complaint:

Appellant denied that any surface water flowing from his property onto respondent's property "exceeds the servitude" or resulted in the damming up of

water and contended that respondent's allegation that it did, had not been substantiated. He denied that water flows off his property onto respondent's property "to any significant degree". He pointed to the shift in respondent's stance regarding the cause of the alleged problem and attributed to her a new contention, namely, that building development on appellant's property and other erven in the vicinity had resulted in a situation in which appellant's "common law rights to discharge the natural flow of water over her land no longer apply". He alleged that the water flow had changed since the servitude was granted as a consequence of the construction of homes "higher up with hard drainage surfaces, drains, fences and swimming pools affecting water flows and seepage". He also drew attention to other physical features upon and adjacent to respondent's property which he contended could have played a causative role in respondent's problems and for which he was not responsible.

In support of his denial that any surface water from his property

was flowing beyond the area provided for in the servitude or indeed beyond the fence, appellant produced certain photographs and annexed: a letter and sketch from one Thompson, a damp proofing specialist; an affidavit and sketch by one Brown, a civil engineer; and an affidavit and sketches by one Armstrong, a certificated mine surveyor. Appellant also referred to what he regarded as an irresolvable dispute of fact relating to the correct position of the cadastral boundary. That, so he said, precluded the court from fixing the area over which the servitude is to exist and disabled it from finding whether any water flow exceeded the area of the servitude.

The demand for a drain:

The first answer was that respondent cannot say that a drain has not been built because the servitude envisages the drain being buried and, for all respondent knows, appellant's predecessor may have built one. A photograph of an underground drain was annexed in support of the suggestion. The next

answer was that appellant cannot be compelled by respondent to exercise his servitotal right and to build a drain if one has not yet been built.

The protruding ivy:

Appellant sought to characterise the ivy as a "party wall" in so far as it constituted "a mutual boundary" between the properties and contended that respondent was "obliged to maintain her side". He denied that the ivy protrudes substantially, that it is unsightly, and that it prevents respondent from gaining access to the area between the southern wall of her cottage and the fence separating the two properties. Any restriction of access he attributed to the building extensions undertaken some years before by respondent, and to certain walls on respondent's property. He said that it would be "physically impossible" to cut the protruding ivy from his side of the boundary fence without "totally destroying" the boundary fence. He said that "given access", and had he been asked to do so, he would have co-operated in trimming the ivy

even, although it formed a mutual boundary. Some of the offending ivy had already been cut (where accessible) by his wife "in an attempt to defuse a situation which had clearly got out of hand". Respondent had also cut some of the offending ivy away. Appellant alleged that he was "never properly or formally approached simply to cut the ivy" but coupled this with a denial that he was obliged to do so.

The special costs order:

Appellant denied that there was any justification for such an order. He alleged that, in launching the proceedings, respondent had acted precipitately and in a high-handed manner, and without proper investigation of the issues. He suggested that the reason for her "haste to have (him) capitulate to her demands" was that he had objected to certain extensions which respondent proposed to make to the buildings next to her southern boundary.

Respondent thereupon filed a lengthy replying affidavit. Appellant

was thereafter permitted without objection from respondent to file an affidavit by one Midgley, professor *emeritus* of civil engineering of the University of the Witwatersrand, in which he set about attempting to show that the development of appellant's property has greatly reduced the quantity of rainwater that would normally have flowed onto respondent's property if such development had not taken place.

The court *a quo* (Coetzee J) granted respondent the relief she sought and ordered appellant to pay the costs on the scale of attorney and own client. Respondent was ordered to pay the wasted costs occasioned by the amendment of the notice of motion and the filing of a further founding affidavit.

The judgment is reported - 1998 (2) SA 263 (W). With the leave of this court appellant appeals against the granting of that relief and the order of costs made against him.

The basis upon which the substantive relief claimed was granted,

was broadly the following. The properties are urban tenements in an urban area

the original contours of which have been disturbed by building and other

structural development to such an extent that whatever right may have existed

historically at common law entitling the owner of higher lying land to allow the

water from his land to flow onto another's lower lying land had come to an end.

The sole source of any right which appellant has to allow rainwater falling upon

his property to flow onto respondent's property is the registered servitude. If

appellant intends to avail himself of his servitutorial right, he is obliged to provide

the drain contemplated by the servitude, and is also obliged not to allow water

from his property to flow beyond the area demarcated in the servitude. Upon a

proper analysis of the affidavits there was no real dispute as to whether or not

rainwater from appellant's land had flowed or would flow onto respondent's

land, or as to whether it had flowed or would flow beyond the servitutorial area.

The volume was irrelevant.

The drain required by the servitude had not been provided. If a certain drain which was found was indeed a drain installed in purported compliance with the servitude, it was not an adequate drain for it failed to restrict water emanating from appellant's land to the servituted area.

As for the ivy, despite the removal of some of it by appellant since the institution of the proceedings, there remained a lot of "overgrown foliage" to which respondent could not gain access in order to remove it. Appellant had neither tendered to remove the offending ivy nor to allow respondent access to his property to enable her to remove it. In the circumstances respondent was entitled to an order compelling appellant to remove the offending foliage.

The motivation for the special costs order granted by the court *a quo* was based upon the manner in which appellant conducted himself while this litigation was in progress and was not related to his conduct prior to the commencement of litigation.

Counsel for appellant's contentions were these.

The stormwater complaint:

Drawing upon respondent's original, speculative, and subsequently withdrawn allegations as to the origin and cause of the flow of water about which she complained, he submitted that her substituted allegations were equally speculative and no more deserving of credence. She had not actually witnessed water flowing onto her property from appellant's property and was therefore in no position to compare any such flow of water with respect to its route, velocity and volume, with what it was or might have been before development of the erven occurred. The consulting engineer, one Lines, who deposed to an affidavit in support of respondent's case, had made the bald and unmotivated assertion that stormwater flowing off appellant's property dams up against the southern external wall of respondent's cottage and is causing damage to the internal finishes. His further affidavit (filed in reply to appellant's

answering affidavits) took the matter no further. It showed no more than that it was theoretically possible that water could flow from appellant's to respondent's property and failed altogether to address the question of whether any such water would flow beyond the servitotal area.

Counsel emphasised that respondent was seeking final relief in motion proceedings and contended that all the key allegations made in support of respondent's case were hotly disputed and, at worst for appellant, should not have been accepted but referred to trial. (I interpolate here that neither party asked the court *a quo* to order the hearing of oral evidence.) At best for appellant, the application should have been dismissed. He submitted that the resolution of the issues was complicated yet further by the existence of a dispute as to the precise location of the correct boundary between the two properties. That dispute would fall to be resolved in other pending trial proceedings in which encroachment was the issue. It was argued that the court *a quo* had

adopted too simplistic an approach towards both the factual and the legal issues, and that it had wrongly characterised as common cause, or as not seriously challenged, a number of allegations by respondent which were in dispute. It was said that it had misunderstood the import of some of the affidavits filed by appellant and unjustifiably extracted from them concessions and admissions which had not in fact been made. Finally, and somewhat laconically, it was submitted that "(I)n any event, the appellant had for many years put his land to its normal use". The sole reference to authority for this proposition was the case of Barklie v Bridle 1956 (2) SA 103 (SR) at 108 A - C.

The demand for a drain:

The dispute of fact as to whether or not a suitable drain had been provided by a predecessor in title was said to be largely irrelevant because appellant was under no obligation to provide or maintain such a drain. The court *a quo* was said to have been wrong in saying "The fact that a suitable drain

has to be constructed is common cause". In the alternative, it was contended that the order granted in this respect is "so vague and uncertain" that it is incapable of implementation and should not have been granted.

The protruding ivy:

Here again it was argued that there were irresolvable disputes of fact which were not capable of being resolved against appellant in motion proceedings. It was contended that "on the respondent's own approach" there was a dispute which was the subject of a pending trial action as to the correct location of the cadastral boundary between the properties and that, if respondent is correct in alleging that the entire fence encroaches upon her property, the "overwhelming probability" is that the ivy is situated on her own property. Even if there remained, after the trimming which had taken place since the commencement of proceedings, some areas in which there was protruding ("overgrown") ivy, there was more than ample room for respondent to gain

access to it from the western side and to trim it herself.

The special costs order:

It was argued that the court *a quo* had been unduly critical of appellant's behaviour with regard to the conduct of the litigation and that respondent's own conduct had not been beyond reproach.

I turn to consider the contentions raised. Generally speaking, it is of course trite that where final relief is sought in motion proceedings, and the respondent seriously disputes allegations proof of which is critical to the applicant's success, the applicant cannot be granted the relief sought. It is no less trite that where there is no real dispute, in the sense that formalistic denials which may have been entered by the respondent are more apparent than real when regard is had to the affidavits as a whole, or where it is clear that the denials are not made *bona fide*, or where the denials are so palpably unfounded as to be incapable of being correct, it is open to a court to disregard the denials.

(The examples I have given of disputes of fact which are not real are not intended to be exhaustive, merely illustrative.) With that in mind I approach the alleged disputes of fact.

The stormwater complaint:

Respondent's case, as I understand it, rests upon an assertion of law and three related allegations of fact. The assertion of law is that appellant has no right to allow rain water to flow from his property to respondent's property save in accordance with the servituted right registered in favour of his property. The allegations of fact are: first, that appellant is allowing the rain water which falls on his property to flow onto her property; secondly, that that water is flowing onto her property beyond the strip of land which is burdened by the servitude; and thirdly, that the water which flows over or collects upon the strip of land burdened by the servitude, is not being led away in the manner provided for by the servitude, namely, by means of a drain of the kind referred to in the

servitude.

Loath as I am to take a position on the asserted proposition of law when the authorities have not been collected nor fully debated by counsel, I see no escape from it for reasons which will emerge. However, I shall say no more about it than is necessary to deal with the case. The historical background to and the origin of the modern rules of law which have evolved in this connection are explained and discussed in cases such as Retief v Louw 1874 B 165; Austen Bros v Standard Diamond Mining Co Ltd (1882) 1 HCG 363; Ludolph and Others v Wegner and Others (1888) 6 SC 193; Cape Town Council v Benning 1917 AD 315. - Useful insights will also be found in Milton, The Law of Neighbours in South Africa, 1969 Acta Juridica 1 at 215 - 233; Van der Merwe, Neighbour Law, 759 - 784 of Zimmerman and Visser, Southern Cross; Rodger, Owners and Neighbours in Roman Law, 141 - 166; Derham, Interference with Surface Waters by Lower Landholders, (1958) 74 LQR 361 - 380. Important for

present purposes is the distinction drawn between urban and rural environments.

In bygone days the distinction affected not only the substantive rights and obligations of adjoining owners but also the choice of procedural remedy. The choice of procedural remedy became progressively less critical as the preoccupation of jurists with formulary procedures diminished. However, the greater tolerance which an owner of rural lower lying land was expected to show towards water flowing onto his land from his neighbour's rural higher lying land persisted. The level of tolerance required from his urban counterpart was not the same. Yet a basic proposition appears to have been common to both rural and urban environments, namely, that surface water such as rainwater flowing naturally by reason of the respective situations of the respective properties (*natura loci*) from one to the other, can give no legitimate cause for complaint.

See Retief v Louw *supra* at 174; Ludolph and Others v Wegner and Others *supra* at 198; Van der Merwe v Van Dyk (1899) 17 SC 538 at 539; Dickens v

Lake (1906) 23 SC 201 at 204; Bhayroo v Van Aswegen 1915 TPD 195 at 196;
New Heriot G M Co Ltd v Union Govt 1916 AD 415 at 421; Cape Town Council v Benning *supra* at 320; Bishop v Humphries 1919 WLD 13 at 17;
Barklie v Bridle 1956 (2) SA 103 (SR) at 108; De Villiers v Galloway 1943 AD 439 at 444; Gorgens v Williams 1946 CPD 10 at 16. It was otherwise where there had been human interference with the natural state of things so that the rainwater was artificially diverted from its natural course, or its volume or velocity increased. See Retief v Louw *supra* at 173, 174; Austen Bros v Standard Diamond Mining Co Ltd *supra* at 375; New Heriot GM Co Ltd v Union Govt *supra* at 421; Cape Town Council v Benning *supra* at 320; Bishop v Humphries *supra* at 16 - 17; Barklie v Bridle *supra* at 108; De Villiers v Galloway *supra* at 444. Cf Johannesburg Municipality v Jolly 1915 TPD 429 at 432 - 3. (This was not necessarily so where rural lands were concerned; an upper owner could increase the flow or volume of water to the detriment of the

lower owner "if such increase be occasioned in the ordinary course of draining, ploughing or irrigating the upper land, and be not greater than is reasonable under the circumstances". De Villiers CJ in Ludolph and Others v Wegner and Others *supra* at 200. See too Johannesburg Municipality v African Realty Trust Ltd 1927 AD 163 at 177; Labuschagne v Steyn 1920 OPD 20 at 23; Kohne v Harris (1899) 16 SC 144 at 145; Gorgens v Williams *supra* at 14.)

Whether or not the upper owner's powers in this regard are correctly characterised as servitotal as was done in De Villiers v Galloway, *supra* at 444, has been questioned, but it is unnecessary to decide the issue for the purposes of this case. See Retief v Louw *supra* at 174. So too whether or not what the upper owner may do, should be classified as a right or merely as a liberty. See Professor Derham's observations regarding the consequences of the choice at page 364 of the article in (1958) 74 LQR to which I made earlier reference.

Notwithstanding the existence of the cases I have cited, respondent boldly contends that “in an urban residential area the owner of the lower property is not obliged to receive stormwater from a higher property”. The authorities cited in support of the proposition are Bishop v Humphries *supra*; Green v Borstel 1940 (2) PH M 89 (W); Barklie v Bridle *supra*; Redelinghuis v Bazzoni 1976 (1) SA 110 (T); Grotius, The Jurisprudence of Holland, Vol 1 sec 2.34.16, (Lee’s translation). In my view, none of these authorities support the proposition.

Bishop’s case was a case of interference with the natural flow of rainwater. It was said explicitly that the right asserted (and denied by the court) “is a very different right from that relating to the flow of surplus rainwater during or after a storm in the way in which it used to flow while the land was in its natural condition”. (At 17.) In other words, the learned judge was contrasting the spurious right asserted with the different and legitimate right to allow

rainwater to flow down to a neighbour's property if that is a naturally occurring phenomenon. The decision is in fact against the proposition for which it is cited by respondent.

Green's case is also against it. There it was an upper owner who sought an order compelling a lower owner to demolish a wall which the latter had erected to prevent rainwater flowing onto his property. The order was refused because it had not been proved by the upper owner that the rainwater so obstructed was no more than would have flowed onto the lower owner's property if there had been no buildings erected on the upper owner's property.

It is inherent in that conclusion that if it had been established that the wall had been erected solely to obstruct rainwater which would have flowed naturally onto the lower property, demolition would have been ordered. Implicit in that is that the upper owner cannot be prevented from allowing rainwater to flow to the lower lying property, provided that he has not artificially worsened the

position of the lower owner.

Barklie's case concerned an attempt by an upper owner to divert the natural flow of water from the property, to increase it considerably, to concentrate it, and to discharge it at a point most convenient to herself and most inconvenient to her lower neighbour. The court refused to allow her to do so.

The case is no authority for the proposition that rainwater which would flow naturally from a higher property to a lower property must be prevented from doing so by the upper owner if the lower owner so demands.

The case of Redelinghuis is also of no assistance to respondent. It was not a case where the natural flow of rainwater was in issue.

The passage from Grotius appears to me to have been misunderstood. Commenting in the 1956 Annual Survey on recent cases involving problems arising out of the discharge of water onto neighbouring properties, and with particular reference to the cases of Barklie and Bishop

supra Professor Scholtens said: “The decision (in Barklie’s case) is correct, but it could have been arrived at in a less roundabout way. Direct authority is provided by Grotius, 2.34.16, who says with regard to urban tenements (Lee’s translation):

‘For by the common law every one must lead his water on his own land, or over his own land out to the street.’

This rule exactly covers the facts of the present case. It is submitted that the decision in Bishop’s case correctly states the Roman-Dutch law although a qualification is needed when the natural situation makes it impossible to discharge rainwater on to a street or road”. (At 136.)

I explained earlier in this judgment why I do not consider that Bishop’s case purports to support the notion that even rainwater which would have flowed naturally onto a lower owner’s property must be prevented from doing so by the upper owner. I think it is reasonably clear that Grotius is not

speaking of naturally flowing rainwater but of water (whether it be rainwater or not) which has been artificially collected by the upper owner and which is sought to be discharged on to the lower owner's property. Such an interpretation harmonises the passage with another passage from Grotius, namely, 2.35.17, in which he said: "By the common law any one may let his water flow in its natural course, from which comes the old proverb 'if water hurts you, you may turn it away'". (Lee's translation) The competing interpretation would result in attributing a self-contradiction to Grotius - a highly unlikely postulate. I am aware that the first passage cited occurs under the rubric of urban servitudes and the second under that of rustic servitudes but I do not think that Grotius was confining his observation in the latter to rural situations. If it was indeed so that a fundamentally different principle applied in urban situations I would have expected Grotius to pointedly draw attention to the contrast. See too the observations of Kuper J in Benoni Town Council v

Meyer and Others 1959 (3) SA 97 (W) at 101 A - E.

I have felt compelled to investigate the law despite the absence of full argument in order to identify what the relevant factual issues are which arise and then to consider whether or not they can be resolved on the affidavits. The questions which seem to me to arise as a consequence of my consideration of the common law are these: 1. Is it so that rainwater from appellant's property is flowing and will continue to flow onto respondent's property? 2. If it is, is it flowing beyond the area to which the servitude relates? 3. If so, is it flowing in a volume, or in a manner, or with a frequency, which would exclude the operation of the maxim *de minimis non curat lex*? (This could include the question of whether damage has been or might be caused.) If the answer is yes, a further question arises. 4. Is the rainwater in question or the inconvenience of the manner of its arrival more than would have had to be tolerated if it had flowed there *natura loci*? If it is, and subject again to the *de minimis* principle

and possibly also to the addition of a rider confining the interdict to water in excess of the historical natural flow or the addition of such other rider as might be appropriate, prayer 1 was properly granted. 5. If it is not, but the provision of the drain contemplated by the servitude would have prevented any water from flowing beyond the servituted area, is prayer 1 inappropriate and is respondent's remedy, if any, confined to prayer 2? 6. In addition, there is a question which may be logically anterior to one or other or all of the previous questions. Is the agreement of servitude an exhaustive statement of the rights and obligations of the parties in regard to stormwater and spring water or does the common law still govern their relationship?

I was inclined initially to think that it might be possible to resolve these questions on the affidavits. There appeared to be much to be said for the contention that the disputes of fact alleged to exist by appellant were more apparent than real. However, maturer reflection and a re-examination of the

affidavits have convinced me that while that may well be so in some instances, it is not so in others. Any attempt to resolve the disputes solely by reference to the affidavits could result in an injustice being done to one or other of the parties. It is a conclusion I reach reluctantly and with regret for it prolongs this unfortunate litigation yet further. Neither party asked the court *a quo* to refer the matter to trial and the question arises whether respondent's application should not simply have been dismissed. I do not consider that that would have been the proper course to take. The claim was for an interdict to protect respondent from having her property damaged by water allegedly emanating from appellant's property. If the claim was a justified one the institution of a trial action would have resulted in a lengthy delay in the obtaining of any relief. The use of motion proceedings was understandable. Somewhat less understandable was the decision to seek final rather than interim relief. Perhaps the perceived need for an order in terms of prayer 2, involving as it did the

construction of a drain, made interim relief seem unattainable. However that may be, a simple dismissal of the application would have left a festering and continuing problem unresolved with all the potential for ongoing hostility between neighbours that that would entail. It was, I think, a case in which the court *a quo* should *mero motu* have ordered the hearing of oral evidence and that is the order which I consider should now be made.

I should make it clear that it is for purely pragmatic reasons that I have taken the debatable and unusual step of dealing with one of the law points which arises in the litigation even although it was not argued as fully as I would have wished and even although it is another court which will decide the fate of the litigation. The case was approached by the court *a quo* on the premise that at common law no rainwater at all which emanated from appellant's property had to be tolerated by respondent. If that premise is wrong, as I consider it to be, it would be as well for the court which deals with the matter hereafter to be

alive to that. For the rest, I abstain from commenting upon either the affidavits or any of the other law points which are or may be involved in the resolution of the litigation.

I propose to uphold the appeal to the extent that all the orders (save the costs order against respondent (applicant)) made by the court *a quo* will be set aside and to remit the matter for the hearing of oral evidence in relation to all relevant disputes of fact which arise from the affidavits filed.

It is necessary to deal with the belated application by appellant to be allowed to place further evidence before this court. The application was withdrawn when the matter was called and a qualified costs tender was made. In my view, the application was so long delayed before it was made, and was so devoid of merit, that it amounted to an abuse of the process of the court and merits a special costs order. Appellant will be ordered to pay the costs of the application to re-open the case and to receive further evidence on the scale of

attorney and client. Appellant will also be ordered to pay on the ordinary scale the costs incurred by respondent in seeking condonation of her failure to respond timeously to the application.

The costs of appeal are not straightforward. Appellant has achieved some success in that the orders of the court *a quo* given against him have been set aside. As against that, he too failed to ask the court *a quo* to do what I have held should have been done, namely, to order the hearing of oral evidence. It may yet appear when oral evidence is heard that appellant's denials were hollow and that his conduct during the litigation justified the granting of a special order for costs against him such as was made by the court *a quo*. To make now an irrevocable costs order in his favour could work injustice. If, on the other hand, his defence is sound, it will follow that his recourse to this court was justified, that respondent's resistance was not, and that she should be ordered to pay the costs of appeal (other than those relating

to the abandoned application by appellant to be permitted to place further evidence before this court). In the circumstances, a special order would be appropriate. (Cf Nortje and others v Attorney General, Cape 1995 (2) SA 460 (C) at 485 F - I.) The costs of appeal (other than those relating to the aforesaid application) will be costs in the cause.

To recapitulate and particularise, the following orders are hereby made:

1. The appeal is upheld to the extent that all the orders (save the costs order against respondent (applicant)) made by the court *a quo* are set aside.
2. The matter is remitted to the court *a quo* for the hearing of oral evidence in relation to all relevant disputes of fact which arise from the affidavits filed. These shall include the issues which have been identified in the judgment of this court, any remaining disputes of fact relating to the complaint about the ivy, and any other issues which are regarded as arising by either of the parties or by the court which hears the oral evidence.
3. Appellant is ordered to pay the costs of the application to this court to

re-open the case and to receive further evidence on the scale of attorney and client and to pay on the ordinary scale the costs incurred by respondent in seeking condonation of her failure to respond timeously to the application.

4. The costs of appeal (other than those referred to in paragraph 3) shall be costs in the cause.

A handwritten signature in black ink, appearing to read 'R M MARAIS', written over a horizontal line.

R M MARAIS

Smalberger JA)

Nienaber JA) Concur

Scott JA)

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

CASE NUMBER: 265/96

In the matter between:

L W WILLIAMS

APPELLANT

and

J M HARRIS

RESPONDENT

CORAM:

**SMALBERGER, NIENABER, MARAIS,
SCOTT and PLEWMAN JJA**

DATE OF HEARING: **5 MARCH 1998**

DATE OF JUDGMENT:

JUDGMENT

PLEWMAN JA

I approach the legal questions raised in Marais JA's judgment with even greater misgivings than he does. This is because in the present case a proper discussion of and application of the principles is bedevilled by a serious factual uncertainty. Firstly the role to be played by the registered servitude is difficult to determine because there is no clarity as to precisely what the flow of water is and what the source thereof is. Secondly the law in the cases referred to has always been considered in the light of specific factual situations. It seems to me that before one can say that Grotius 2.34.16 has been misunderstood or that Digest 3.1.17 is not an direction to some other substantive solution one would have to obtain certainty as to what the factual matrix is which has to be considered. That is precisely what is lacking in the present case.

Save for these observations I concur in the judgment of Marais JA.

C PLEWMAN JA