

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case number: 16599/2013

In the review between:

DAVID WILLOUGHBY ABBOTT **APPLICANT**

And

OVERSTRAND MUNICIPALITY **FIRST RESPONDENT**

**MINISTER DEPARTMENT OF ENVIRONMENTAL
AFFAIRS AND TOURISM** **SECOND RESPONDENT**

**MINISTER DEPARTMENT OF ENVIRONMENTAL
AFFAIRS AND DEVELOPMENT PLANNING**

WESTERN CAPE **THIRD RESPONDENT**

THE KLEIN RIVER ESTUARY FORUM **FOURTH RESPONDENT**

JUDGMENT

BLOMMAERT A J

INTRODUCTION

1. The Klein River Estuary near Hermanus, known locally as the Hermanus lagoon, is an estuarine lake that seasonally opens and closes under normal river flow regimes. The estuary stretches from the sea (or mouth of the estuary, when open) to just beyond the Stanford bridge at Stanford. The estuary is a major national and local asset that provides a host of ecosystem services to the region and to the entire South African coast. It is of both high biodiversity and conservation value which, in turn, requires that it be maintained as a healthy functional estuary. It has been noted as the 5th most important estuary in South Africa.
2. The estuary can be divided into 3 sections. The lower reaches, stretching from 0 to 3 kilometres from the mouth, and comprising the mouth area and the inlet channels. When the mouth of the Klein River estuary is closed, it is separated from the sea by a sand-berm (hereinafter "the berm"). To establish connectivity with the sea the berm needs to overtop and be eroded by water (from the land or the seaside), or artificially breached (hereinafter the "mouth").
3. The second part of the Klein River estuary, which became known as "the Vlei". The Vlei comprises a large unconstrained main water body upstream of the tidal channels to where the estuary once again becomes a narrow confined channel. This stretches from approximately 3 kilometres to 8.5 kilometres from the mouth (hereinafter "the Vlei").

4. The remainder of the Klein River estuary comprises of the Klein River which is the area from 8.5 to 17.5 kilometres upstream from the mouth and stretches from the estuary upstream of the Vlei to a few hundred metres beyond the Stanford Bridge at Stanford (hereinafter "the River").
5. Since $\pm$ 1860 the berm has from time to time been artificially breached. The breaching of the berm has been the subject matter of a number of scientific studies. The reason for artificially breaching the berm is that, with the lapse of time, the Vlei area builds up with sediment. In order to clear this sediment it becomes necessary to breach the berm, either naturally or artificially, in order to create a flushing action. In other words, the hydrological power of the Vlei is harnessed. This, in turn, cleans the lagoon and also provides support for the fauna and flora in the lagoon. It has been scientifically proved that this is necessary to preserve and conserve the biodiversity of the area.
6. During the 19th century people began settling along the Klein River estuary and, to prevent these properties from being flooded, a practice of artificially breaching the mouth of the estuary was instituted. Initially artificial breachings were undertaken by teams of workers using spades. At a later stage mechanical equipment, such as bulldozers, was used to enable artificial breaching at even lower levels.
7. When an estuary mouth is closed the inflow from the River gradually fills the estuary. This occurs when the River inflow exceeds the level of losses

due to evaporation and seepage. Under natural conditions, and at a time before human settlement took place, the water levels in the Klein River estuary would eventually exceed the height of the berm and a breaching would occur naturally at levels often exceeding 3 to 3.5 MSL (metres above sea-level).

8. Applicant in this matter owns portion 1 of the farm Middelburg, number 643, Stanford in the Western Cape, which property is situated on the banks of the River and forms part of the estuary, albeit as described herein on the so-called, River section.
9. He complains that his house has been flooded and alleges that the First Respondent had previously taken steps, especially by breaching the mouth of the estuary at a certain level, to prevent his property on the River from being damaged by water. However, First Respondent had upwardly adjusted the mean water level at which the berm would be breached. Applicant alleges that this decision by First Respondent caused the damage he has suffered.
10. In his Notice of Motion as amended the Applicant seeks the following relief:

"1. That the decision of First Respondent to refuse to take any steps to prevent damage from being occasioned to Applicant's house, built on his property being portion 1 of the farm Middelburg 643,

Stanford, Western Cape ("the house") caused by the flooding from the Klein River be reviewed and set aside in terms of Section 6(1) and (8)(1)(c) of the Promotion of Administrative Justice Act 3 of 2000 (the Act), or alternatively in terms of the powers of review which this Honourable Court has at common law, and that the said decision be remitted to the First Respondent for reconsideration which shall include consideration of steps to be taken to protect the house, against any flooding of the house, which might be caused by the failure to artificially breach the berm of the mouth of the Klein River or to only breach such berm when the mean water level in the Klein River estuary exceeds 2.1 metres.

- 2.1 Declaring that an established practice exists in respect of the breaching of the berm at the mouth of the Klein River Estuary whenever low lying properties were threatened with damage;*
- 2.2 Declaring that such established practice can only lawfully be departed from if the First Respondent takes reasonable steps to protect the house referred to in prayer 1 above from damages occasioned by the flooding of the house as a result of the departure from established practice.*
- 2.3 Directing that First Respondent shall take reasonable steps to prevent the house from such flooding"*

HISTORICAL OVERVIEW AND BASIS FOR THE APPLICATION

11. Applicant purchased his property along the River on which his home is situated during 1982. According to him, prior to building on his property, in 1989, he held many and lengthy discussions with officials of the local authorities being the predecessors in law of the First Respondent. During these discussions he was advised that there had been a policy followed by the Municipality of breaching the berm at the estuary mouth when the water in the Vlei reached a height of 2.1 MSL. At this stage it bears noting that the First Respondent emphasises that this was the minimum height at which the berm could be breached. This is also evident from the CSIR research report entitled "*Estuaries of the Cape*" dated October 1989 and annexed to Applicant's founding papers.
12. Building plans for Applicant's house were approved by the then predecessor in law of the First Respondent being the Overberg Regional Services Council and Applicant thereafter commenced building his home on the said property.
13. In his Founding Affidavit the Applicant alleges that up until 2008 there were no occasions on which his home had been flooded by water from the River. As will appear more fully below, this allegation is subject to some controversy. Up until at least that time the applicable policy followed by

the First Respondent (and its predecessors in law) was to breach the berm when the water in the River reached a certain height, also the Applicant alleges that steps were taken to protect low lying properties by erecting floodwalls or similar protection when the water in the Vlei and River rose to heights which threatened those properties. The papers however conclusively reveal that the properties which were protected were protected for reasons of wave incursions caused by winds and were located on the Vlei and not the River. The protection was thus designed to reduce the impact of wave energy and not to protect properties from flooding.

14. In June 2009 an entity known as the Klein River Estuary Forum (the Fourth Respondent herein) was established.
15. This Forum (hereinafter referred to as “**KREF**”) was initially not created pursuant to any empowering legislation nor was it incorporated according to any applicable legislation.
16. In March 2010 a KREF workshop was held at which a document entitled the Mouth Management Plan for the Klein River was adopted (hereinafter “**the Management Plan**”).
17. In 2011 the Management Plan for the period 2010 to 2015 was adopted. It is Applicant's contention that the following provisions of the Management Plan were of direct importance to him and affected him

negatively.

17.1. In the absence of “crisis conditions” as deemed by a specialist team, artificial breaching would not be contemplated at water levels less than 2.6 MSL and that “higher levels” were “preferred”;

17.2. The artificial breaching would not be considered in order to prevent water inundation (i.e flooding) of low lying private or public properties.

18. It is further Applicant’s contention that, following the adoption of the Management Plan, he experienced problems of the repeated flooding of his property and that the height of the water caused the River to burst its banks which, in turn, caused damage to his house.

19. In support of his allegations the Applicant filed a Supporting Affidavit by one, John Fredick Glen Fourie, a professional structural engineer. The said Fourie inspected the house, observed the cracks therein, and explains this as follows in his report annexed to his Supplementary Affidavit:

“The house is built on a River bank. The soil has fine silty particles and larger sand particles. It is evident from the lack of cracks to the building prior to the rising of the flood level, that the soil layers at and under founding levels were stable. This conclusively proves that the cracks were

caused by the water flooding the area.

The raised water level has caused these stable layers to become saturated with water causing the static load of the building to be partially supported on the water.

Large particles in the saturated soil settle to a lower level, and the smaller silty particles rise to a higher level, as showed in the diagram below.

The soil particles can then re-arrange to a tighter fit. When the flood passes, the water is removed from the layers and the soil again supports the full static load of the building. However the support will now occur on the lower level than the pre-flood level due to consolidation of the soil. The building foundations have moved downwards. The downward movement is not constant over the entire building, the foundation closest to the River will settle more than those away from the River.”

20. It is to be noted that Fourie alleges that he visited Applicant's home on or about 2 September 2013, on which date he conducted his investigation.
21. This First Respondent, in turn, disputes these allegations. Furthermore the First Respondent raises various further defences *inter alia* that –
 - 21.1. Applicant persisted against the wrong Respondent;
 - 21.2. Applicant is the author of his own misfortune by having built his

house closer to the flood line than he was authorised to do;

21.3. Applicant had changed the contour of the River.

22. It would seem to me that before Applicant, as it were, gets out of the starting blocks, he has to prove that First Respondent's conduct, of which he complains, is the cause of his damage. This means that it must first be established that, by raising the level at which the berm is breached, it in fact caused the flooding of Applicant's property and that this was the cause of the damage to Applicant's property.
23. As First Respondent denies that this is the case and pertinently places this allegation in issue, the question as to the proper approach to be adopted by a Court in evaluating evidence on Affidavit becomes relevant.
24. From the relief sought it is evident that the Applicant seeks final relief on motion. He has not applied for a referral to oral evidence and therefore the issues should be evaluated on the papers.

THE LEGAL POSITION

25. The general rule was stated by Van Wyk J (with whom De Villiers JP and Rosenow J concurred) in **Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd** 1957 (4) SA 234 (C) at E – G as follows:

“... where there is a dispute as to the facts a final interdict should only be

granted in notice of motion proceedings if the facts as stated together with the facts in the application in the Respondent's affidavit justify such an order ... Where it is clear that, facts though not formally admitted, cannot be denied, they must be regarded as admitted."

26. Corbett J A (as he then was) in **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) SA 623 (AD) at page 634E to 635C commented as follows on the aforesaid:

*"It seems to me, however, that this formulation of the general rule and particularly the second sentence thereof, require some clarification and perhaps, quantification. It is correct that, where in proceedings on notice of motion disputes of facts 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. The Power of the Court to give such a final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by a Respondent of a fact alleged by the Applicant may be such as to raise a real genuine or bona fide dispute of fact (see in this regard **Room Hire Company (Pty) Limited v Jeppe Street Mansions (Pty) Ltd** 1949 (3) SA 1155 (T) at 163 to 165; **Da Mata v Otto NO** 1972 (3) SA 858 (A) at 882D – H). If in such a case Respondent has not availed himself of his right to apply for the deponents*

concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court (at **Petersen v Cuthbert and Co Ltd 1945 AD 20** at 428; **Room Hire** case supra at 1164) and the Court is satisfied as to the inherent credibility of the Applicant's factual averment, it may proceed on a basis of the correctness thereof and include this fact amongst those upon which it determines whether the Applicant is entitled to the final relief which he seeks (see eg. **Rikhoto v East Rand Administration Board and Another 1983 (4) SA 278 (W)** at 283E – H). Moreover, there may be exceptions to this general rule as for example where the allegations or denials of the Respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of Botha A J A in the **Associate South African Bakeries** case supra at 934A)."

27. More recently the SCA refined the aforesaid in **Wightman t/a J W Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 SAC** at paragraph 12 as follows:

"Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-

fetches or clearly untenable that the court is justified in rejecting them merely on the papers”

IS THERE A DISPUTE OF FACT?

28. In essence the question is whether the raising of the breach level of the berm from 2.1 to 2.6 MSL is the cause of the Applicant's damage. In paragraph 54 of his Founding Affidavit Applicant makes the following allegations:

“However this all changed when a new committee called the Klein River Estuary Forum was established in or about August 2009 (“the Fourth Respondent hereto”)

29. In his Replying Affidavit Applicant however alleges that from 1989 to 2010 no flooding of his property occurred and that *“the flooding which has occurred since 2010 has affected the buildings erected in accordance with the approved plans”*.

30. This seems to be confirmed by the said Fourie who inspected the Applicant's premises on 2 September 2013. In his affidavit he says:

“On the same date I visited the Applicant's property during which visit I was briefed that the house was built some 20 years ago and that it had

recently suffered damage due to continued flooding of the property”

31. It should be noted that Fourie attended Applicant’s home on 2 September 2013, that is before the flood of 15 to 17 November 2013 and, in any event, Applicant admits the flooding in 2013 was caused by an unusual flood that came down the River and had nothing to do with the breaching of the berm. In fact the berm had been breached at that point in time. Thus it seems to me that the cause of his complaint is founded on alleged floods during 2010 to 2012. This aspect will be dealt with in more detail below.
32. It is against this background that the allegations by the First Respondent should be seen and evaluated.
33. First Respondent’s answer to this is formulated as follows in paragraph 38 of its Answering Affidavit:

“As referred to in the Estuarine Specialist Report and as CSIR has remarked upon over the years (see paragraphs 89.9, 92, 106.3, 115 below) while artificial breaching can moderate maximum water levels under the low to moderate inflow conditions the flood attenuation effect is significantly less in the upper reaches in comparison with the Vlei (the upper reaches are only about 50 metres wide in comparison with the Vlei which is 650 to 1500 metres wide). Therefore the lack of storage area will drive up the water levels regardless of the mouth state and natural or

artificial breaching practices. In other words, Mr Abbott's property can be flooded regardless of whether the mouth is open or closed and in contradistinction to low lying properties on the Vlei, flood protection measures would need to be in place year around to minimise flood risk because the properties in the upper reaches of the Klein River along the River, are generally subject to a significant increase in water levels over a short period during floods. Also as recognised by Mr Abbott himself (see paragraph 136.3 below) increased sedimentation in the upper reaches of the estuary has retarded the rate of the flow of the River and has narrowed its course".

34. In support of the aforesaid, First Respondent specifically annexed a CSIR report published in February 1997. The report is entitled the "*Klein River Estuary, the Effects of High Water Levels During the Mouth Breaching in 1996*", and was prepared by the Division of Water Environment and Forestry Technology, CSIR and Dennis Moss Partnership Inc.
35. Under the heading "*The effects of High Water Levels before Breaching on properties along the Klein River*", the authors state the following:

"All this information indicates strongly that flooding at Stanford is probably mainly caused by extremely high flows in the Klein River, and that it is unlikely that the higher water levels in the Vlei before breachings would have a meaningful additional contribution to flooding in Stanford. Constrictions in the Riverbed, such as the road bridge and also the narrow

and shallow sections downstream determine most likely the maximum flood levels reached at Stanford.

The mark of the water level used to indicate whether mouth breaching needed to be undertaken, referred to by Mr Carstens, was probably more relevant in terms of a very high River flow occurring. Such high River flows were more likely to result in a quick rise of water levels in the Vlei which in turn could lead to problems of flooding of properties on the banks of the Vlei. It was more likely that the Vlei be breached to prevent flooding of properties on the Vlei than to prevent flooding the properties on the Klein River in the Stanford area.”

36. The report concludes as follows:

“It is unlikely that high water levels in the Vlei will result in a significant increase in flood levels in Stanford. High flood levels at Stanford are mainly determined by very high River flows during major floods, and are also related to “bottleneck” effect in the River (i.e. River morphology, alien vegetation infestation at River banks, etc)”.

37. In a follow-up report dated 1998 the CSIR again makes the following comments:

“Except from the area near the mouth, significant differences especially upstream are not observed between these surveys”.

38. In discussing breaching in 1998, the CSIR comments as follows:

“1. The increase of more than 4 metres in the water level at the River flow gauging station within two hours shows that a flash flood front occurred, like a wall of water coming down the River.

At such floods, the height of the maximum flood levels along the River are determined by the local River typography. This was also the case in Stanford. The maximum flood levels in Stanford were not determined by water levels further downstream in the Vlei.”

39. Furthermore, First Respondent says in paragraph 280.2:

“I deny further that breaching the berm artificially would necessarily protect Mr Abbott’s property.

40. In support of this allegation First Respondent also refers to paragraph 36 of the estuarine specialist affidavit which reads as follows:

“36. In contrast properties in the upper reaches of the Klein Estuary, are generally subject to a significant increase in water levels over a short period during floods. As high water levels in the upper reaches can occur under estuary open or closed mouth conditions flood protection measures would need to be in place year round to minimise flood risk. To be effective flood protection measures would need to encircle the property or they need to stretch from the water’s edge to higher ground to prevent

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water from entering the property”

41. Lastly, the 1998 CSIR report concludes that:

“The above reading is significant because as stated earlier it proves that the high flood levels at Stanford are determined by the magnitude of River floods and not by high water levels in the Vlei (see also CSIR 1997).”

42. In my view it is evident from the aforesaid that there is a dispute as to exactly what the cause of the Applicant's damage is. It is therefore necessary to consider the Applicant's reply to the Respondent's contentions.

43. In its Replying Affidavit and in a reply to the allegations contained in paragraph 38 above, the Applicant replies as follows:

“However, I do point out that the method of flooding postulated in paragraph 37 is incorrect. The flooding happens purely as a result of the rising water levels as can be seen on the photographs contained on page 29 of annexure “OM98”. I also point out the flooding that occurred during November 2013 did not occur in the manner described in paragraph 37 although it was a major flood that devastated much of the Cape Peninsula and Overberg to the extent that even the Vergelegen Mediclinic in Somerset West was flooded.

44. Of further significance in the Replying Affidavit is the following:

“First Respondent ignores the reality of the situation which is that from 1998 to 2010 no flooding of my property occurred. It was only when the decision was taken that artificial breaching of the River mouth would cease flooding of the Applicant’s property commenced.”

“Furthermore for a period of over 20 years thereafter no flooding problems were experienced given the fact that the local authority continued to apply the breaching policy which it had applied in the past.”

“I furthermore point out the flooding which has occurred since 2010 has affected the building erected in accordance with the approved building plans.”

45. The aforesaid should be seen in the light of the historical factual evidence contained in First Respondent’s **Answering** Affidavit relating to breaching of the berm, for instance:

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45.1. On 3 August 1991 the berm was naturally breached at 2.8 to 2.9 MSL;

45.2. On 2 July 1997 the berm was breached at 2.66 MSL and the CSIR report comments as follows on the Applicant’s property:

“Mr D Abbott who has a house on the southern bank of the River between Stanford and the Vlei could have had damage if the water levels had increased by another 0.30 metres”

- 45.3. On 11 June 1998 the berm breached naturally at 2.63 MSL;
- 45.4. On 27 September 1999 the berm was artificially breached at 2.63 MSL;
- 45.5. In September 2001 the berm was breached at 2.8 MSL;
- 45.6. In 2003 the berm was breached at approximately 2.6 MSL;
- 45.7. In August 2006 the berm was breached at 2.75 MSL;
- 45.8. In 2007 the berm was breached at 2.6 MSL;
- 46. In seeking to persuade me that the Applicant has established the cause of his damage to be the higher breaching levels, Applicant makes the following statement in his submissions in Reply:

“The Ice Boland Report was specifically commissioned by First Respondent, was put up by it as part of its answering papers and is a report dealing inter alia, specifically with the effect rising water levels have on the property. It is thus an integral part of the First Respondent’s case and the conclusion put forward constitutes part of First Respondent’s case inter alia for purposes of evaluating disputes based on the test formulated in Plascon Evans. The report specifically with reference to the Applicant’s property states the following at paragraph 4.2.2 thereof.

“Due to the level of the site and the proximity to the Klein River lagoon, the water level in the lagoon will significantly impact the flood line calculation. In line with this, the (artificial/natural) breaching of the lagoon is a critical factor. As the breaching level is one of the items under consideration, the flood lines for three breaching scenarios have been calculated namely:

- 1. 2.1 MSL;*
- 2. 2.66 MSL;*
- 3. 2.8 MSL”*

47. To my mind, the aforesaid Ice Report should be seen in the context of certain reservations contained therein. So, for instance, in the introduction to its flood line investigation the report says:

“Determination of flood lines is case-specific and considering the complexity and scale of the Klein River catchment and the urgency of this report there was insufficient time to carry out a detailed hydrological analysis of the catchment”.

48. Furthermore, the Ice Reports contains the following:

“Only the area 100 metres upstream and downstream of the Abbott property was surveyed and modelled for this flood line analysis. With reference to the Google Earth extract below, diagram 4, the shape of the

River upstream would be a major influencing factor in determining flood lines. The high energy levels in the flooding River, choked by the reef bed (A) would force the water to accelerate around the bend. This high localised velocity would lead to high energy levels on the outer edge of the River (B). It is therefore likely that a portion of the River would split to flow below the reef line (C). This area is low lying and would direct flood water directly at the Abbott dwelling, prior to re-joining the main stream. The remnants of the side stream are still evident at (D).

49. Finally the so-called Ice Report concludes:

“As mentioned in the report, the flood lines presented in this report are conservative (low) and should not be used for setting out. In order to calculate more accurate flood lines a detailed hydrological analysis of the Klein River catchment and survey of the River upstream of the Abbott property is required.”

50. To my mind, the Ice Report should be regarded with circumspection and should be seen merely as one of the factors to be taken into account in determining the question of whether Applicant has made out its case on the papers.
51. As appears above the only years during which Applicant avers that he suffered damage are from 2010 to 2013.

52. It must be remembered that 2013 can be excluded as that was a flood, for which the First Respondent, even on Applicant's own version, cannot be held accountable.
53. Furthermore, Applicant's engineer, Fourie who attended the scene in September 2013 already maintained that there were cracks i.e. before the 2013 flood. In any event, the berm was open during the 2013 flood.
54. As to the period 2010 to 2012 the following appears from the papers:
 - 54.1. In a document considered by KREF entitled "*Artificial Breaching at the Klein River Estuary, Hermanus*" dated 9 September 2011 the following is said relating to 2010.

"However, the mouth did not open during 2010 because drought conditions meant that the water level remained below 2.6 MSL."
 - 54.2. It is thus unlikely that Applicant's house was flooded in 2010.
 - 54.3. In his founding papers Applicant maintains that his property was flooded and he annexes copies of photographs, that he alleges, depicts the flooding during September 2011. These photographs show water close to Applicant's house but not in the house.
 - 54.4. The KREF Report referred to in paragraph 54.1 above, and dealing with 2011, reports as follows:

"The house of David Abbott on the River bank, and guest cottage owned by Bill Mylae and Mr Neil Mc Carthy on the estuary's northern shore, were at risk if the water rose further"

54.5. On 9 September 2011 the berm was breached at a level of 2.78 MSL.

54.6. It is thus, at least, doubtful whether Applicant's house was flooded in 2011.

54.7. In 2012 the berm was breached at ± 8.00 am on 14 August at 2.78 MSL.

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54.8. On 13 August 2012 at 6.20pm Applicant sent an e-mail to one Mr Groenewald at the Overstrand Government (sic) and *inter alia* mentions the following *"I also informed him that the water would enter a portion of my house should it rise a further 400 mm."*

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54.9. Furthermore Applicant attended the KREF meeting that discussed the 2012 breaching and made no mention of the flooding of his house.

54.10. To my mind, the aforesaid does not conclusively establish that Applicant's house was flooded during 2012.

55. At the very least, I am of the opinion that the aforesaid is indicative of the

fact that Applicant has not conclusively shown that his property was indeed flooded during the period 2010 to 2013.

56. Of particular concern to me is that the Applicant alleges that his problems only began in 2010. However, the factual evidence is that, on a number of occasions in the previous years (as set out above), the breaching of the berm took place at considerably higher levels than the 2.6 metre mark, of which he complains. This, in turn, raises the question as to why the raised level during these years did not cause Applicant any damage. Applicant has not even attempted to deal with this aspect.
57. First Respondent has pertinently raised the issue as to the cause of the flooding of Applicant's property and hence Applicant's alleged damage. In support of its allegations First Respondent has not only given a reason for its view, but has also substantiated those reasons by means of documentation and expert reports.
58. To my mind First Respondent's response as to the reasons for the alleged flooding of Applicant's property is not "*so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that he is demonstrably and clearly unworthy of credence*" see also **Fakie N.O v CC 211 Systems (Pty) Ltd 2006 (4) SA 326 (SCA)** at paragraph 56.
59. First Respondent has set up a perfectly reasonable answer to the Applicant's allegations which the Applicant has failed to convincingly

dispute in reply. I am left in serious doubt as to what caused Applicant's damage and I am consequently unable to decide this issue on the papers as they stand.

60. At the outset of this matter, and during argument, I indicated to the parties that I had some difficulty with, what I considered to be a factual dispute. However, despite this, Applicant did not apply for a referral of this matter to oral evidence.
61. In the light of the aforesaid, I considered the possibility that I should *mero motu* refer the matter to oral evidence.
62. In dealing with this issue Myburgh J (with whom De Villiers J and Nestadt J concurred) in **Joh-Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T)** is reported as follows:

"It requires in my view a bold step, by a presiding Judge in an opposed application, to refer the matter to evidence on trial mero motu because it is a real possibility that the Applicant had decided not to ask for such proceedings to be followed (at page 428 H)

and also at page 429G – H where the learned Judge says:

"In my view, it would render a Judge's task impossible, even if the Applicant is obliged to come to Court by way of application, if at the end of the argument in any such case he must consider whether or not he should

mero motu refer the matter to evidence or trial. It would be unwise to adopt such a procedure in view of all the considerations that could reasonably have exercised the Applicant's, or Respondent's mind in not asking for such procedure to be followed".

63. As stated above, Applicant was at all times aware of the risks involved in his approach to this matter.
64. Furthermore it would seem to me that, in light of the vast amount of scientific evidence available, it is certainly not a cut and dried matter as to what evidence would be needed to determine the issue.
65. From the aforesaid it is clear that there are a number of factors which are possible causes of flooding of the Applicant's property.
66. The height of the breaching of the berm is but one of these factors and the leading of oral evidence would in all probability not resolve this problem.
67. It is for these reasons that I decided not to refer the matter to oral evidence *mero motu*.
68. As appears above, I am of the view that the Applicant has not succeeded in getting out of the, so-called, "*starting blocks*" and therefore it is not necessary for me to deal with the further defences raised by First Respondent.

69. In the premises the application is refused with costs, such costs to include the costs of two counsel.

BLOMMAERT A J

CAPE TOWN